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Documents for the Conference



Table of contents

TABLE OF CONTENTS

PART I - Organization of the CMI

	PAGE No.
Constitution	8
Rules of Procedure	26
Guidelines for proposing the appointment of Titulary and Provisional Members	29
Headquarters of the CMI	30
Members of the Executive Council	30
President ad Honorem and Honorary Vice Presidents	35
Functions	36
Member Associations	41
Temporary Members	86
Members Honoris Causa	87
Titulary Members	87
Consultative Members	114

PART II - The work of the CMI Documents for the Vancouver Conference

Transport Law

1	Introduction	120
2	Draft Instrument on the carriage of goods [wholly or partly] [by sea]	122
3	Report of the seventh meeting of the CMI International Sub-Committee on Issues of Transport Law held in London on 27 th -28 th February 2003	191
4	Draft Report of the eighth meeting of the CMI International Sub-Committee on Issues of Transport Law held in London on 17 th November 2003	199
5	PHILIPPE DELEBECQUE: <i>The UNCITRAL Draft Instrument on the Carriage of Goods by Sea</i>	208
6	MICHAEL STURLEY: <i>Transport law: the treatment of performing parties</i>	230
7	STUART HETHERINGTON: <i>Jurisdiction and arbitration</i>	245
8	A guide to E-Commerce Features in the Draft Instrument on the carriage of goods [wholly or partly] [by sea]	250
9	GERTJAN VAN DER ZIEL: <i>The Legal Underpinning of E-Commerce in Maritime Transport by the UNCITRAL Draft Instrument on the Carriage of Goods by Sea</i>	260

Table of contents

General Average

Report by the CMI International Sub-Committee	274
---	-----

Places of Refuge

1 Introduction	314
2 Report of meeting 17 November 2003	315
3 Report to IMO with Responses to Second Questionnaire	327
4 RICHARD SHAW: <i>Places of Refuge – International Law in the Making?</i>	329
IMO Guidelines on Places of Refuge for Ship in need of assistance	344
5 RICHARD SHAW: <i>Recent Developments Update as at August 2003</i>	358
6 STUART HETHERINGTON: <i>Prestige – Can the Law Assist?</i>	361
7 GREGORY TIMAGENIS: <i>Places of Refuge as a Legislative Problem</i>	375
8 STUART HETHERINGTON: Discussion Paper (with 3 Appendices) for ISC Meeting-London 17 November 2003	380
9 ERIC VAN HOOYDONK: <i>The Obligation to Offer a Place of Refuge to a Ship in Distress</i>	403
10 RICHARD SHAW: <i>Designation of Places of Refuge and Mechanism of Decision Making</i>	446
11 STUART HETHERINGTON: <i>Civil Liability and Monetary Incentives or Accepting Ships in Distress</i>	457
12 FRANK WISWALL: <i>Penal Liability</i>	468
13 GREGORY TIMAGENIS: <i>Reception Facilities for Ships in Distress</i>	470
14 WELMOED VAN DER VELDE: <i>The Position of Coastal States and Casualty Ships in International Law</i>	479

Marine insurance

1 MALCOLM CLARKE: <i>Alteration of Risk</i>	500
2 GRAYDON STARING: <i>Harmonization of Warranties and Conditions: Study and Proposals</i>	522
3 ANDREW TULLOCH: <i>Utmost Good Faith</i>	534
4 TRINE-LISE WILHELMSEN: <i>Misconduct of the Assured and Identification</i>	540
5 Report on the IWG meeting in London, November 2003	573

Pollution of the Marine Environment

COLIN DE LA RUE: <i>Review of the Civil Liability and Fund Conventions</i>	576
--	-----

Criminal Acts on the High Sea

Summary of Current National Laws applicable to the Jurisdictional Issues re Criminal Offences committed on board foreign flagged ships	582
--	-----

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

- Editor's notes	589
- Collision between vessels, 23 rd September 1910	590
- Assistance and salvage at sea, 23 rd September 1910	592
- Assistance and salvage at sea, Protocol of 27 th May 1967	595
- Limitation of liability of owners of sea-going vessels, 25 th August 1924	596
- Bills of lading, 25 th August 1924 (Hague Rules)	597
- Bills of lading, Protocol of 23 rd February 1968 (Visby Rules)	603
- Bills of lading, Protocol of 21 st December 1979 (SDR Protocol)	605
- Maritime liens and mortgages, 10 th April 1926	606
- Immunity of State-owned ships, 10 th April 1926 and additional Protocol 24 th May 1934	607
- Civil jurisdiction in matters of collision, 10 th May 1952	609
- Penal jurisdiction in matters of collision or other incidents of navigation, 10 th May 1952	611
- Arrest of sea-going ships, 10 th May 1952	618
- Limitation of the liability of owners of sea-going ships, 10 th October 1957	623
- Limitation of the liability of owners of sea-going ships, Protocol of 21 st December 1979	628
- Stowaways, 10 th October 1957	629
- Carriage of passengers by sea, 29 th April 1961	629
- Nuclear ships, 25 th May 1962	630
- Carriage of passengers' luggage by sea, 27 th May 1967	631
- Vessels under construction, 27 th May 1967	631
- Maritime liens and mortgages, 27 th May 1967	632

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

- Editor's notes	633
- International convention on civil liability for oil pollution damage (CLC 1969)	634
- Protocol of 1976 to the International convention on civil liability for oil pollution damage (CLC Prot 1976)	642
- Protocol of 1992 to amend the International convention on civil liability for oil pollution damage, 1969 (CLC Prot 1992)	646
- International convention on the establishment of an international fund for compensation for oil pollution damage (Fund 1971)	649
- Protocol of 1976 to the International convention on the establishment of an international fund for compensation for oil pollution damage, 1971 (Fund Prot 1976)	652

Table of contents

- 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)	654
- Convention relating to civil liability in the field of maritime carriage of nuclear material (Nuclear 1971)	658
- Athens convention relating to the carriage of passengers and their luggage by sea (PAL 1974)	659
- Protocol of 1976 to amend the 1974 Athens convention relating to the carriage of passengers and their luggage by sea (PAL Prot 1976)	662
- Protocol of 1990 to amend the 1974 Athens convention relating to the carriage of passengers and their luggage by sea (PAL Prot 1990)	664
- Convention on limitation of liability for maritime claims (LLMC 1976)	664
- Protocol of 1996 to amend the Convention on limitation of liability for maritime claims, 1976 (LLMC Prot 1996)	672
- International convention on salvage (Salvage 1989)	672
- International convention on oil pollution preparedness, response and co-operation, 1990	676
- International convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea, 1996 (HNS 1996)	679
 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)	682
- The United Nations Convention on the carriage of goods by sea, 31 March 1978 (The Hamburg Rules 1978)	684
- The United Nations Convention on international multimodal transport of goods, 24 May 1980 (Multimodal 1980)	685
- The United Nations Convention on the law of the sea, 10 December 1982	685
- The United Nations Convention on conditions of registration of ships, 7 February 1986 (Registration ships 1986)	688
- The United Nations Convention on the liability of operators of transport terminals in the international trade, 1991	689
- International Convention on maritime liens and mortgages, 1993	689
- International Convention on Arrest of Ships, 1999	689
 Status of the ratifications of and accessions to UNIDROIT conventions in the field of private maritime law:	
- UNIDROIT Convention on international financial leasing, 1988	690

APPENDIX

Conferences of the Comité Maritime International	691
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PART I

**Organization of
the CMI**

Comité Maritime International

CONSTITUTION

1992*

PART I - GENERAL

Article 1

Object

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

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

Article 2

Domicile

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

Article 3

Membership

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

Where in a State there is no national Association of Maritime Law in existence, and an organization in that State applies for membership of the Comité Maritime International, the Assembly may accept such organization as a Member of the Comité Maritime International if it is satisfied that the object of such organization, or one of its objects, is the unification of maritime law

* 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

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.

HEADQUARTERS OF THE CMI SIÈGE DU CMI

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¹ Joined the leading London based Maritime law firm of Ince & Co. in June 1958 and became a Partner in 1966. He was Senior Partner from January 1989 to May 1995 and remains a Consultant with the firm. In addition to being President of the Comité Maritime International he is also Secretary/Treasurer of the British Maritime Law Association (BMLA). He is a regular speaker at seminars and conferences on various aspects of maritime law and co-author of "Limitation of Liability for Maritime Claims" (3rd Ed. 1998). He has contributed numerous articles to legal publications. He is a member of the Board of Governors of IMLI, a member of the Editorial Board of the Lloyd's Maritime and Commercial Law Quarterly and member of the Advisory Board of the Admiralty Law Institute, Tulane University.

² Born in 1927, Senior Partner Philip & Partners, law firm, Copenhagen, Denmark. Past Professor and Dean Copenhagen University. Past President CMI. Past Chairman of Panel, United Nations Compensation Commission for the Gulf War. Chairman Danish Government Commission on Reform of the Maritime Code. Member Institut de Droit International, Honorary Member American Maritime Law Association

³ Born 1944 in Västerås, Sweden. 1971: Bachelor of law, University of Uppsala, Sweden. 1971-1972: Lecturer, School of Economics, Gothenburg, Sweden. 1972: Associate, Mannheimer & Zetterlöf,

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Gothenburg, Sweden. 1973-1976: Legal officer, United Nations Commission on International Trade Law, United Nations Conference on Trade and Development, Geneva, Switzerland. 1977-1981: Research fellow, Scandinavian Institute of Maritime Law, Oslo, Norway. 1982: Attorney at law, Northern Shipowners Defence Club, Oslo, Norway. 1993-2000: President, Norwegian Maritime Law Association, Oslo, Norway. 1994: Executive Councillor, Comité Maritime International, Antwerp, Belgium. 1996: Chairman of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and related subjects. 1998: Mediation Workshop, arranged by Professor Frank E.A. Sander, Harvard Law School. 1999: President of the Main Committee of the Diplomatic Conference on Arrest of Ships. 2000: Deputy Managing Director, Northern Shipowners Defence Club. 2001: Vice President, Comité Maritime International, Antwerp. Delegate of Norway to several IMO, UNCTAD and UNCITRAL meetings. Participated in the drafting of several BIMCO documents, such as BARECON 2001.

⁴ Licensed Master (Near Coastal) of Steam & Motor Vessels since 1960. B.A., Colby College, 1962. *Juris Doctor*, Cornell University, 1965; research assistant to Prof. G. H. Robinson (*Robinson on Admiralty*). Ph.D. in the Faculty of Law and Yorke Prizeman of the University of Cambridge (Clare College), 1967. Practice with Burlingham Underwood, New York, 1967-72. Author of *Development of Admiralty Jurisdiction and Practice* (Cambridge U. P.), elected Fellow of the Royal Historical Society, 1970. Maritime Legal Adviser, International Bank, Washington, DC (seconded to Liberian maritime administration), 1973-85. Sometime Professor of Law at Cornell, Virginia, Tulane and World Maritime Universities. Vice-Chairman (1974-79) and Chairman (1980-84), IMO Legal Committee. Professor and Governor, IMO International Maritime Law Institute since 1991. Editor-in-Chief, *International Maritime Law* (7 Vols), *Benedict on Admiralty* since 1992. Member of MLAUS since 1964. CMI Titulary Member (1980), Executive Councillor (1989), Vice-President (1997). [Chairman of the CMI Working Group on Classification Societies; Chairman of the Joint International Working Group on Piracy and Maritime Violence; Past Chairman of the Joint International Working Group on General Average.]

⁵ Born on December 15, 1962 in Ljubljana, Slovenia. Univ. dipl. iur., University of Ljubljana, Faculty of Law, 1986 (Slovenia). Master of Laws, University of Split, Faculty of Law, 1989 (Croatia). Doctor of Civil Law, McGill University, Faculty of Law, 1992 (Canada). Slovenian Bar Examination, 1993. Associate Professor of Transport and Insurance Law, University of Ljubljana. Head of the Maritime and Transport Law Department, University of Ljubljana, Faculty of Maritime Studies and Transportation. Vice-Dean of the Faculty. Visiting Professor (since 1998) and External Examiner (since 2001) at the IMO International Maritime Law Institute, Malta. Visiting Professor at the Queensland University, T.C. Beirne School of Law, 2002 (Australia). Visiting Professor at the Katholieke Universiteit Leuven, Faculteit Rechtsgeleerdheid, 2002 (Belgium). Deputy Member of the Board of Management, Sava Re, 1992-1998. General Manager, Slovenian Nuclear Insurance and Reinsurance Pool, 1994-1998. Lawyer of the Year, 2001 (Slovenia). President of the Maritime Law Association of Slovenia (since 1997). Titulary Member of CMI. Member of numerous national and international professional organisations. Correspondent to various international law journals. Author and co-author of hundreds of articles and fourteen books, including *Implied Terms of Voyage Charters* (1993), *Transport Law* (2000), *Insurance Law* (2000) and *The "ABC" of Maritime Law and Arrest of Ships in Slovenia* (2002).

Officers

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⁶ Wim Fransen was born on 26th July 1949. He became a Master of law at the University of Louvain in 1972. During his apprenticeship with the Brussels firms, Botson et Associés and Goffin & Tacquet, he obtained a '*licence en droit maritime et aérien*' at the Université Libre de Bruxelles. He started his own office as a maritime lawyer in Antwerp in 1979 and since then works almost exclusively on behalf of Owners, Carriers and P&I Clubs. He is the senior partner of Fransen Advocaten. He is often appointed as an Arbitrator in maritime and insurance disputes. Wim Fransen speaks Dutch, French, English, German and Spanish and reads Italian. Since 1998 he is the President of the Belgian Maritime Law Association. He became Administrator of the CMI in June 2002.

⁷ Candidate in law, Louvain, 1984. Licentiate in law, Louvain, 1987. LL. M. In Admiralty, Tulane, 1989. Diploma Maritime and Transport law, Antwerp, 1990. Member of the Antwerp bar since 1987. Professor of maritime law, University of Louvain (UCL). Professor of Marine insurance, University of Limbourg (LUC). Member of the board of directors and of the board of editors of the Antwerp Maritime Law Reports. Member of the board of the Belgian Maritime Law Association. Publications in the field of maritime law in Dutch, French and English.

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Practice: Admitted as a practising attorney at law and notary public of the High Court of South Africa in 1974. Erstwhile partner of Fairbridge Arderne & Lawton (1977 to 1991). Currently partner of Shepstone & Wylie (1999 -)

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Business: Founder (1993) and Chairman of Telepassport (Pty) Ltd, SA based telecommunications company. Numerous trustee and board appointments.

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INTRODUCTION

The Draft Instrument submitted by the CMI to UNCITRAL in December 2001 (“the CMI Draft”)¹ was considered at the ninth, tenth and eleventh sessions of UNCITRAL Working Group III on Transport Law. It was then revised by the UNCITRAL secretariat in accordance with the decisions made at these three sessions. The clean text of this revised draft is set out in document (2) at pages 122 to 190. The official version of this document, which indicates the changes to the CMI Draft by underlining or strikeout, is published on the UNCITRAL website (www.uncitral.org) as document A/CN.9/WGIII/WP.32 (“WP 32”).

The footnotes to this document to a large extent summarise the salient points made in the discussions at the ninth, tenth and eleventh sessions, and explain the changes made to the CMI Draft. Full reports of these sessions are published on the UNCITRAL website².

A number of core issues arising out of WP 32 were considered by Working Group III at its twelfth session in Vienna in October 2003. The full report of this session (document A/CN.9/544) is published on the UNCITRAL website. The provisional revised versions of articles 1(a), (e), (f) and (g), 2, 13, 14 and 15 which have been prepared by the UNCITRAL Secretariat on the basis of what was agreed at the twelfth session, with explanatory footnotes, are set out in document A/CN.9/WGIII/WP 36. This document updates WP 32 as regards these articles.

At the twelfth session delegates had before them a written proposal from the Government of the Netherlands on the door to door application of the Draft Instrument and from the Government of the United States on ten separate aspects of it. These two proposals are published on the UNCITRAL website as documents A/CN.9/WGIII/WP.33 and 34 respectively.

A short report of the next session to be held in May 2004, at which it is expected that further core issues will be considered, will be posted on the CMI website (www.comitemaritime.org) in the week beginning 17 May 2004.

¹ Published in CMI Yearbook 2001 Singapore II at pages 532 to 597.

² Documents A/CN.9/510, 525 and 526.

Introduction

The International Sub Committee on Issues of Transport Law has held two meetings since the CMI Draft was submitted to UNCITRAL. Reports of these two meetings are documents (3) at pages 191 to 198 and (4) at pages 199 to 207.

The CMI held a Colloquium in Bordeaux in June 2003 and Transport Law was the subject of one of the sessions. Document (5) at pages 208 to 229 is an update of a paper presented by Me Philippe Delebecque which reviews WP.32. Papers presented by Prof. Michael Sturley and Stuart Hetherington are documents (6) at pages 230 to 244 and (7) at pages 245 to 249.

Document (8) at pages 250 to 259 is a guide to the e-commerce features in WP 32 prepared by the E-Commerce Working Group on the basis of a paper submitted in Bordeaux by George Chandler. Document (9) at pages 260 to 271 is a paper presented by Professor Gertjan van der Ziel. Articles 3 to 6 of WP 32 and its e-commerce features generally have not yet been considered in detail by Working Group III.

An Agenda Paper suggesting a framework for discussion of certain selected topics and Background Papers on those topics are currently in the course of preparation and will be posted on the CMI website as soon as possible.

31 March 2004

STUART BEARE

**United Nations Commission
on International Trade Law**

Working Group III (Transport Law)
Twelfth session
Vienna, 6-17 October 2003

A/CN.9/WC.III/WP.32
4 September 2003

TRANSPORT LAW

**DRAFT INSTRUMENT ON THE CARRIAGE OF
GOODS [WHOLLY OR PARTLY] [BY SEA]**

NOTE BY THE SECRETARIAT

Contents:

	<i>Page*</i>	<i>Paragraphs</i>
Introduction	125 (6)	1-5 <i>Notes</i>
ANNEX: Draft instrument on the carriage of goods [wholly or partly] [by sea]	125 (8)	1-240
<i>Chapter 1: General Provisions</i>	125 (8)	1-38
Article 1. Definitions	125 (8)	1-26
Article 2. Scope of application	132 (13)	27-38
<i>Chapter 2: Electronic communication</i>	135 (16)	39
Article 3.	135 (16)	
Article 4.	135 (16)	
Article 5.	135 (17)	
Article 6.	136 (17)	40
<i>Chapter 3: Period of responsibility</i>	136 (17)	41-44
Article 7.	136 (17)	41
Article 8. Carriage preceding or subsequent to sea carriage	137 (18)	42-43
Article 9. Mixed contracts of carriage and forwarding	138 (19)	44
<i>Chapter 4: Obligations of carrier</i>	138 (19)	45-56
Article 10.	138 (19)	45
Article 11.	138 (19)	46
Article 12.	139 (20)	48-49
Article 13. Additional obligations applicable to the voyage by sea	139 (20)	50-56
<i>Chapter 5: Liability of carrier</i>	140 (21)	57-102
Article 14. Basis of liability	140 (21)	57-80
Article 15. Liability of performing parties	145 (27)	81-83
Article 16. Delay	147 (29)	84-86

* The page numbers in brackets are those of the original UNCITRAL document A/CN.9/WG. III/WP.32.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 17. Calculation of compensation	148	(29)	87-90
Article 18. Limits of liability	149	(30)	91-93
Article 19. Loss of the right to limit liability	150	(31)	94
Article 20. Notice of loss, damage, or delay	150	(32)	95-101
Article 21. Non-contractual claims	151	(32)	102
<i>Chapter 6: Additional provisions relating to carriage by sea</i>	151	(33)	103-113
Article 22. Liability of the carrier	152	(33)	104-108
Article 23. Deviation	153	(34)	109-112
Article 24. Deck cargo	153	(35)	113
<i>Chapter 7: Obligations of the shipper</i>	154	(35)	114-126
Article 25.	154	(35)	114-116
Article 26.	154	(36)	117
Article 27.	155	(36)	118
Article 28.	155	(37)	119
Article 29.	155	(37)	120
Article 30.	156	(38)	123-125
Article 31.	156	(38)	
Article 32.	157	(38)	126
<i>Chapter 8: Transport documents and electronic records</i>	157	(39)	127-146
Article 33. Issuance of the transport document or the electronic record	157	(39)	127
Article 34. Contract particulars	158	(39)	128-131
Article 35. Signature	159	(41)	132-133
Article 36. Deficiencies in the contract particulars	159	(41)	134-138
Article 37. Qualifying the description of the goods in the contract particulars	160	(41)	139-142
Article 38. Reasonable means of checking and good faith	162	(43)	143
Article 39. Prima facie and conclusive evidence	162	(44)	144-145
Article 40. Evidentiary effect of qualifying clauses	163	(44)	146
<i>Chapter 9: Freight</i>	163	(45)	147-159
Article 41.	163	(45)	148
Article 42.	164	(46)	149-151
Article 43.	164	(46)	152
Article 44.	165	(47)	153-158
Article 45.	166	(48)	159
<i>Chapter 10: Delivery to the consignee</i>	166	(48)	160-179
Article 46.	166	(48)	160-162
Article 47.	167	(49)	163
Article 48.	167	(49)	164-167
Article 49.	168	(50)	168-174
Article 50.	170	(52)	175-176
Article 51.	171	(53)	177
Article 52.	171	(53)	178-179
<i>Chapter 11: Right of control</i>	171	(53)	180-200
Article 53.	171	(53)	180-183
Article 54.	172	(54)	184-190

Transport Law

Article 55.	174 (56)	191-197
Article 56.	176 (58)	198
Article 57.	176 (58)	199
Article 58.	175 (58)	200
<i>Chapter 12: Transfer of rights</i>	177 (59)	201-207
Article 59.	177 (59)	201-202
Article 60.	177 (59)	203-205
Article 61.	178 (60)	206
Article 62.	178 (60)	207
<i>Chapter 13: Rights of suit</i>	179 (61)	208-213
Article 63.	179 (61)	208-211
Article 64.	180 (62)	212
Article 65.	180 (62)	213
<i>Chapter 14: Time for suit</i>	180 (62)	214-221
Article 66.	180 (62)	214-215
Article 67.	181 (63)	216
Article 68.	182 (63)	217
Article 69.	182 (64)	218-219
Article 70.	182 (64)	220
Article 71.	183 (64)	221
<i>Chapter 15: Jurisdiction</i>	183 (65)	222-224
Article 72.	183 (65)	223-224
Article 73.	184 (66)	
Article 74.	184 (66)	
Article 75.	184 (66)	
Article 75 bis.	184 (66)	
<i>Chapter 16: Arbitration</i>	185 (67)	225-228
Article 76.	185 (67)	
Article 77.	185 (67)	227
Article 78.	186 (68)	226 and 228
Article 79.	186 (68)	
Article 80.	186 (68)	
Article 80 bis.	186 (68)	
<i>Chapter 17: General average</i>	187 (69)	229-230
Article 81.	187 (69)	229
Article 82.	187 (69)	230
<i>Chapter 18: Other conventions</i>	188 (70)	231-235
Article 83.	188 (70)	231
Article 84.	188 (70)	232
Article 85.	188 (70)	233
Article 86.	189 (70)	234
Article 87.	189 (71)	235
<i>Chapter 19: Limits of contractual freedom</i>	189 (71)	236-240
Article 88.	189 (71)	237-239
Article 89.	190 (72)	240

Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.ⁱ At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.ⁱⁱ

2. At its thirty-sixth session, in July 2003, the Commission had before it the reports of the tenth (Vienna, 16-20 September 2002) and eleventh (New York, 24 March-4 April 2003) sessions of the Working Group (A/CN.9/525 and A/CN.9/526, respectively).

3. The Commission was mindful of the magnitude of the project undertaken by the Working Group and expressed appreciation for the progress accomplished so far. It was widely felt that, having recently completed its first reading of the draft instrument on transport law, the Working Group had reached a particularly difficult phase of its work. The Commission noted that a considerable number of controversial issues remained open for discussion regarding the scope and the individual provisions of the draft instrument. Further progress would require a delicate balance being struck between the various conflicting interests at stake. A view was stated that a door-to-door instrument might be achieved by a compromise based on uniform liability, choice of forum and negotiated contracts, which would not deal with actions against performing inland parties. It was also stated that involving inland road and rail interests was critical to achieve the objectives of the text. A view was expressed that increased flexibility in the design of the proposed instrument should continue to be explored by the Working Group to allow for States to opt-in to all or part of the door-to-door regime.

4. The Commission also noted that, in view of the complexities involved in the preparation of the draft instrument, the Working Group had met at its eleventh session for a duration of two weeks, thus making use of additional conference time that had been made available by Working Group I completing its work on privately financed infrastructure projects at its fifth session, in September 2002. The Chairman of Working Group III confirmed that, if progress on the preparation of the draft instrument was to be made within an

acceptable time frame, the Working Group would need to continue holding two-week sessions. After discussion, the Commission authorized Working Group III, on an exceptional basis, to hold its twelfth and thirteenth sessions on the basis of two-week sessions. It was agreed that the situation of the Working Group in that respect would need to be reassessed at the thirty-seventh session of the Commission in 2004. The Working Group was invited to make every effort to complete its work expeditiously and, for that purpose, to use every possibility of holding inter-session consultations, possibly through electronic mail. The Commission realized, however, that the number of issues open for discussion and the need to discuss many of them simultaneously made it particularly relevant to hold full-scale meetings of the Working Group.ⁱⁱⁱ

5. The annex to this note contains revised provisions for a draft instrument on the carriage of goods [wholly or partly] [by sea] prepared by the Secretariat for consideration by the Working Group. Changes to the text previously considered by the Working Group (contained in document A/CN.9/WG.III/WP.21) have been indicated by underlining and strikeout.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Annex

Draft instrument on the carriage of goods [wholly or partly] [by sea]

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions¹

For the purposes of this instrument:

- (a) “Contract of carriage”² means a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly³ by sea from one place to another.
- (b) “Carrier”⁴ means a person that enters into a contract of carriage with a shipper.
- (c) “Consignor”⁵ means a person that delivers the goods to a the carrier or a performing party⁶ for carriage.

¹ Paragraph 72 of the Report of the 9th session of the Working Group on Transport Law (A/CN.9/510) noted that it was generally agreed that the readability of the draft instrument would be improved if the definitions were arranged according to a more logical structure by first listing the various parties that might intervene in the contractual relationships covered by the draft instrument and then listing the technical terms used in the draft provisions. The order of the definitions has been changed as suggested. The Working Group may also wish to consider titles for those articles in the draft instrument that do not currently have them.

² It was suggested in paragraph 83 of A/CN.9/510 that this definition was too simplistic and might require a more detailed consideration of the various obligations of the carrier. It was further suggested that the shipper also be mentioned, and that the definition should refer to a “person” rather than to a “carrier”. No decisions were made on these matters, and the suggestions have not, therefore, been incorporated.

³ It is noted in paragraph 85 of A/CN.9/510 that the Working Group decided that the words “wholly or partly” would be maintained in the draft provision, but that the words “wholly or partly” would be identified by adequate typographical means as one element of the draft instrument that might require particular consideration in line with the final decision to be made regarding the scope of the draft instrument. The Working Group may also wish to consider whether the phrase “wholly or partly” should appear in the title of the draft instrument.

⁴ It was recalled in paragraph 73 of A/CN.9/510 that this definition followed the same principle as the Hague-Visby and Hamburg Rules. Concern was expressed that the definition did not make sufficient reference to parties on whose behalf a contract was made, nor did it adequately cover the case of freight forwarders, nor did it make clear that it intended to cover both legal and natural persons. No agreement was reached on these issues, but it was agreed in paragraph 74 of A/CN.9/510 that the current definition constituted an acceptable basis for continuation of the discussion.

⁵ Support was expressed in paragraph 78 of A/CN.9/510 for the introduction of a mention that the consignor delivered the goods “on behalf” of the shipper. It was also suggested in paragraph 79 of A/CN.9/510 that additional language should be introduced to clarify that the consignor should deliver the goods to the “actual” or “performing” carrier, but the view was expressed that the words “a carrier” sufficiently addressed the possibility that a performing party might intervene in addition to the original carrier. Finally, a view was expressed in paragraph 80 of A/CN.9/510 that the Working Group might consider the text of article 1, paragraph 5 of the Multimodal Convention in revising the definition. The Working Group did not reach any agreement with respect to revising this provision.

(d) “Shipper”⁷ means a person that enters into a contract of carriage with a carrier.

(e) “Performing party”⁸ means a person other than the carrier that physically performs [or undertakes to perform]⁹ ~~for fails to perform in whole or in part~~¹⁰ 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.

(f) “Holder”¹¹ means a person that 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 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

⁶ An oversight was carried over from the original draft of the instrument from CMI, which had intended to correct the phrase “a carrier” to read “the carrier or a performing party” in those situations where such a change was necessary. This adjustment has been made at various points in this iteration of the draft instrument.

⁷ As noted in paragraph 107 of A/CN.9/510, bearing in mind the concerns expressed in the context of the definition of “carrier” in paragraph 1.1 (now paragraph (b)), it was generally agreed that the draft definition of “shipper” constituted an acceptable basis for continuation of the discussion at a future session.

⁸ While some views were expressed to the contrary, it is noted in paragraph 99 of A/CN.9/510 that wide support was expressed for the presence of this notion in the draft instrument; its concept was also widely supported, including the use of the term “physically performs” as a way to limit the categories of persons to be included within the definition. As noted in paragraph 104 of A/CN.9/510, suggestions were made to simplify and shorten the drafting of the definition, and it was suggested to delete the words “regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage” as unclear and as adding nothing substantial to the definition. However, it is unclear whether this suggestion received sufficient support in the Working Group.

⁹ As noted in paragraph 100 of A/CN.9/510, it was suggested that all of the options for the definition of “performing party” contained in the draft text and commentary should be retained for the time being. Paragraph 16 of A/CN.9/WG.III/WP.21 suggested as a possible alternative to the relatively restrictive definition represented in the original text of A/CN.9/WG.III/WP.21, a relatively inclusive definition that might be drafted with the following language at the start of the 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...”.

¹⁰ It is noted in paragraph 104 of A/CN.9/510 that the Working Group considered that these words should be deleted.

¹¹ The suggestion was made in paragraph 91 of A/CN.9/510 that the term “for the time being” was unnecessary, and support was expressed for maintaining a requirement that the holder should be in “lawful” possession of a negotiable transport document. Again, it is unclear whether this suggestion received sufficient support in the Working Group.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

(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 6 able to demonstrate that it has [access to] [control of] such record.

(g) “Right of control”¹² has the meaning given in article 49.

(h) “Controlling party”¹³ means the person that pursuant to article 50 is entitled to exercise the right of control.

(i) “Consignee”¹⁴ means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic record.

(j) “Goods” means the wares, merchandise, and articles of every kind [whatsoever that a carrier or a performing party [received for carriage] [undertakes to carry under a contract of carriage]]¹⁵ and includes the packing and any equipment and container not supplied by or on behalf of the carrier or a performing party.

¹² It was noted in paragraph 105 of A/CN.9/510 that this was more a cross-reference than a definition, and it was proposed that it could therefore be deleted. However, it was agreed by the Working Group to retain the definition for further consideration at a later stage. See also *infra* note 13.

The Working Group may wish to consider whether the first sentence of the chapeau in paragraph 11.1 (now article 53) should be moved to paragraph 1.18 (now paragraph (g)) as the definition of “right of control”. Should the Working Group decide to do so, paragraph (g) could read: “‘Right of control’ means (i) the right to give instructions to the carrier under the contract of carriage and (ii) the right to agree with the carrier to a variation of such contract.”

¹³ Noting the concerns expressed in paragraph 87 of A/CN.9/510 regarding the use of index referencing in the definition section, the Working Group agreed that the definition should be retained for further discussions.

¹⁴ As noted in paragraph 75 of A/CN.9/510, it was suggested that the definition might be redrafted along the following lines: “‘Consignee’ means a person entitled to take delivery of the goods under a contract of carriage, which may be expressed by way of a transport document or electronic record”, while another suggestion was that a reference to the controlling party might need to be introduced in the definition of “consignee”. As noted in paragraph 76 of A/CN.9/510, the Working Group took note of those questions, concerns and suggestions for continuation of the discussion at a later stage.

¹⁵ In paragraph 90 of A/CN.9/510, a concern was expressed that the reference in the definition of “goods” that a carrier or a performing party “received for carriage” rather than “undertakes to carry” may mean that the definition failed to cover cases where there was a failure by the carrier to receive the goods or load cargo on board a vessel. It was said that the current reference only to receipt of goods was too narrow, and, alternatively, that the definition should be simplified by removing any reference to receipt of the goods. The Working Group decided that the Secretariat should prepare two alternative texts taking account of each of these approaches, however, the Working Group may wish to consider whether the amendment made above could accommodate the concerns of the Working Group, without the need for either of the two alternative texts.

The Working Group may also wish to note that if the phrase “undertakes to carry under a contract of carriage” is adopted, the complete phrase must be limited to “whatsoever that a carrier undertakes to carry under a contract of carriage”, since the performing party does not undertake to carry the goods under the contract of carriage. However, if the phrase “received for carriage” is adopted, then the complete phrase should be “whatsoever that a carrier or a performing party received for carriage”.

(k) “Transport document”¹⁶ means a document issued pursuant to a contract of carriage by the carrier or a performing party that

(i) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or

(ii) evidences or contains a contract of carriage,

or both.

(l) “Negotiable transport document”¹⁷ 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”.

(m) “Non-negotiable transport document”¹⁸ means a transport document that does not qualify as a negotiable transport document.

(n) “Electronic communication”¹⁹ 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.

(o) “Electronic record”²⁰ 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

(i) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or

¹⁶ In paragraph 86 of A/CN.9/510, it was suggested with respect to the paragraph 1.6 (now paragraph (r)) definition of “contract particulars” (see, *infra*, note 23) that the text should indicate more clearly to what the phrase “relating to the contract of carriage” referred. In this respect, it was suggested that when the Working Group considered draft paragraphs 1.9 and 1.20 (now paragraphs (o) and (k)) it consider whether the requirement that an electronic communication or a transport document evidences a contract of carriage was really necessary. This definition may be based on s. 5(1) of the UK Carriage of Goods by Sea Act, 1924, but there does not seem to be any doubt that the transport document is also usually evidence of the contract of carriage. It would not, therefore, seem advisable to place square brackets around articles 1.20(b) (now paragraph (k)(ii)) or 1.9(b) (now paragraph (o)(ii)).

¹⁷ It was suggested in paragraph 93 of A/CN.9/510 that there be a clearer explanation of the differences between negotiability and non-negotiability, particularly in order to provide for appropriate rules on negotiable electronic records. In response, it was noted that whilst it was important to be precise in this area, particularly because it was a new area and was affected by national law, the Working Group should keep in mind that it could not regulate all consequences.

¹⁸ As noted in paragraph 94 of A/CN.9/510, although a suggestion was made that this definition was not necessary and should be deleted, the Working Group agreed to retain the definition for further consideration.

¹⁹ As noted in paragraph 88 of A/CN.9/510, a number of concerns have been raised with respect to this provision and to the definition of “electronic record”. It should be noted that the discussion of the electronic commerce aspects of the draft instrument have been postponed until later in the Working Group’s discussions.

²⁰ See *supra* notes 16 and 19.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

(ii) 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.

(p) “Negotiable electronic record”²¹ 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 6, 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.

(q) “Non-negotiable electronic record”²² means an electronic record that does not qualify as a negotiable electronic record.

(r) “Contract particulars”²³ 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.

(s) “Container” means²⁴ any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, [capable of being carried by sea][designed for carriage by sea] and any equipment ancillary to such unit load.²⁵

²¹ As noted in paragraph 92 of A/CN.9/510, the Working Group accepted the definitions of “negotiable electronic record” and “non-negotiable electronic record” as a sound basis for further discussions.

²² Correction to original text following paragraph 13 of A/CN.9WG.III/WP/21. Also, see *supra* note 21.

²³ In paragraph 86 of A/CN.9/510, it is noted that the Working Group agreed that the following concerns should be considering in redrafting the definition: that the definition could contain contradictions when read together with paragraph 1.20 (now paragraph (k)), and that the text should indicate more clearly to what the phrase “relating to the contract of carriage” referred (see *supra* note 16). However, the existence of a contradiction between the definition of “contract particulars” in paragraph 1.6 (now paragraph (r)) and “transport document” is in paragraph 1.20 (now paragraph (k)) is unclear. Further, the phrase “relating to the contract of carriage” would seem to be clear.

²⁴ It is noted in paragraph 82 of A/CN.9/510 that the Secretariat was requested to prepare a revised definition for “container” with possible variants reflecting the views and concerns expressed. The first such concern expressed in paragraph 81 of A/CN.9/510 was that the word “includes” made the definition open-ended, and the second, expressed in paragraph 82 of A/CN.9/510, was that the definition should be limited to containers designed for sea transport. The suggested changes present alternative language and are an attempt to reflect these views.

²⁵ To avoid the apparent circularity in the words “‘Container’ means any type of container...”, the Working Group may wish to consider the following alternative text: “‘Container’ means any unit load used to consolidate goods that is [capable of being carried by sea][designed for carriage by sea] and any equipment ancillary to such unit load, [such as][including] transportable tank or flat, swapbody, or any similar unit load.”

(t) “Freight”²⁶ means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

Article 2. Scope of application

1. Variant A of paragraph 1²⁷

Subject to²⁸ paragraph 3, this instrument applies 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 receipt²⁹ specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the place of delivery 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]³⁰

(e) the contract of carriage provides that this instrument, or the law of any State giving effect to them, is to govern the contract.

²⁶ A concern was expressed in paragraph 89 of A/CN.9/510 that the definition of freight was incomplete in that it failed to state the person who was liable to pay the freight. However, it was agreed that the role of the definition was simply to describe what freight was and that issues relating to the freight could be dealt with elsewhere.

²⁷ Variant A of paragraph 1 is based on the original text of the draft instrument.

²⁸ The Working Group may wish to review all articles and paragraphs in the draft instrument that begin with the phrase, “Subject to article/paragraph...”, or “Notwithstanding article/paragraph...” and the like, in order to assess whether, in each case, the clause is necessary or whether it may be deleted. In the interests of achieving consistency, it is suggested that this review be completed by examining the instrument as a whole with this sole purpose in mind.

²⁹ It was noted in paragraph 244 of A/CN.9/526 that the Working Group agreed on a provisional basis that the draft instrument should cover any type of multimodal carriage involving a sea leg, and that no further distinction would be needed, based on the relative importance of the various modes of transport used for the purposes of the carriage. It was also agreed that draft article 3 (now article 2) might need to be redrafted to better reflect that the internationality of the carriage should be assessed on the basis of the contract of carriage. The Secretariat was requested to prepare revised provisions, with possible variants, for continuation of the discussion at a future session. However, in view of the definition of “contract of carriage” in paragraph 1.5 (now article 1(a)), there would seem to be no need to change the text of paragraph 3.1(a) and (b) (now articles 2(1)(a) and (b)) except that the words in brackets could be deleted.

³⁰ As noted in paragraph 34 of A/CN.9/510, it was widely held in the Working Group that, in modern transport practice, the place of conclusion of the contract was mostly irrelevant to the performance of the contract of carriage and, if electronic commerce was involved, that place might even be difficult or impossible to determine.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Variant B of paragraph 1³¹

Subject to paragraph 3, this instrument apply to all contracts of carriage of goods by sea³² 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]³³

(e) the contract of carriage provides that this Instrument, or the law of any State giving effect to them, is to govern the contract.

1 *bis*. This instrument also applies to carriage by inland waterway before and after the voyage by sea as well as to carriage by road or by rail from the place of receipt to the port of loading and from the port of discharge to the place of delivery, provided that the goods, during the sea voyage, have been unloaded from the means of transport with which the land segment of the carriage is performed.³⁴

Variant C of paragraph 1³⁵

Subject to paragraph 3, this instrument applies to all contracts of carriage in

³¹ In paragraphs 245 to 249 of A/CN.9/526, the relationship of the draft instrument with other transport conventions and with domestic legislation is discussed. The Working Group instructed the Secretariat in paragraph 250 of A/CN.9/526, *inter alia*, to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1 (now paragraph 1) of the draft instrument (see A/CN.9/WG.III/WP.26). This variant is reflected in Variant B.

³² If Variant B is adopted by the Working Group, the use of the phrase “of goods by sea” may require an amendment to the paragraph 1.5 (now article 1(a)) definition of “contract of carriage”.

³³ See *supra* note 30.

³⁴ The Working Group may wish to consider the relationship of this paragraph 1 *bis* with article 83.

³⁵ A suggestion reflected in paragraph 243 of A/CN.9/526 was that the draft instrument should only apply to those carriages where the maritime leg involved cross-border transport. Under that suggestion, it was said to be irrelevant whether the land legs involved in the overall carriage did or did not involve cross-border transport. The Working Group took note of that suggestion and requested the Secretariat to reflect it, as a possible variant, in the revised draft to

which the port of loading and the port of discharge are in different States if

(a) the port of loading specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the 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]³⁶

(e) the contract of carriage provides that this instrument, or the law of any State giving effect to them, is to govern the contract.³⁷

2. This instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.³⁸

3. This instrument does not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements].

4. Notwithstanding paragraph 3, 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.

be prepared for continuation of the discussion at a future session. Variant C is intended to reflect this approach. As noted in paragraph 243 of A/CN.9/526, the prevailing view, however, was that, pursuant to draft article 3 (now article 2), the internationality of the carriage should not be assessed in respect of any of the individual unimodal legs but in respect of the overall carriage, with the place of receipt and the place of delivery being in different States.

³⁶ See *supra* note 30.

³⁷ The Working Group may also wish to consider the addition of paragraph 1 *bis* to Variant C, as follows: “1 *bis*. If under the contract of carriage, the goods are carried only partly by sea, this instrument applies however only if (a) the place of receipt and the port of loading are in the same State, and (b) the port of discharge and the place of delivery are in the same State.” This suggestion may be in conflict with subparagraph 4.2.1 (now article 8). In addition, as indicated in note 35, *supra*, the prevailing view in the Working Group was that the internationality of the carriage should not be assessed in respect of any of the individual unimodal legs but in respect of the overall carriage, with the place of receipt and the place of delivery being in different States.

³⁸ It has been suggested that in the interests of uniformity and for the avoidance of doubt, it would be desirable to also include a reference to the applicable law (paragraph 37 of A/CN.9/WG.III/WP.21/Add.1).

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

5. If a contract provides for the future carriage of goods in a series of shipments, this instrument applies to each shipment to the extent that paragraphs 1, 2, 3 and 4 so specify.

CHAPTER 2. ELECTRONIC COMMUNICATION³⁹

Article 3.

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.

Article 4.

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 ceases to have any effect or validity.

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 ceases to have any effect or validity.

Article 5.

The notices and confirmation referred to in articles 20(1), 20(2), 20(3), 34(1)(b) and (c), 47, 51, the declaration in article 68 and the agreement as to weight in article 37(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.

³⁹ The discussion of this chapter has been postponed to a future consideration of the draft instrument. This chapter has been kept in its original position. However the Working Group may wish to consider the optimum placement of it within the draft instrument when its provisions are considered. Further changes to this chapter are expected following those discussions.

Article 6.

The use of a negotiable electronic record is subject to rules of procedure agreed between the carrier and the shipper or the holder mentioned in article 1(p)⁴⁰. 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
 - (ii) pursuant to articles 4(2) or 49(a)(ii) the negotiable electronic record has ceased to have any effect or validity.

CHAPTER 3. PERIOD OF RESPONSIBILITY

Article 7.⁴¹

1. Subject to article 9, 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.
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.
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.
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

⁴⁰ This is a correction to the original version of the draft instrument set out in A/CN.9/WGIII/WP21, which should have made reference to the definition of “negotiable electronic record” in article 1(p).

⁴¹ The Working Group may wish to note paragraph 40 of A/CN.9/510, which sets out the arguments against, and in favour of, the approach taken in article 7.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

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 paragraph 3.

[Article 8. Carriage preceding or subsequent to sea carriage]⁴²

1. 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 [or national law] 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, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this instrument.]

[2. The provisions under article 8 shall not affect the application of article 18(2)]⁴³

⁴² It is noted in paragraph 250 of A/CN.9/526 that the Working Group agreed provisionally to retain the text of subparagraph 4.2.1 (now article 8) as a means of resolving possible conflicts between the draft instrument and other conventions already in force. The Secretariat was instructed to prepare a conflict of convention provision for possible insertion into article 16 (now chapter 18) of the draft instrument, and to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1 (now article 2(1)). The exchange of views regarding the relationship between the draft instrument and national law was inconclusive, and the decision was made to consider this issue further in light of anticipated future proposals. Given the level of support with respect to the issue of national law, however, the Working Group requested the Secretariat to insert a reference to national law in square brackets into the text of subparagraph 4.2.1 (now article 8) for further reflection in the future. Further, both the text of the Swedish proposal with respect to article 3 (now article 2) and a conflict of law provision in article 16 (now chapter 18), have been inserted in the text of the draft instrument in square brackets.

The Working Group may also wish to consider whether this article is appropriately placed within the draft instrument, or whether it should be moved to another chapter, such as, perhaps, chapter 5 on the Liability of the Carrier.

⁴³ In the discussion of the treatment of non-localised damages in paragraphs 264 to 266 of A/CN.9/526, it was suggested in paragraph 266 that the draft instrument might need to reflect more clearly the legal regimes governing localized damages under subparagraph 4.2.1 (now article 8) and non-localized damages under subparagraph 6.7.1 (now article 18(1)). The Secretariat was invited to consider the need for improved consistency between those two provisions when preparing a revised draft of the instrument.

[3. Article 8 applies regardless of the national law otherwise applicable to the contract of carriage.]

Article 9. Mixed contracts of carriage and forwarding⁴⁴

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.
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.

CHAPTER 4. OBLIGATIONS OF THE CARRIER

Article 10.

The carrier shall, subject to this instrument and in accordance with the terms of the contract of carriage, [properly and carefully] carry the goods to the place of destination and deliver them to the consignee.⁴⁵

Article 11.

1. The carrier shall during the period of its responsibility as defined in article 7, and subject to article 8, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.⁴⁶

The “improved consistency” between subparagraph 4.2.1 and the new provision subparagraph 6.7.1 *bis* (now article 18(2)) suggested in paragraph 264 for insertion after subparagraph 6.7.1 (now article 18(1)) (reading as follows: “Notwithstanding the provisions of subparagraph 6.7.1 (now article 18(1)), if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.”) could be realized by adding paragraph (2) as indicated.

⁴⁴ The Working Group may wish to consider whether article 9 is properly placed within chapter 3 on period of responsibility.

⁴⁵ It was noted in paragraph 116 of A/CN.9/510 that the Working Group provisionally agreed to retain the text of paragraph 5.1 (now article 10) as drafted. It was widely thought that the concerns and drafting suggestions mentioned in paragraphs 113 to 116 of A/CN.9/510 should be revisited at a later stage.

⁴⁶ As discussed in paragraph 117 and as noted in paragraph 119 of A/CN.9/510 that, notwithstanding that there was some support for omitting paragraph 5.2.1 (now article 11(1)), the Working Group provisionally agreed to retain the draft article given the extensive experience with analogous provisions in existing conventions such as article 3(2) of the Hague Rules. It was also agreed that further study of the draft article should be undertaken to assess the interplay and the consistency between paragraph 5.2.1 (now article 11(1)) and draft article 6 (now chapter 5), as well as the effect of the various possible definitions of the period during which the obligation in paragraph 5.2.1 (now article 11(1)) would apply. The Working Group may wish to note that there does not appear to be a particular maritime orientation to the use of the terms in sub paragraph 5.2.1 (now article 11(1)), and that deletion of the terms could result in a provision setting out only a general standard of care.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

[2. The parties may agree that certain of the functions referred to in paragraph 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.]⁴⁷

Article 12.

Variant A⁴⁸

Notwithstanding articles 10, 11, and 13(1), 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.⁴⁹

Variant B

Notwithstanding articles 10, 11, and 13(1), the carrier may unload, destroy or render dangerous goods harmless if they become an actual danger to life or property.

Article 13. Additional obligations applicable to the voyage by sea⁵⁰

1. The carrier shall be⁵¹ bound, before, at the beginning of, [and during]⁵² the voyage by sea, to exercise due diligence to:

⁴⁷ It was noted in paragraph 127 of A/CN.9/510 that it was decided that the provision should be placed between square brackets as an indication that the concept of FIO (free in and out) and FIOS (free in and out, stowed) clauses had to be reconsidered by the Working Group including their relationship to the provisions on the liability of the carrier. The Working Group may wish to review this provision based on any changes that are made to articles 10 and 11(1).

It was suggested that written information about the practice of FIO(S) clauses should be prepared for a future session of the Working Group to assist it in its considerations.

⁴⁸ Variant A of article 12 is based on the original text of the draft instrument.

⁴⁹ It was noted in paragraph 130 of A/CN.9/510 that the Working Group generally agreed that the text of paragraph 5.3 (now article 12) required further improvement. As an alternative to the current text of the provision as represented by Variant A, the Secretariat was requested to prepare a variant, reflected in Variant B, based on the principles expressed in article 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods. It was also agreed that the issue of compensation that might be owed to the carrier or the shipper in such circumstances might need to be further discussed in the context of paragraph 7.5 (now article 29).

⁵⁰ In light of the wide support expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port (see paragraph 239 of A/CN.9/526), it was thought that separating out provisions of the draft instrument that should apply only to carriage by sea might assist the restructuring of the draft instrument. As a consequence, articles 5 and 6 (now chapters 4 and 5, and a new chapter 6, entitled "Additional provisions relating to carriage by sea [or by other navigable waters]") of the draft instrument have been reorganized in this fashion.

⁵¹ This is the first of several instances where mandatory language has been inserted into the draft instrument in order to use a consistent approach throughout.

⁵² As noted in paragraph 131 of A/CN.9/510, the Working Group confirmed its broad support for imposing upon the carrier an obligation of due diligence that was continuous throughout the voyage by retaining the words that were currently between square brackets "and during" and "and keep". However, a concern was reiterated that the extension of the carrier's

- (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 where⁵³ supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.⁵⁴

[2. Notwithstanding articles 10, 11, and 13(1), the carrier ~~in the case of carriage by sea or by inland waterway~~⁵⁵ 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.]⁵⁶

CHAPTER 5. LIABILITY OF THE CARRIER

Article 14. Basis of liability⁵⁷

Variant A of paragraphs 1 and 2⁵⁸

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 chapter 3, unless the carrier proves that neither its fault nor that of any person referred to in article 15(3) caused or contributed to the loss, damage or delay.⁵⁹

obligation to exercise due diligence in respect of the whole voyage put a greater burden on carriers and could lead to the associated costs being passed on in the form of higher freights.

⁵³ The Working Group may wish to consider whether "where" should be changed to "when", since the place in which the containers are supplied is not relevant.

⁵⁴ It was noted in paragraph 136 of A/CN.9/510 that the Working Group agreed that the current text of paragraph 5.4 (now paragraph (1)) constituted a workable basis for continuation of its deliberations. The Working Group took note of the various suggestions that had been expressed in respect of the draft provision. It was generally agreed that the draft provision would need to be further considered in light of similar or comparable provisions in other unimodal transport conventions.

⁵⁵ This phrase would become redundant if this paragraph were placed under the heading "Additional obligations applicable to the voyage by sea" as suggested in the text.

⁵⁶ It was noted in paragraph 143 of A/CN.9/510 that the Working Group was divided between those who favoured the elimination of the subparagraph, and those who preferred to retain it but to further consider its substance. The Working Group decided to place the draft article between square brackets.

⁵⁷ Once the Working Group decides upon the preferred variant for paragraphs 1 and 2, it may be advisable to split paragraphs 1, 2 and 3 into separate articles.

⁵⁸ Variant A of paragraphs 1 and 2 are based on the original text of the draft instrument.

⁵⁹ (a) It was noted in paragraph 34 of A/CN.9/525 that strong support was expressed for the substance of paragraph 6.1 (now article 14). It was also noted in paragraph 34 of A/CN.9/525 that the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made. Variants B and C to subparagraphs 6.1.1 and 6.1.3 (now paragraphs 1 and 2) are presented as possible solutions to the views and suggestions expressed, as noted in the remainder of this note, as well as in notes 61 to 66, *infra*.

(b) The suggestion was noted in paragraph 31 of A/CN.9/525 that subparagraph 6.1.1 (now article 14(1)) was closer in substance to the approach taken in article 4.2(q) of the Hague-Visby Rules

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

[6.1.2 ⁶⁰]

2.⁶¹ Notwithstanding paragraph 1, if the carrier proves that it has complied

than the approach taken in article 5.1 of the Hamburg Rules, which required that the carrier prove that it, its servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences. However, there was some criticism that the reference to the “period of the carrier’s responsibility as defined in article 4 (now chapter 3)” would allow the carrier to restrict its liability to a considerable extent, since, as noted in paragraph 40 of A/CN.9/510, some reservations were expressed with the approach taken in article 7, according to which the precise moment of the receipt and delivery of goods was a matter of contractual arrangements between the parties of a matter to be decided upon by reference to customs or usages.

(c) As further noted in paragraph 31 of A/CN.9/525, some concern was expressed as to why it had been considered necessary to deviate from the language used in the Hamburg Rules. It was suggested that the reason for the difference in wording from both the Hague Rules and the Hamburg Rules was to improve and provide greater certainty (e.g. as to the fact that the liability of the carrier was based on presumed fault, a matter that had required clarification by way of the common understanding adopted by the drafters of the Hamburg Rules). A contrary view was that combining different languages from both the Hague and Hamburg Rules might increase uncertainty as it was not clear how the provision would be interpreted. Since the views differed, and there is no evidence that one of them prevailed over the other, it does not seem possible to reflect them in the text.

(d) A suggestion was made in paragraph 31 of A/CN.9/525 that the basis of liability should be simplified by abolishing the standard of due diligence and replacing it with liability stemming from use of the vessel as such. This suggestion would entail a very strict, if not objective, standard of liability. Since support was expressed in paragraph 31 of A/CN.9/525 for the requirement of fault-based liability on the carrier, the change that has been suggested would seem to clash with the majority view.

(e) Paragraph 32 of A/CN.9/525 suggested that, whilst a higher standard of liability had been adopted in instruments dealing with other modes of transport (such as COTIF), a higher standard would not be acceptable in the maritime context. In this regard, support was expressed for features in addition to paragraph 6.1 (now article 14), such as draft article 5 (now chapter 4), which set out the positive obligations of the carrier. This suggestion appeared to have the support of the Working Group, and should be taken into consideration.

(f) The original text as presented in Variant A has no clear linkage between article 5 (now chapter 4) and article 6 (now chapter 5) of the draft instrument, i.e. between the breach of the obligations set out in article 5 (now chapter 4) (as well as the allocation of the burden of proof) and the liability of the carrier in accordance with article 6 (now chapter 5). The suggestion that was made is to create such a linkage.

(g) It was noted in paragraph 31 of A/CN.9/525 that if the draft instrument were to apply on a door-to-door basis, conflict with unimodal land transport conventions (such as COTIF and CMR) would be inevitable given that both imposed a higher standard of liability on the carrier. However it was suggested that these conflicts could be reduced by adopting suitable wording in paragraph 6.4 (now article 16) as well as the language used in respect of the performing carrier. More generally, doubts were expressed as to whether default liability rules applicable in the context of door-to-door transport should be based on the lower maritime standard instead of relying on the stricter standard governing land transport.

⁶⁰ Moved to new chapter 6 (now chapter 5) under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

⁶¹ Paragraph 45 of A/CN.9/525 notes that the Secretariat was requested to take the suggestions, views and concerns in paragraphs 38 to 44 of A/CN.9/525 into consideration when preparing a future draft of the provision. The prevailing view noted in paragraph 39 was that this provision should be maintained. An attempt has been made in this text to take into account the comments and suggestions made by the Working Group, as noted in paragraphs 40 to 43 of A/CN.9/525.

with its obligations under chapter 4⁶² and that loss of or damage to the goods or delay in

delivery has been caused [solely]⁶³ 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]⁶⁴ that loss, damage or delay]⁶⁵ [the carrier shall not be liable, except where proof is given of its fault or of the fault of a performing party, for such loss, damage or delay].⁶⁶

(a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

(b) quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process];

(c) act or omission of the shipper, the controlling party or the consignee;

(d) strikes, lock-outs, stoppages or restraints of labour;

[(v) ... ⁶⁷;]

(e) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(f) insufficiency or defective condition of packing or marking;

(g) latent defects not discoverable by due diligence.

(h) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

(i) acts of the carrier or a performing party in pursuance of the powers conferred by article 12 and 13(2) when the goods have been become a danger to persons, property or the environment or have been sacrificed;

[(xi) ... ⁶⁸;]

⁶² Paragraph 42 of A/CN.9/525 made reference to concerns that the chapeau of subparagraph 6.1.3 (now paragraph (2)) insufficiently addressed cases where the carrier proved an event in the list under subparagraph 6.1.3 (now paragraph (2)), but there was an indication that the vessel might not have been seaworthy. See also the comments under paragraph 6.1 (now article 14), as noted in note 59, *supra*.

⁶³ It was suggested in paragraph 42 of A/CN.9/525 that the word “solely” be added to the subparagraph, particularly if the events listed were to be treated as exonerations.

⁶⁴ It was suggested in paragraph 42 of A/CN.9/525 Report that the words “or contributed to cause” be deleted, again, particularly if the events listed were to be treated as exonerations.

⁶⁵ This is the first alternative based on the “presumption regime” suggested in paragraphs 41 and 42 of A/CN.9/525.

⁶⁶ As noted in paragraph 41 of A/CN.9/525, this is the second alternative, based on the traditional exoneration regime, but subject to proof being given of the carrier’s fault.

⁶⁷ Moved to new chapter 6 under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

⁶⁸ Moved to new chapter 6 under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Variant B of paragraphs 1 and 2:

1. The carrier is relieved from liability if it proves that:
 - (i) it has complied with its obligations under article 13.1 [or that its failure to comply has not caused [or contributed to]⁶⁹ the loss, damage or delay], and
 - (ii) neither its fault, nor the fault of its servants or agents has caused [or contributed to]⁷⁰ the loss, damage or delay, or

that the loss, damage or delay has been caused by one of the following events:

 - (a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;
 - (b) quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];
 - (c) act or omission of the shipper, the controlling party or the consignee;
 - (d) strikes, lock-outs, stoppages or restraints of labour;
 - [(v) ... ⁷¹];
 - (e) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;
 - (f) insufficiency or defective condition of packing or marking;
 - (g) latent defects not discoverable by due diligence.
 - (h) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;
 - (i) acts of the carrier or a performing party in pursuance of the powers conferred by article 12 and 13(2) when the goods have been become a danger to persons, property or the environment or have been sacrificed;
 - [(xi) ... ⁷²];

The carrier shall, however, be liable for the loss, damage or delay if the shipper proves that the fault of the carrier or the fault of its servants or agents has caused [or contributed to]⁷³ the loss, damage or delay.

Variant C of paragraphs 1 and 2

1. The carrier shall be liable for loss resulting from loss of or damage to the

⁶⁹ See note 64, *supra*.

⁷⁰ *Ibid.*

⁷¹ Moved to new chapter 6 under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

⁷² Moved to new chapter 6 under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

⁷³ See note 64, *supra*.

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 chapter 3.

2. The carrier is relieved of its liability under paragraph 1 if it proves that neither its fault nor that of any person referred to in article 15(3) caused [or contributed to]⁷⁴ the loss, damage or delay.

2.bis It shall be presumed that neither its fault nor that of any person referred to in article 15(3) caused the loss, damage or delay if the carrier proves that loss of or damage to the goods or delay in delivery has been caused [solely]⁷⁵ by one of the following events:

(a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

(b) quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];

(c) act or omission of the shipper, the controlling party or the consignee;

(d) strikes, lock-outs, stoppages or restraints of labour;

[(v) ... 76;]

(e) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(f) insufficiency or defective condition of packing or marking;

(g) latent defects not discoverable by due diligence.

(h) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

(i) acts of the carrier or a performing party in pursuance of the powers conferred by article 12 and 13(2) when the goods have been become a danger to persons, property or the environment or have been sacrificed;

[(xi) ... 77;]

The presumption is rebutted if the claimant proves that the loss, damage or delay was caused by the fault of the carrier or any person referred to in article

⁷⁴ See note 64, *supra*.

⁷⁵ See note 63, *supra*.

⁷⁶ Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

⁷⁷ Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

15 (3). Furthermore the presumption is rebutted if the claimant proves that the loss, damage or delay was caused by one of the cases listed in article 13 (1)(a), (b) or (c). However, in such a case, the carrier is relieved of liability if it proves compliance with the duty under article 13.

3. If loss, damage or delay in delivery is caused in part by an event⁷⁸ 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.

79

[6.2 Calculation of compensation⁸⁰]

Article 15. Liability of performing parties⁸¹

⁷⁸ As noted in paragraph 55 of A/CN.9/525, one concern raised was the ambiguous nature of the “event”, and whether it was intended to be limited to “cause”, and whether it would be limited to the list of presumptions in subparagraph 6.1.3 (now paragraph 2).

⁷⁹ The text that has been deleted was included as a second alternative in the first draft of the draft instrument. As noted in paragraph 56 of A/CN.9/525, the first alternative received the strongest support in the Working Group and the decision was made to maintain only the first alternative in the draft instrument for the continuation of the discussion at a later stage. However, the Working Group decided to preserve the second alternative as a note or in the comments to the draft text, to permit further consideration of that alternative at a later stage:
[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.]

⁸⁰ As suggested in paragraph 60 of A/CN.9/525, paragraph 6.2 (now article 17) has been moved after article 6.4 (now article 16) in order to ensure its closer connection with paragraph 6.7 (now article 18).

⁸¹ (a) As noted in paragraph 64 of A/CN.9/525, it was agreed that paragraph 6.3 (now article 15) should be retained, subject to a revision of the text taking account of the concerns expressed and to considering whether further changes were necessary if the draft instrument ultimately applied on a door-to-door basis.

An analysis of the “concerns” summarized in paragraph 64 follows in order to ascertain which may be taken into account in the preparation of a revised text.

(b) A concern was expressed that the coverage of performing parties was a novel rule which created a direct right of action as against a party with whom the cargo interests did not have a contractual relationship. It was strongly argued that this innovation should be avoided as it had the potential for serious practical problems. Disagreement was expressed with respect to the statement in paragraph 94 of document A/CN.9/WG.III/WP.21 that a performing party was not liable in tort. In this respect, it was argued that liability of the performing party in tort was a matter of national law to which the present instrument did not extend. Since the Working Group decided to retain this provision, the above concerns cannot be considered.

(c) Also it was submitted that it was not clear under which conditions liability could be imposed upon the performing party. It was said that even though it appeared that the loss or damage had to be “localized” with the performing party (i.e. the loss or damage had to have occurred when the

1. Variant A of paragraph 1⁸²

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 (a) during the period in which it has custody of the goods; and (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

Variant B of paragraph 1

A performing party is 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:

- (a) during the period in which it has custody of the goods; or
- (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage provided the loss, damage or delay occurred during the performance of such activities.

The responsibilities and liabilities imposed on the carrier under this instrument

goods were in the performing party's custody), it was less than clear how the burden of proof on this point was to be dealt with. It was suggested that one interpretation could require that the performing party prove that the loss or damage occurred at a time when the goods were not in that party's custody. The burden of proof should be on the claimant and this should be stated. An effort to remedy this concern was made in the suggested alternative text for subparagraph 6.3.1(a) (now article 15(1)).

(d) As well it was suggested that, whilst subparagraph 6.3.4 (now article 15(6)) created joint and several liabilities, it did not indicate how the recourse action as between the parties was to be determined. This was particularly ambiguous given that there was not necessarily a contractual relationship between the parties concerned. However, it is thought that it may be preferable to avoid regulating the recourse actions between parties who are jointly and severally liable. This has not been done in the Hague-Visby Rules (article 4 bis) nor in the Hamburg Rules (article 7).

(e) For these reasons, it was suggested in paragraph 64 of A/CN.9/525 that paragraph 6.3 (now article 15) and the definition of "performing party" in draft article 1 should be deleted or, in the alternative, that the definition should be clarified so as to ensure that it was limited to "physically" performing parties. Support was expressed for limiting the scope of paragraph 6.3 (now article 15) to "physically" performing parties. In this respect it was suggested that the words "or undertakes to perform" should be deleted from subparagraph 6.3.2(a)(ii) (now paragraph 3(b)). However, the existing definition of "performing party" in paragraph 1.17 (now paragraph 1(e)) of the draft instrument clearly states that such is a party that physically performs any of the carrier's responsibilities, so no changes to this provision would seem to be necessary.

(f) It should be noted that in paragraphs 251 to 255 of A/CN.9/526, when discussing the scope of application of the instrument, the Working Group also considered the issue of the treatment of performing parties. As noted in paragraph 256 of A/CN.9/526, it was agreed that the treatment of performing parties under the draft instrument was an important matter that would shape the entire instrument, and could help in the solution of other problems, such as the inclusion of mandatory national law in subparagraph 4.2.1 (now article 8). The anticipation of a more refined written proposal on this issue prevented a clear final or interim decision from being made at that stage. That proposal is now contained in A/CN.9/WG.III/WP.34. In light of this proposal, the Working Group may wish to consider the treatment of performing parties, as well as the other issues discussed therein.

⁸² Variant A of paragraph 1 is based on the original text of the draft instrument.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

and the carrier's rights and immunities provided by this instrument shall apply in respect of performing parties.

2. 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 16(2), 24(4), and 18, a performing party shall not be bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits.

3. Subject to paragraph 5, the carrier shall be responsible for the acts and omissions of

(a) any performing party, and

(b) 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. The 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.

4. Subject to paragraph 5, 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.⁸³

5. If an action is brought against any person, other than the carrier, mentioned in paragraphs 3 and 4, 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.

6. 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 16, 24 and 18.

7. Without prejudice to article 19, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument

Article 16. Delay⁸⁴

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

⁸³ Language correction to reflect that used in 6.3.2(a) and 6.3.3 (now paragraphs 3, 4 and 5).

⁸⁴ As noted in paragraph 70 of A/CN.9/525, the Working Group agreed that the text of paragraph 6.4 (now article 16) would remain as currently drafted for continuation of the discussion at a later stage.

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].

2. If delay in delivery causes loss not resulting from loss of or damage to the goods carried and hence not covered by article 17, the amount payable as compensation for such loss shall be limited to an amount equivalent to [. . . times the freight payable on the goods delayed]. The total amount payable under this provision and article 18(1) shall not exceed the limit that would be established under article 18(1) in respect of the total loss of the goods concerned.

[6.5 Deviation⁸⁵]

[6.6 Deck cargo⁸⁶]

Article 17. Calculation of compensation⁸⁷

1. Subject to article 18⁸⁸, the compensation payable by the carrier for loss of or damage to the goods shall be calculated by reference to the value of such goods at the place and time of delivery according to the contract of carriage.

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.

3. In case of loss of or damage to the goods ~~and save as provided for in article 16~~ ^{6.4}⁸⁹, the carrier shall not be liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 except where the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of article 18⁹⁰.

Article 18. Limits of liability⁹¹

⁸⁵ Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

⁸⁶ Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

⁸⁷ See *supra* note 80.

⁸⁸ A linkage between the provisions relating to the calculation of compensation and the limits of liability was suggested in paragraph 60 of A/CN.9/525.

⁸⁹ The words that have been stricken out do not seem necessary, since paragraph 6.4 (now article 16) deals only with financial loss.

⁹⁰ Further to paragraphs 57 to 59 of A/CN.9/525, this phrase was intended to include a provision standardizing the calculation of the compensation, and that this calculation should take account of the intention of the parties as expressed in the contract of carriage. As noted in paragraph 58 of A/CN.9/525, it was suggested that whether or not consequential damages should be included in the compensation payable should depend on what was the intention of the parties.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

1. Subject to article 16(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, ~~for where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.~~⁹²

[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.]⁹³

⁹¹ It was noted in paragraph 85 of A/CN.9/525 that the Working Group decided to retain the entire text of paragraph 6.7 (now article 18) in the draft instrument for continuation of the discussion at a later stage.

During the 11th session of the Working Group, the scope of application of the instrument was discussed, and in conjunction with that discussion, the subject of limits of liability was also discussed. As noted in paragraphs 257 to 263 of A/CN.9/526, several suggestions were made with respect to limits of liability, but at this stage no instructions were given to the Secretariat. As noted in paragraph 257 of A/CN.9/526, there was, however, wide support for the suggestions that no attempt should be made to reach an agreement on any specific amount for the limits of liability under this provision at the current stage of the discussion, and that a rapid amendment procedure for the limit on liability should be established by the draft instrument.

⁹² As noted in paragraph 259 of A/CN.9/526, the Working Group recalled that the final phrase in subparagraph 6.7.1 (now paragraph 1) was bracketed pending a decision as to whether any mandatory provision should be one-sided or two-sided mandatory, and that the Working Group agreed provisionally that the square brackets should be removed.

The Working Group may also wish to consider the following alternative language for paragraph 1: "Subject to article 16(2) ~~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~~ ~~However,~~ where the nature and value of the goods has been declared by the shipper before shipment and included in the contract particulars, ~~for where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper,~~ the compensation payable is limited to such amount." The Working Group may wish to note that the final additional phrase of this alternative text should be reassessed in light of article 88, as it may be unnecessary if article 88 is adopted. The Working Group may wish to consider the method that should be used for determining an amount, possibly through the use of statistical data.

⁹³ Further, when discussing the issue relating to the treatment of non-localised damages, the proposal was made in paragraph 264 of A/CN.9/526, and adopted by the Working Group in paragraph 267, to insert this paragraph after subparagraph 6.7.1 (now paragraph 1) in square brackets. It now appears as paragraph 2.

The following presents several different alternatives for paragraph 2: "Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during [the carriage preceding or subsequent to the sea carriage][either of the periods referred to in article 8(1)(a) and (b)], the highest limit of liability [in the international [and national] mandatory provisions that govern the different parts of the transport][provided for in any

3. 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.

4. 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.

Article 19 Loss of the right to limit liability

Neither the carrier nor any of the persons mentioned in article 15(3) and (4) shall be entitled to limit their liability as provided in articles [16(2)] 24(4), and 18 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]⁹⁴ 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.

Article 20 Notice of loss, damage, or delay

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 notice⁹⁵ of loss of or damage to [or in connection with]⁹⁶ the goods, indicating the general nature of such loss or damage, shall have been given [by

international convention [or national law] that may apply in accordance with article 8)[that would have governed any contract which would have been concluded between the parties for each part of the carriage which involved one mode of transport][that would have been applicable had a specific contract been made for that mode of transport] shall apply.”

⁹⁴ During the initial discussion of this provision, as noted in paragraph 92 of A/CN.9/525, the Working Group took note of the comments and suggestions made and decided to maintain the text of paragraph 6.8 (now article 19) in the draft instrument for continuation of the discussion at a later stage. As noted in paragraphs 260 and 261 of A/CN.9/526, however, after a discussion concerning the reference to the “personal act or omission” of the person claiming the right to the liability limit, the Working Group agreed to place the word “personal” between square brackets for continuation of the discussion at a later stage.

⁹⁵ Paragraph 94 of A/CN.9/525 instructs the Secretariat to take account both the broad support for written notice and for the accommodation of electronic communications when preparing the revised draft of the text. Paragraph 2.3 (now article 5) of the draft instrument states that the notice in, *inter alia*, subparagraph 6.9.1 (now paragraph 1) may be made using electronic communication; otherwise, it must be made in writing.

⁹⁶ In accordance with the comments in paragraph 97 of A/CN.9/525, the words “or in

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

or on behalf of the consignee]⁹⁷ 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][a reasonable time][__ working days at the place of delivery][__ consecutive days]⁹⁸ after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection⁹⁹ of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.

2. No compensation shall be payable under article 16 unless notice of such loss¹⁰⁰ was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.

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 was given to the carrier, and notice given to the carrier shall have the same effect as a notice given to the performing party that delivered the goods.

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 and [for][must provide] access to records and documents relevant to the carriage of the goods¹⁰¹.

Article 21 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 and delay in delivery of such goods¹⁰², whether the action is founded in contract, in tort, or otherwise.

CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO CARRIAGE BY SEA [OR BY OTHER NAVIGABLE WATERS]¹⁰³

connection with” have been placed in square brackets and the words “by or on behalf of the consignee” have been added. It is possible that such comments have not met with sufficient support.

⁹⁷ *Ibid.*

⁹⁸ Paragraph 95 of A/CN.9/525 instructed the Secretariat to place “three working” in square brackets, together with other possible alternatives.

⁹⁹ It was suggested in paragraph 95 of A/CN.9/525 that “concurrent inspection” or “*inspection contradictoire*” might be more appropriated phrases in a civil law context.

¹⁰⁰ The Working Group may wish to consider whether language should be added to indicate that this loss should be limited to the loss for delay.

¹⁰¹ Paragraph 100 of A/CN.9/525 noted that the provision should also include reference to providing access to records and documents relevant to the carriage of goods. The words in square brackets indicate two alternatives: the first link the access to the obligation to give “reasonable facilities”, the second is independent and the notion of reasonability is not applied to it.

¹⁰² Paragraph 102 of A/CN.9/525 noted wide support for the inclusion of a reference to delay in delivery.

¹⁰³ As noted in note 50, *supra*, in light of the wide support expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port

Article 22. Liability of the carrier¹⁰⁴Variant A¹⁰⁵

1. [Notwithstanding the provisions of article 14(1) the carrier shall not be liable for loss, damage or delay arising or resulting from fire on the ship, unless caused by the fault or privity of the carrier.]¹⁰⁶

2. Article 14 shall also apply in the case of the following events:

(a) saving or attempting to save life or property at sea; and

[(b) perils, dangers and accidents of the sea or other navigable waters;]

Variant B

Article 14 shall also apply in the case of the following events¹⁰⁷

(a) saving or attempting to save life or property at sea;

[(b) perils, dangers and accidents of the sea or other navigable waters;]
[and]

[(c) fire on the ship, unless caused by fault or privity of the carrier;]¹⁰⁸

(see paragraph 239 of A/CN.9/526), it was thought that separating out provisions of the draft instrument that should apply only to the carriage by sea might assist the restructuring of the draft instrument. As a consequence, the following provisions in article 6 (now chapter 5) have been moved from their position in the original draft to be grouped together under this heading: subparagraph 6.1.2 (now article 22) and the relevant portions of subparagraph 6.1.3 (now also in article 22) on the basis of liability, paragraph 6.5 (now article 23) on deviation, and paragraph 6.6 (now article 24) on deck cargo.

¹⁰⁴ If Variant B or C for articles 14(1) and (2) is adopted, the Working Group may wish to re-examine this article with a view to adopting a consistent approach in terms of the shifting presumptions.

¹⁰⁵ Variant A of article 22 is based on the original text of the draft instrument.

¹⁰⁶ Subparagraph 6.1.2(a) has been deleted in view of the statements in paragraphs 36 and 37 of A/CN.9/525 that it was widely felt that the removal of that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. It was also emphasized that such a step might be essential in the context of establishing international rules for door-to-door transport. A related view was that, although it was probably inevitable to do away with the general exception based on error in navigation, subparagraph (a) should be maintained in square brackets pending a final decision to be made at a later stage on what was referred to as “the liability package” (i.e., the various aspects of the liability regime applicable to the various parties involved). After discussion, however, the Working Group decided that subparagraph (a) should be deleted. Subparagraph 6.1.2(b) (now article 22(1)) was kept in square brackets pursuant to the decision of the Working Group in paragraph 37 of A/CN.9/525.

In paragraph 43 of A/CN.9/525, it is noted that the suggestion was made that if the case of fire on the ship were to be maintained, it should be moved from subparagraph 6.1.2 to subparagraph 6.1.3 (now both contained in article 22). This has not been done in Variant A, but it has been done in Variant B.

¹⁰⁷ See *supra* note 106.

¹⁰⁸ In paragraph 43 of A/CN.9/525, it is noted that the suggestion was made that if the case of fire on the ship were to be maintained, it should be moved from subparagraph 6.1.2 to subparagraph 6.1.3 (now article 22).

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 23. Deviation

1. The carrier is not liable for loss, damage, or delay in delivery caused by a deviation¹⁰⁹ to save or attempt to save life [or property]¹¹⁰ at sea[, or by any other [reasonable] deviation]¹¹¹.
2. Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with this instrument.¹¹²

Article 24. Deck cargo¹¹³

1. Goods may be carried on or above deck only if
 - (a) such carriage is required by applicable laws or administrative rules or regulations, or
 - (b) they are carried in or on containers on decks that are specially fitted to carry such containers, or
 - (c) in cases not covered by paragraphs (a) or (b) 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.
2. If the goods have been shipped in accordance with paragraphs 1(a) and (c), 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 paragraph 1(b), 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 paragraph 1, the carrier shall be liable, irrespective of article 14, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

¹⁰⁹ The Working Group may wish to consider whether, as noted in paragraph 73 of A/CN.9/525, the phrase "authorized by the shipper or a deviation" should be inserted after the phrase "...in delivery caused by a deviation" should be added.

¹¹⁰ Further to paragraph 72 of A/CN.9/525, reference to salvage of property has been placed in square brackets because objections were raised to the inclusion of salvage of property..

¹¹¹ The reference to any other reasonable deviation has been placed in square brackets since concerns were raised with respect to its use in paragraph 73 of A/CN.9/525. It was also suggested in paragraph 72 of A/CN.9/525 that the draft article could include language to the effect that, when goods are salvaged as a result of the deviation, compensation received as a result of the salvage could be used as compensation for loss caused by the resulting delay.

¹¹² Alternative language for this paragraph could read as follows: "Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this instrument." If such language is adopted, the Working Group may wish to consider whether paragraph 1 is necessary.

¹¹³ Further to paragraph 80 of A/CN.9/525, the Working Group decided to retain the structure and content of paragraph 6.6 (now article 24) for continuation of the discussion at a later stage. The Working Group may wish to note that this article depends heavily on the definition of "container" in article 1(s).

3. If the goods have been shipped in accordance with paragraph 1(c), 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 paragraph 1(c) 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.

4. If the carrier under this article 24 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 16 and 18; 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.

CHAPTER 7. OBLIGATIONS OF THE SHIPPER

Article 25.

[Subject to the provisions of the contract of carriage,]¹¹⁴ the shipper shall deliver the goods ready for carriage ~~and~~¹¹⁵ 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.¹¹⁶

Article 26.

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 25.¹¹⁷

¹¹⁴ As noted in paragraph 148 of A/CN.9/510, the Working Group agreed to place the phrase "Subject to the provisions of the contract of carriage" in square brackets pending further consultations and discussions on the scope of the obligation of the carrier and the extent to which it was subject to freedom of contract.

¹¹⁵ Paragraphs 145 and 148 of A/CN.9/510 noted the Working Group's agreement to remove the word "and".

¹¹⁶ The suggestion in paragraph 148 of A/CN.9/510 to prepare alternative wording based on articles 12, 13 and 17 of the Hamburg Rules was noted by the Working Group.

¹¹⁷ As noted in paragraph 151 of A/CN.9/510, some doubts were expressed as to whether the draft provision, which focused on the duties of the carrier, was properly placed in the chapter covering the obligations of the shipper. However, it was considered that, in view of the close link between draft article 7.2 (now, article 26) and the other provisions of draft chapter 7 (now, articles 25-32), the placing of the draft provision was not necessarily inappropriate. Subject to the other observations expressed in paragraphs 149 to 151 of A/CN.9/510, the Working Group decided to retain the draft provision with a view to considering its details at a future session (paragraph 152 of A/CN.9/510).

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 27.

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 34(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.¹¹⁸

Article 28.

The information, instructions, and documents that the shipper and the carrier provide to each other under articles 26 and 27 must be given in a timely manner, and be accurate and complete.¹¹⁹

Article 29.

Variant A¹²⁰

The shipper and the carrier are liable¹²¹ 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 26, 27, and 28¹²²

¹¹⁸ As noted in paragraph 153 of A/CN.9/510, the Working Group approved the text of paragraph 7.3 (now article 27) as a sound basis for continuation of the discussion at a later stage.

¹¹⁹ As noted in paragraph 154 of A/CN.9/510, the Working Group agreed that the text should be retained for further consideration.

¹²⁰ Variant A of article 29 is based on the original text of the draft instrument.

¹²¹ As noted in paragraph 156 of A/CN.9/510, a concern was raised that the type of liability established by paragraph 7.5 (now paragraph 1) was inappropriate given that the obligations set out in paragraphs 7.2, 7.3 and 7.4 (now, articles 26, 27 and 28) were not absolute and involved subjective judgements. Imposing strict liability for failure to comply with what were described as flexible and imprecise obligations seemed excessive to some delegations. It was also stated that as currently drafted, the provision was ambiguous and that it was not clear what its effect would be either as to liability to a consignee or a controlling party or as to whether a carrier would be liable to a consignee for the shipper's failure to provide adequate particulars and vice versa.

¹²² Other concerns expressed in paragraph 157 A/CN.9/510 were that the provision did not accommodate the situation where both the shipper and the carrier were concurrently liable by allowing for shared liability, and that the provision was ambiguous in that it was not clear what was meant by "loss or damage", when, for example, compared to paragraph 7.6 (now, article 30) which referred to "loss damage or injury". Paragraph 158 of A/CN.9/510 noted that the Working Group concluded that paragraph 7.5 (now article 29) should be placed between square brackets, pending its re-examination in the light of the concerns and suggestions noted in paragraphs 156 and 157. The Secretariat was requested to prepare a revised draft, with possible alternative texts to take

Variant B

[1. The shipper is liable to the carrier, the consignee and the controlling party for any loss or damage [or injury] caused by its failure to comply with its obligations under articles 27 and 28.

2. The carrier is liable to the shipper, the consignee and the controlling party for any loss or damage [or injury] caused by its failure to comply with its obligations under articles 26 and 28.

3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier shall be jointly liable to the consignee or the controlling party for any such loss or damage [or injury].]

Article 30.Variant A¹²³

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 25, 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.

Variant B

A shipper is not [responsible][liable] for loss or damage sustained by the carrier or a ship from any cause without the act, fault or neglect of the shipper[, its agents or servants].¹²⁴

Variant C

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 25 unless the shipper proves it did not cause or contribute to the loss or damage.¹²⁵

Article 31.

If a person identified as “shipper” in the contract particulars, although not the

account of the suggestions made. At the close of the discussion, the Working Group generally agreed that in revising the draft provision, due consideration should be given to the fact that the information referred to in paragraph 7.5 (now article 29) might be communicated by way of electronic messages, i.e., fed into an electronic communication system and replicated with or without change in the transmission process. In view of the comments made, the alternative texts in Variant B have been prepared.

¹²³ Variant A of article 30 is based on the original text of the draft instrument.

¹²⁴ As noted in paragraphs 161 and 170 of A/CN.9/510, it was agreed that this alternative text appear along with the original text of paragraph 7.6 (now Variant A) so that both texts could be considered again at a future session of the Working Group. Paragraph 166 of A/CN.9/510 also noted that it might be necessary to delete the reference in this alternative text to “agents or servants” of the shipper, as the matter might be dealt with in paragraph 7.8 (now article 32).

¹²⁵ This alternative is intended to mirror the language used in Variant C for articles 14(1) and (2). The Working Group may wish to consider mirror language for this provision based on which alternative for articles 14(1) and (2) it adopts.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

shipper as defined in article 1(d), 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 57, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 13.

Article 32.

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.¹²⁶

CHAPTER 8. TRANSPORT DOCUMENTS AND ELECTRONIC RECORDS

Article 33. Issuance of the transport document or the electronic record

Upon delivery of the goods to the carrier or performing party

(a) 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;

(b) the shipper or, if the shipper so indicates to the carrier, the person referred to in article 31, 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 3 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.¹²⁷

¹²⁶ As noted in paragraphs 169 and 170 of A/CN.9/510, the Working Group agreed that paragraph 7.8 (now article 32) was a basis on which to continue discussions whilst keeping in mind the various concerns that had been expressed as to its current wording. At the close of the discussion, it was suggested that paragraph 7.8 (now article 32) should be narrowed so as to apply only to shipper obligations that were delegable rather than those obligations that were non-delegable. It was agreed that the text in paragraph 7.8 (now article 32) should be retained along with the proposal set out at paragraph 161 of A/CN.9/510 as an alternative for the current text of paragraph 7.6 (now article 30) so that both texts could be considered again at a future session of the Working Group.

¹²⁷ As noted in paragraph 25 of A/CN.9/526, the Working Group found the substance of paragraph 8.1 (now article 33) to be generally acceptable. In addition, with respect to subparagraph (i) (now paragraph (a)), a suggestion was made that the words "transport document" should be replaced by the word "receipt". While the term "transport document" was generally preferred for reasons of consistency in terminology, it was acknowledged that, since not all transport documents as defined under paragraph 1.20 (now article 1(k)) served the function of

Article 34. Contract Particulars

1. The contract particulars in the document or electronic record referred to in article 33 must include

a description of the goods;

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, as furnished by the shipper before the carrier or a performing party receives the goods¹²⁸ and

(ii) the weight as¹²⁹ 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.¹³⁰

evidencing receipt of the goods by the carrier, it was important to make it abundantly clear that, under subparagraph 8.1(i) (now paragraph (a)), the transport document should serve the receipt function. Further, as noted in paragraph 26 of A/CN.9/526, a question was raised as to whether paragraph 8.1 (now article 33) might interfere with various existing practices regarding the use of specific types of transport documents such as “received for shipment” and “shipped on board” bills of lading. It was stated in response that paragraph 8.1 (now article 33) had been drafted broadly to encompass any type of transport document that might be used in practice, including any specific types of bill of lading or even certain types of non-negotiable waybills.

¹²⁸ As noted in paragraph 27 of A/CN.9/526 the Working Group agreed that these words be added. As noted in paragraph 28 of A/CN.9/526, a concern was expressed that the addition of this phrase might be read as placing a heavy liability on the shipper, particularly if article 8 (now articles 33 to 40) was to be read in combination with paragraph 7.4 (now article 28). It was pointed out in response that subparagraph 8.2.1 (now paragraph 1) was not to be read as creating any liability for the shipper under draft article 7 (now chapter 7).

¹²⁹ The concern was expressed in paragraph 28 of A/CN.9/526 that the words “as furnished by the shipper before the carrier or a performing party receives the goods” might be read as placing a heavy burden on the shipper, and the response that this provision was not intended to create any liability for the shipper. The Working Group may wish to consider replacing the phrase “as furnished by the shipper” with the phrase “if furnished by the shipper”, and that care should be taken with respect to the use of those phrases in each of the relevant provisions.

¹³⁰ As noted in paragraph 75 of A/CN.9/526, it was suggested that the Working Group should consider redrafting subparagraph 8.2.1 (now paragraph 1) to include the name and address of the consignee in the contract particulars that must be put into the transport document. See also the suggested changes to subparagraph 10.3.1 (now article 48), *infra*. The Working Group may wish to determine whether the name and address of the consignee belong on a list of mandatory

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

2. The phrase “apparent order and condition of the goods” in paragraph 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.¹³¹

Article 35 Signature¹³²

(a) A transport document shall be signed by 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 authorization of the electronic record.¹³³

Article 36. Deficiencies in the contract particulars¹³⁴

1. The absence of one or more of the contract particulars referred to in article 34(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.¹³⁵

2. If the contract particulars include the date but fail to indicate the significance thereof, then the date is 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

elements. The Working Group may also wish to discuss the sanction for failure to provide mandatory information. Such sanctions may be different according to whether a transport document is negotiable or not.

¹³¹ Paragraph 31 of A/CN.9/526 noted that the Working Group found the substance of subparagraph 8.2.2 (now paragraph 2) to be generally acceptable.

¹³² The Working Group may wish to consider whether “signature” should be defined as, for example, in article 14(3) of the Hamburg Rules, particularly in light of modern practice.

¹³³ As noted in paragraph 32 of A/CN.9/526, the Working Group agreed that the substance of subparagraph 8.2.3 (now article 35) was generally acceptable, but that the provision might need to be further discussed at a later stage with a view to verifying its consistency with the UNCITRAL Model Law on Electronic Signatures 2001. In redrafting, it may be useful to bear in mind articles 14(2) and (3) of the Hamburg Rules.

¹³⁴ For improved consistency, this provision has been moved here from its original location.

¹³⁵ As noted in paragraph 34 of A/CN.9/526, the Working Group found the substance of subparagraph 8.2.4 (now paragraph 1) to be generally acceptable.

loaded on board a vessel, the date on which the carrier or a performing party received the goods.¹³⁶

3. 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.]]¹³⁷

4. 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 39, 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.¹³⁸

Article 37. Qualifying the description of the
goods in the contract particulars

The carrier, if acting in good faith when issuing a transport document or an electronic record, may qualify the information mentioned in article 34(1)(a),¹³⁹ 34(1)(b) or 34(1)(c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

- (a) For non-containerized goods
- (i) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or

¹³⁶ As noted in paragraph 55 of A/CN.9/526, the Working Group found the substance of subparagraph 8.4.1 (now paragraph 2) to be generally acceptable, taking into account the issue raised with respect to electronic records that the terms “transport document or electronic record” are repeated throughout the provisions of chapter 8 of the draft instrument, and that the repetition of this phrase emphasized the distinction between transport documents and electronic records, rather than focusing on the content of the document, as intended in the mandate of the Working Group.

¹³⁷ As noted in paragraph 60 of A/CN.9/526, the prevailing view in the Working Group was the subparagraph 8.4.2 (now paragraph 3) identified a serious problem that must be treated in the draft instrument, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep subparagraph 8.4.2 (now paragraph 3) in square brackets in the draft instrument, and to discuss it in greater detail at a future date.

¹³⁸ As noted in paragraph 61 of A/CN.9/526, the Working Group found the substance of subparagraph 8.4.3 (now paragraph 4) to be generally acceptable.

¹³⁹ The addition of a reference to subparagraph 8.2.1(a) (now article 34(1)(a)) was suggested in paragraph 36 of A/CN.9/526.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

(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 or a performing party in a closed container, unless¹⁴⁰ 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 before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate¹⁴¹, the carrier may include a 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.

(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
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, or
- (ii) the carrier can show that there was no commercially reasonable means of checking the weight of the container.¹⁴²

¹⁴⁰ The phrase “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 before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate” has been moved to this position in the chapeau from its original position at the end of the paragraph in order to clarify that it is intended to apply to the entire paragraph.

¹⁴¹ As noted in paragraph 36 of A/CN.9/526, another suggestion was that language along the lines of subparagraph 8.3.1(a)(ii) (now paragraph (a)(ii)) should be included also in subparagraph 8.3.1(b) (now paragraph b) to address the situation where the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. The Working Group may also wish to note the suggestions made in paragraph 37 of A/CN.9/526 that the carrier who decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification, that the draft instrument should deal with the situation where the carrier accepted not to qualify the description of the goods, for example not to interfere with a documentary credit, but obtained a guarantee from the shipper. Another suggestion was that, where the carrier acting in bad faith had voluntarily avoided to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

¹⁴² As noted in paragraph 36 of A/CN.9/526, it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container. The Working Group may wish to note that this subparagraph is intended to align with the provision on the reasonable means of checking, in article 38.

Article 38 Reasonable means of checking and good faith

For purposes of article 37:

(a) a “reasonable means of checking” must be not only physically practicable but also commercially reasonable;

(b) the 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.

(c) The burden of proving whether the 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.¹⁴³

Article 39. Prima facie and conclusive evidence

Except as otherwise provided in article 40, 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) Variant A of paragraph (b)(ii)¹⁴⁴

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].

Variant B of paragraph (b)(ii)

if no negotiable transport document or no negotiable electronic record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.¹⁴⁵

¹⁴³ As noted in paragraph 43 of A/CN.9/526, the Working Group found the substance of subparagraph 8.3.2 (now article 38) to be generally acceptable.

¹⁴⁴ Variant A of paragraph (b)(ii) is based on the original text of the draft instrument.

¹⁴⁵ As noted in paragraph 48 of A/CN.9/526, the prevailing view in the Working Group was to retain subparagraph 8.3.3(b)(ii) (now paragraph (b)(ii)) in square brackets and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made in paragraphs 45 to 47.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 40. Evidentiary effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 37, then the transport document will not constitute *prima facie* or conclusive evidence under article 39 to the extent that the description of the goods is qualified by the clause.¹⁴⁶

CHAPTER 9. FREIGHT¹⁴⁷

Article 41.

[1. Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 7(3), [and is payable when it is earned,]]¹⁴⁸

¹⁴⁶ As noted in paragraphs 50 to 52 of A/CN.9/526, while some support was expressed for redrafting subparagraph 8.3.4 (now article 40), the prevailing view was that it should be retained in substance for continuation of the discussion at a future session.

The Working Group may also wish to consider the alternative language for subparagraph 8.3.4 (now article 40) suggested in paragraphs 153 and 154 of A/CN.9/WG.III/WP.21:

40(1) "If the contract particulars include a qualifying clause, then the transport document will not constitute *prima facie* or conclusive evidence under article 39 ~~8.3.3~~, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under paragraph ~~2 8.3.5~~."

It would then be necessary to add a new article 8.3.5 (perhaps as paragraph 2), which might provide:

2. "A qualifying clause in the contract particulars is effective for the purposes of paragraph ~~1 8.3.4~~ under the following circumstances:

(a) For non-containerized goods, a qualifying clause that complies with the requirements of article ~~37 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 ~~37 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."

¹⁴⁷ It was said by way of general comment in paragraph 172 of A/CN.9/510, that neither the Hague nor the Hamburg regimes contained provisions on freight and that it was questionable whether the draft instrument would benefit from dealing with this issue. Further reservations were noted in that paragraph as to the inclusion of freight provisions were based on the fact that practices varied widely between different trades. Paragraph 183 of A/CN.9/510 noted that the draft provision should be restructured, with paragraphs 9.1(a) (now article 41(1)) and 9.2(b) (now article 42(2)) being combined in a single provision, paragraph 9.1(b) (now article 41(2)) standing alone and paragraphs 9.2(b) and (c) (now articles 42(2) and (3)) also being combined. It was also provisionally agreed that appropriate clarification should be introduced to limit the application of paragraphs 9.2(b) and (c) (now articles 42(2) and (3)) to cases where specific agreement had been concluded between the parties.

¹⁴⁸ As noted in paragraph 174 of A/CN.9/510, there was general agreement that the principle of freedom of contract should apply to determining when the payment of freight was earned as well as when the payment of freight became due. See also *ibid*, paragraph 183 of A/CN.9/510.

unless the parties have agreed that the freight is earned, wholly or partly, at an earlier point in time.

2. Unless otherwise agreed, no freight becomes due for any goods that are lost before the freight for those goods is earned.

Article 42.

Variant A¹⁴⁹

1. 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.

2. 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.

3. 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].

Variant B¹⁵⁰:

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, unless otherwise agreed, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery, nor is payment of freight 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 of which has not yet been agreed or established]¹⁵¹.

Article 43.

1. Unless otherwise agreed, the shipper is liable to pay the freight and other charges incidental to the carriage of the goods.

2. 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:

(a) with respect to any liability under chapter 7 of the shipper or a person mentioned in article 31; or

(b) with respect to any amounts payable to the carrier under the contract

¹⁴⁹ Variant A of article 42 is based on the original text of the draft instrument.

¹⁵⁰ See *supra* note 147, paragraph 183 of A/CN.9/510.

¹⁵¹ As noted in paragraph 182 of A/CN.9/510, wide support was expressed for including in the draft provision the words currently between square brackets, "the indebtedness or the amount of which has not yet been agreed or established".

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

of carriage, except to the extent that the carrier has adequate security pursuant to article 45 or otherwise for the payment of such amounts.

(c) to the extent that it conflicts with article 62.¹⁵²

Article 44.

1. If the contract particulars in a negotiable¹⁵³ transport document or a[n] negotiable¹⁵⁴ 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.

[If the contract particulars in a non-negotiable transport document or in a non-negotiable electronic record contain a statement “freight prepaid” or a statement of a similar nature, then it shall be presumed that the shipper is liable for the payment of the freight.]¹⁵⁵

2.

Variant A of paragraph 2¹⁵⁶

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][the right of the consignee to obtain delivery of the goods is conditional on the payment of freight].¹⁵⁷

Variant B of paragraph 2

If the contract particulars in a transport document or an electronic record contain the statement “freight collect”, or a statement of a similar nature, that constitutes a provision that, in addition to the shipper, any holder or consignee who takes delivery of the goods or exercises any right in relation to the goods will thereupon become liable for the freight.¹⁵⁸

¹⁵² As noted in paragraph 189 of A/CN.9/510, the Working Group took note of the criticism of provision 9.3(b) (now paragraph 2) (noted in paragraphs 185 to 188 of A/CN.9/510) and decided to postpone its decision on the matter until the issue, including the practical context in which the provision was to operate, was further studied.

¹⁵³ Paragraph 110 of A/CN.9/525 noted the suggestion that the declaration in subparagraph 9.4(a) (now paragraph 1) was too radical in freeing the holder and consignee of any responsibility for the payment of freight, and instead that it would be better to create a presumption of the absence of a debt for freight. However, the alternative view was expressed that subparagraph 9.4(a) (now paragraph 1) should not create a presumption that the freight had been prepaid. A possible answer to this suggestion reported in paragraph 110 would be to draw a distinction between negotiable and non-negotiable transport documents or electronic records.

¹⁵⁴ *Ibid.*

¹⁵⁵ See *supra* note 153.

¹⁵⁶ Variant A of paragraph 2 is based on the original text of the draft instrument.

¹⁵⁷ See *supra* note 153.

¹⁵⁸ As noted in paragraph 111 of A/CN.9/525, it was said that draft articles 12.2.2 and 12.2.4 (now articles 60(2) and 62) were intimately linked with subparagraph 9.4(b) (now paragraph 2), and that consideration of these provisions should be undertaken at the same time. It was suggested that if the consignee took any responsibility for the delivery of the goods, it should also be

Article 45.

1. [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

(a) freight, deadfreight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods,

(b) any damages due to the carrier under the contract of carriage,

(c) 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.

2. If the payment as referred to in paragraph 1 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.¹⁵⁹

CHAPTER 10. DELIVERY TO THE CONSIGNEE

Article 46.

When the goods have arrived at their destination, the consignee [that exercises any of its rights under the contract of carriage]¹⁶⁰ shall accept delivery of the goods at the time and location mentioned in article 7(3). [If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the 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

responsible for the freight. At the same time, it was noted that subparagraph 9.4(b) (now paragraph 2) could serve to provide information or a warning that freight was still payable. However, it was suggested that the payment of freight should be a condition for the consignee to obtain delivery of the goods, rather than an obligation. It was further noted that subparagraph 9.4(b) (now paragraph 2) should focus on the payment of freight in fact, rather than on who should bear the obligation for the unpaid freight. As noted in paragraph 112 of A/CN.9/525, one proposal to remedy the perceived problem was to replace the words “such a statement puts the consignee on notice that it may be liable for the payment of the freight” with the words, “the payment of freight is a condition for the exercise by the consignee of the right to obtain delivery of the goods.” Paragraph 113 of A/CN.9/525 noted the alternative suggestion used in order to overcome the problems outlined in paragraphs 111 and 112.

¹⁵⁹ Although the text of paragraph 9.5 (now article 45) was heavily criticised in paragraphs 115 to 122 of A/CN.9/525, it does not appear that the Secretariat has been requested to prepare a new draft or an alternative draft. Paragraph 123 of A/CN.9/525 noted that the Working Group decided that paragraph 9.5 (now article 45) should be retained in the draft instrument for continuation of the discussion at a later stage.

¹⁶⁰ As noted in paragraph 67 of A/CN.9/526, a preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

omission of the carrier [or of the performing party]¹⁶¹ done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.¹⁶²

Article 47.

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.¹⁶³

Article 48.

If no negotiable transport document or no negotiable electronic record has been issued:

(a) If the name and address of the consignee is not mentioned in the contract particulars the controlling party shall advise the carrier thereof, prior to or upon the arrival of the goods at the place of destination;¹⁶⁴

(b) Variant A of paragraph (b)¹⁶⁵

The carrier shall deliver the goods at the time and location mentioned in article 7(3) to the consignee upon the consignee's production of proper identification;¹⁶⁶

Variant B of paragraph (b)

As a requisite for delivery, the consignee shall produce proper identification.

Variant C of paragraph (b)

The carrier may refuse delivery if the consignee does not produce proper identification.

¹⁶¹ As noted in paragraph 70 of A/CN.9/526, it was suggested that the concern that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of paragraph 10.1 (now article 46) could be clarified with the addition of the phrase "or of the performing party" after the phrase "personal act or omission of the carrier".

¹⁶² As noted in paragraph 67 of A/CN.9/526, suggestions were made that paragraph 10.1 (now article 46) and 10.4 (now articles 50, 51 and 52) could be merged, or that to reduce the confusion caused by the interplay of paragraphs 10.1 (now article 46) and 10.4 (now articles 50, 51, and 52), the second sentence of paragraph 10.1 (now article 46) could be deleted, and paragraph 10.4 (now articles 50, 51, and 52) could be left to stand on its own. The second of these alternatives has been chosen, and the last sentence has been placed in square brackets.

¹⁶³ As noted in paragraph 73 of A/CN.9/526, the Working Group found the substance of paragraph 10.2 (now article 47) to be generally acceptable.

¹⁶⁴ As noted in paragraph 77 of A/CN.9/526, the Working Group found the principles embodied in subparagraph 10.3.1 (now article 48) to be generally acceptable. The Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

The suggestion made in paragraph 75 of A/CN.9/526, regarding the identity of the consignee has been incorporated in the text. See also the note to subparagraph 8.2.1 (now article 34(1)), *supra*, note 130.

¹⁶⁵ Variant A of paragraph (b) is based on the original text of the draft instrument.

¹⁶⁶ The suggestion made in paragraph 76 of A/CN.9/526 that subparagraph 10.3.1(ii) (now paragraph b) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier has been incorporated in the text of both Variant B and C.

(c) If the consignee 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 the controlling party, the shipper, accordingly. In such event such controlling party or shipper shall give 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 31 shall be deemed to be the shipper for purposes of this paragraph.¹⁶⁷

Article 49.

If a negotiable transport document or a negotiable electronic record has been issued, the following provisions shall apply:

(a) (i) Without prejudice to article 46 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 7(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 cease to have any effect or validity.

(ii) Without prejudice to article 46 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 7(3) to such holder if it demonstrates in accordance with the rules of procedure mentioned in article 6 that it is the holder of the electronic record. Upon such delivery, the electronic record ceases to have any effect or validity.¹⁶⁸

(b) 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 accordingly the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the 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 31 shall be deemed to be the shipper for purposes of this paragraph.¹⁶⁹

¹⁶⁷ As noted in paragraph 82 of A/CN.9/526, a suggestion was made during the consideration of subparagraph 10.3.2(b) (now article 49(b)) that the principles expressed therein should also apply in cases where no negotiable instrument had been issued. A provision to this effect has been added as subparagraph 10.3.1(iii) (now paragraph (c)).

¹⁶⁸ Subject to the note of caution raised in paragraph 80 of A/CN.9/526, that the Working Group would have to carefully examine the balance of different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution, as noted in paragraph 81 of A/CN.9/526, the Working Group found the substance of subparagraphs 10.3.2(a)(i) and (ii) (now paragraphs (a)(i) and (ii)) to be generally acceptable.

¹⁶⁹ The first suggestion made in paragraph 82 of A/CN.9/526, that the carrier should have

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

(c) [Notwithstanding the provision of paragraph (d) of this article,]¹⁷⁰ the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) 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 6, that it is the holder.

(d) [Except as provided in paragraph (c) above]¹⁷¹ 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 (a) (ii) 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 [against the carrier]¹⁷² 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. [This paragraph does not

the obligation of accepting the negotiable transport document and of notifying the controlling party if the holder of the document did not claim delivery. These concerns appear to be already addressed by the text of subparagraph 10.3.2(b) (now paragraph b). The second suggestion in paragraph 82 of A/CN.9/526 that this subparagraph should set out the consequences for the carrier when it failed to notify the controlling party or the shipper or the deemed shipper has met with objections and, therefore, has not been included in the revised text.

¹⁷⁰ As noted in paragraph 83 of A/CN.9/526, it was suggested that it was unclear how subparagraphs 10.3.2(c) and (d) (now paragraphs (c) and (d)) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. It was requested that the drafting in this regard be clarified. It should be noted that a link between subparagraphs 10.3.2(c) and (d) (now paragraphs (c) and (d)) already exists, since subparagraph 10.3.2(c) (now paragraph (c)) starts with the words, "Notwithstanding the provision of paragraph (d) of this article". This is a technique used in other provisions of the draft instrument, such as paragraphs 5.3 (now article 12) and 6.1.3 (now article 14(2)). Other alternatives are possible, for example, to start subparagraph (d) with the words "Except as provided" or to add at the end of that paragraph a new sentence reading "The provisions of this paragraph (d) do not apply where the goods are delivered by the carrier pursuant to paragraph (c) of this article." The various alternatives are provisionally inserted in square brackets.

¹⁷¹ As noted in paragraph 83 of A/CN.9/526. See *supra* note 170.

¹⁷² Various comments and explanations with respect to subparagraph 10.3.2(d) (now paragraph d) are noted in paragraphs 83 to 88 of A/CN.9/526. The first concern expressed in paragraph 88 of A/CN.9/526 is that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. It is thought that a solution might be to indicate in subparagraph (d) that the rights are acquired against the carrier, and this language has been inserted into the provision. It could also be added that such rights arise from the failure of the carrier to fulfil its obligation under paragraph 5.1 (now article 10), but this may not be advisable. In addition, attention is drawn to the new much wider provision suggested for paragraph 13.1 (now article 59), *infra*. The second concern expressed in paragraph 88 of A/CN.9/526 that there was a lack of certainty regarding the phrase "could not reasonably have had knowledge of such delivery" has not specifically been addressed.

apply where the goods are delivered by the carrier pursuant to paragraph (c) above.]¹⁷³

(e) If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods [or in cases where the controlling party or the shipper cannot be found]¹⁷⁴, the carrier is entitled, without prejudice to any other remedies that the carrier may have against such controlling party or shipper, to exercise its rights under articles 50, 51 and 52.

Article 50.

1. If the goods have arrived at the place of destination and

(a) the goods are not actually taken over by the consignee at the time and location mentioned in article 7(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]¹⁷⁵; or

(b) 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 2.

2. Under the circumstances specified in paragraph 1, the carrier is entitled, at the risk and account and at the expense¹⁷⁶ of the person entitled to the goods, to exercise some or all of the following rights and remedies:

(a) to store the goods at any suitable place;

(b) 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

(c) 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.

3. If the goods are sold under paragraph 2(c), the carrier may deduct from the proceeds of the sale the amount necessary to

¹⁷³ As noted in paragraph 83 of A/CN.9/526. See *supra* note 170.

¹⁷⁴ This addition has been made on the basis of the suggestion in paragraph 89 of A/CN.9/526 that subparagraph 10.3.2(e) (now paragraph (e)) should be aligned with subparagraph 10.3.2(b) (now paragraph (b)) through the insertion of this phrase.

¹⁷⁵ As noted in paragraph 92 of A/CN.9/526, concern was expressed with respect to the phrase “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” as confusing, since it could be seen to concern a contract for warehousing if it is one that “succeeds to the contract of carriage”, and the notion of “express or implied” was also said to be difficult to understand. The phrase has thus been placed in square brackets for possible future deletion.

¹⁷⁶ As noted in paragraph 97 of A/CN.9/526, concern was expressed that when the carrier exercised its rights under subparagraph 10.4.1 (now article 50) it could result in costs in addition to those arising from loss or damage, and that the value of the goods might not in some cases cover the costs incurred. The addition of the phrase “and at the expense” adding in subparagraph 10.4.1(b) (now paragraph 2) is intended to meet these concerns.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

- (a) pay or reimburse any costs incurred in respect of the goods; and
 - (b) pay or reimburse the carrier any other amounts that are referred to in article 45(1) 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.

Article 51.

The carrier is only allowed to exercise the right referred to in article 46 after it has given a reasonable advance¹⁷⁷ 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.

Article 52.

When exercising its rights referred to in article 50(2), the carrier or performing party shall be liable¹⁷⁸ for loss of or damage to these goods, only if the loss or damage results from [an act or omission of the carrier or of the performing party done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result]¹⁷⁹.

CHAPTER 11. RIGHT OF CONTROL

Article 53.

[The right of control [means][includes][comprises] the right to agree with the carrier to a variation of the contract of carriage and the right¹⁸⁰ under the

¹⁷⁷ As noted in paragraph 93 of A/CN.9/526, the question was raised why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights. The addition of the phrase “a reasonable advance” before the word “notice” in subparagraph 10.4.2 (now article 51) is intended to meet these concerns.

¹⁷⁸ The concern expressed in paragraph 94 of A/CN.9/526 that the wording of subparagraph 10.4.3 (now article 52) could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. The deletion of the words “acts as an agent of the person entitled to the goods but without any liability” and the addition of the words “shall only be liable”, is intended to meet this concern.

¹⁷⁹ As noted in paragraph 94 of A/CN.9/526, it was suggested that the phrase “or of the performing party” be added after the phrase “personal act or omission of the carrier”, and that the word “personal” be deleted. Both of these suggestions have been adopted in the text. The suggestion in paragraph 96 of A/CN.9/526 that subparagraphs 10.4.3 (now article 52) and 10.4.1 (now article 50) had similarities in their content that should be reflected in their language was not thought to have received enough support for reflection in the text.

¹⁸⁰ The concerns raised in paragraph 103 of A/CN.9/526 that subparagraph (iv) (now paragraph (d)) should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was suggested that this provision served a useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the

contract of carriage to give the carrier instructions in respect of the goods during the period of its responsibility as stated in article 7(1)]¹⁸¹ Such right to give the carrier instructions comprises rights to:

- (a) give or modify instructions in respect of the goods [that do not constitute a variation of the contract of carriage]¹⁸²;
- (b) demand delivery of the goods before their arrival at the place of destination;
- (c) replace the consignee by any other person including the controlling party;
- [(d) agree with the carrier to a variation of the contract of carriage.] ¹⁸³

Article 54.

1. When no negotiable transport document or no negotiable electronic record is issued, the following rules apply:

(a) 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] [designates the consignee or another person as the controlling party]¹⁸⁴.

(b) 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]¹⁸⁵ shall notify the carrier of such transfer.

(c) When the controlling party exercises the right of control in accordance with article 53, it shall produce proper identification.

counterpart of the carrier during the voyage. These concerns could be met by placing subparagraph (iv) (now paragraph (d)) in square brackets, and by inserting a phrase such as that in subparagraph (iv) (now paragraph (d)) in the chapeau of paragraph 11.1 (now article 53). It should also be noted that the first sentence of the chapeau will have to be adjusted if a definition based upon it is included in article 1(g).

¹⁸¹ The Working Group may wish to consider whether this sentence should be somewhat altered and moved to the article 1(g) definition of “right of control”. Should the Working Group decide to move the sentence, the suggested modifications to the chapeau and to subparagraph (d), *supra* note 180, should be readdressed.

¹⁸² The concern was raised in paragraph 102 of A/CN.9/526 that the phrase “give or modify instructions...that do not constitute a variation of the contract” might be read as contradicting themselves. It was stated in response that a clear distinction should be made in substance between what was referred to as a minor or “normal” modification of instructions given in respect of the goods and a more substantive variation of the contract of carriage. These concerns could be reflected by deleting the words placed in square brackets, since they would seem to be unnecessary in light of the limits within which the right can be exercised are set out in subparagraph 11.3(a) (now article 55(1)).

¹⁸³ See *supra*, note 180.

¹⁸⁴ The question was raised in paragraph 105 of A/CN.9/526 why the consent of the consignee was required to designate a controlling party other than the shipper, when the consignee was not a party to the contract of carriage. Further, it was observed that if the contract provided for the shipper to be the controlling party, subparagraph (ii) (now paragraph 1(b)) conferred to him the power to unilaterally transfer his right of control to another person. These concerns were addressed by placing the words that follow the words “unless the shipper” in square brackets for possible deletion and inserting instead, in square brackets, the text “designates the consignee or another person as the controlling party”.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

[(d) The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.]¹⁸⁶

2. When a negotiable transport document is issued, the following rules apply:

(a) The holder¹⁸⁷ or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party.

(b) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 59, 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.

(c) 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 the document was issued, all originals [except those that the carrier already holds on behalf of the person seeking to exercise a right of control] shall be produced, failing which the right of control cannot be exercised¹⁸⁸.

(d) Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated on the negotiable transport document.

3. When a negotiable electronic record is issued:

(a) 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 6, upon which transfer the transferor loses its right of control.

(b) 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

¹⁸⁵ The concern mentioned in paragraph 107 of A/CN.9/526 that in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier could be met by deleting the words “or the transferee” in subparagraph 11.2(a)(ii) (now paragraph 1(b)). This phrase placed in square brackets.

¹⁸⁶ As mentioned in paragraph 106 of A/CN.9/526 and in paragraph 188 of A/CN.9/WG.III/WP.21, the controlling party remained in control of the goods until their final delivery. However, nothing is said in paragraph 11.2 (now article 54) regarding the time until which the right of control can be exercised in case non-negotiable transport document or electronic record is issued. It is thought that something could be said to take care of the observation that has been made, and subparagraph 11.2(a)(iv) (now paragraph 1(d)) has been added. Note, however, that paragraph 106 of A/CN.9/526 also notes the concern that the common shipper’s instruction to the carrier not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected could be frustrated. Further, since article 53 states that the right of control is the right to give the carrier instructions during the period of responsibility as set out under article 7, it may be unnecessary to state when the right of control ends.

¹⁸⁷ As noted in paragraph 109 of A/CN.9/526, the concern raised in respect of the reference to the “holder” does not seem to be justified in consideration of the definition of “holder” in paragraph 1.12 (now article 1(f)).

in article 6, that it is the holder.

(c) Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated in the electronic record.¹⁸⁹

4. Notwithstanding article 62, a person, not being the shipper or the person referred to in article 31, 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.¹⁹⁰

Article 55.

1. Variant A of paragraph 1¹⁹¹

Subject to paragraphs 2 and 3 of this article, if any instruction mentioned in article 53(a), (b) or (c)

(a) can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;

(b) will not interfere with the normal operations of the carrier or a performing party; and

(c) 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 sub-paragraphs (a), (b), (c) of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction.¹⁹²

¹⁸⁸ As noted in paragraph 110 of A/CN.9/526, the Working Group was in agreement that subparagraph 11.2(b)(iii) (now paragraph 2(c)) did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier, and that in such cases, the carrier should be free to refuse to follow the instructions given by the controlling party. The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised, and that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. In order to meet these concerns, it is suggested that the phrases noted should be added to subparagraph 11.2(b)(iii) (now paragraph 2(c)).

¹⁸⁹ As noted in paragraph 112 of A/CN.9/526, the Working Group deferred consideration of subparagraph 11.2(c) (now paragraph 3) until it had come to a more precise understanding of the manner in which the issues of electronic commerce would be addressed.

¹⁹⁰ As noted in paragraph 113 of A/CN.9/526, the Working Group found the substance of subparagraph 11.2(d) (now paragraph 4) to be generally acceptable.

¹⁹¹ Variant A of paragraph 1 is based on the original text of the draft instrument.

¹⁹² As noted in paragraph 117 of A/CN.9/526, the Working Group generally agreed that subparagraph 11.3(a) (now paragraph 1) should be recast to reflect the views and suggestions in paragraphs 114 to 116. It was agreed that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Variant B of paragraph 1

Subject to paragraphs 2 and 3 of this article, the carrier shall be bound to execute the instructions mentioned in article 53(a), (b), and (c) if:

- (a) the person giving such instructions is entitled to exercise the right of control;
- (b) the instructions can reasonably be executed according to their terms at the moment that they reach the carrier;
- (c) the instructions will not interfere with the normal operations of the carrier or a performing carrier.¹⁹³

2. In any event, the controlling party shall reimburse¹⁹⁴ the carrier, performing parties, and any persons interested in other goods carried on the same voyage for any additional expense that they may incur and indemnify them against any loss, or damage that may suffer as a result of executing any instruction under this article.¹⁹⁵

3. [If the carrier

(a) reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and

(b) is nevertheless willing to execute the instruction,
then the carrier is entitled to obtain security from the controlling party] If requested by the carrier, the controlling party shall provide security¹⁹⁶ for the amount of the reasonably expected additional expense, loss, or damage.

4. The carrier shall be liable for loss of or damage to the goods resulting from its failure to comply with the instructions of the controlling party in

¹⁹³ As noted in paragraph 114 of A/CN.9/526, to avoid a contradiction between subparagraphs 11.3(a)(iii) (now paragraph 1(c)) and subparagraph 11.1(ii) (now article 53(b)) with respect to the right of control and the possible generation of “additional expenses”, it was suggested that either the carrier should be under no obligation to execute the instruction received under subparagraph 11.1(ii) (now article 53(b)) or that subparagraph 11.3(a)(iii) (now paragraph 1(c)) should limit the obligation of the carrier to execute to cases where the instruction would not cause “significant” additional expenses. Further, as noted in paragraph 115 of A/CN.9/526, broad support was expressed in the Working Group for the deletion of subparagraph 11.3(a)(iii) (now paragraph 1(c)). In view of these suggestions, subparagraph 11.3(a) (now paragraph 1) could be reworded as indicated, and the right of the carrier under subparagraph 11.3(c) (now paragraph 3) could be made more stringent, as indicated *infra* note 196. In addition, subparagraph 11.3(a)(iii) (now paragraph 1(c)) has been deleted.

¹⁹⁴ As noted in paragraph 56 of A/CN.9/510 and in paragraph 118 of A/CN.9/526, the notion of “indemnity” inappropriately suggested that the controlling party might be exposed to liability, and that notion should be replaced by that of “remuneration”, which was more in line with the rightful exercise of its right of control by the controlling party.

¹⁹⁵ The changes to subparagraph 11.3(b) (now paragraph 2) have been made in view of the suggestion in paragraph 117 of A/CN.9/526 that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions.

¹⁹⁶ Although subparagraph 11.3(c) (now paragraph 3) was found “generally acceptable”, as noted in paragraph 119 of A/CN.9/526, the changes indicated have been made in connection with the comments on subparagraph 11.3(a) (now article 51(1)). See note 193 *supra*.

breach of its obligation under paragraph 1 of this article.¹⁹⁷

Article 56.

Goods that are delivered pursuant to an instruction in accordance with article 53(b) are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in chapter 10, are applicable to such goods.¹⁹⁸

Article 57.

If during the period that the carrier or a performing party holds the goods in its custody, the carrier or a performing party reasonably requires information, instructions, or documents in addition to those referred to in article 27(a), the controlling party, on request of the carrier or such performing party, shall provide such information.¹⁹⁹ 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 31.

Article 58.

Articles 53(b) and (c) and 55 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 54(1)(b). If a negotiable transport document or a negotiable electronic record is issued, any agreement referred to in this

¹⁹⁷ As noted in paragraph 116 of A/CN.9/526 a question was raised regarding the nature of the obligation incurred by the carrier under paragraph 11.3 (now article 55), and whether the carrier should be under an obligation to perform or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party. The view was expressed that the former, more stringent obligation, should be preferred. However, the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft instrument should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract. In furtherance of these views, a new subparagraph 11.3(d) (now paragraph 4) has been added. As regards the consequences of the non-execution of the instructions, obviously where such execution should have taken place, it is assumed that the implied intention was to provide that the carrier would be liable in damages. If the Working Group decides to include a provision to that effect, it may also wish to consider whether there should be a limitation on such liability.

¹⁹⁸ As noted in paragraph 120 of A/CN.9/526, the Working Group found the substance of paragraph 11.4 (now article 56) to be generally acceptable.

¹⁹⁹ As noted in paragraph 121 of A/CN.9/526, the suggestion that paragraph 11.5 (now article 57) should allow the carrier the choice to seek instructions from “the shipper or the controlling party” was not supported. As noted in paragraph 122 of A/CN.9/526, the suggestion to add reference to the performing party in addition to the carrier, to the performing party was generally supported. In view also of the recommendation mentioned in paragraph 123 of A/CN.9/526, changes have been made in an attempt to clarify the formulation of the subparagraph 11.5 (now article 57).

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

paragraph must be stated or incorporated²⁰⁰ in the contract particulars.

CHAPTER 12. TRANSFER OF RIGHTS

Article 59.

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,

(a) if an order document, duly endorsed either to such other person or in blank, or,

(b) if a bearer document or a blank endorsed document, without endorsement, or,

(c) 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.²⁰¹

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 6.²⁰²

Article 60.

1. Without prejudice to article 57, 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.²⁰³

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

²⁰⁰ As noted in paragraph 126 of A/CN.9/526, there was broad support in the Working Group that the revised draft of paragraph 11.6 (now article 58) should avoid suggesting any restriction to the freedom of parties to derogate from article 11 (now chapter 11). Further, it appears to be implied that the last sentence of subparagraph 11.6 (now article 58) should apply only if a negotiable document or electronic record is issued. This has consequently been mentioned in the revised text, together with the suggested reference to agreements incorporated by reference.

²⁰¹ As noted in paragraph 133 of A/CN.9/526, there was strong support in the Working Group to maintain the text of subparagraph 12.1.1 (now article 59(1)) as drafted in order to promote harmonization and to accommodate negotiable electronic records. The concern raised in paragraph 132 of A/CN.9/526 regarding nominative negotiable documents under certain national laws was noted.

²⁰² As noted in paragraph 134 of A/CN.9/526, the Working Group took note that subparagraph 12.1.2 (now paragraph 2) would be discussed at a later date in conjunction with the other provisions in the draft instrument regarding electronic records.

²⁰³ As noted in paragraph 136 of A/CN.9/526, there was some support in the Working Group for the view that the concept in subparagraph 12.2.1 (now paragraph 1) was superfluous. However, it does not appear that there was enough support in the Working Group for this conclusion.

of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record] [the liabilities imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic record]²⁰⁴.

3. Any holder that is not the shipper and that

(a) under article 4 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

(b) under article 59 transfers its rights,
does not exercise any right under the contract of carriage for the purpose of paragraphs 1 and 2.²⁰⁵

Article 61.

The transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record is issued shall be effected in accordance with the provisions of the applicable law. 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].²⁰⁶

Article 62.

If the transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record has been

²⁰⁴ As noted in paragraph 140 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of subparagraph 12.2.2 (now paragraph 2) with due consideration being given to the views expressed. However, the views expressed in the preceding paragraphs 137 to 139 are not consistent. Those that favoured a revision of the text requested that the subparagraph stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract. Despite there being opposition to such an itemization, an attempt has been made to revise the text. It should be noted that there is a relevant type of liability that ought perhaps to be considered: the liability in respect of loss, damage or injury caused by the goods (but excluding in any event that for breach of the shipper's obligations under paragraph 7.1 (now article 25)).

²⁰⁵ As noted in paragraph 141 of A/CN.9/526, the Working Group found the substance of subparagraph 12.2.3 (now paragraph 3) to be generally acceptable.

²⁰⁶ As noted in paragraph 142 of A/CN.9/526, concern was raised with respect to a conflict that could arise between paragraph 12.3 (now article 61) and national law in countries where notice of transfer of rights must be given by the transferor, and may not be given by the transferor or the transferee. Alternative suggestions were made in paragraph 142 of A/CN.9/526, but the first suggestion, consisting in the addition at the end of the final sentence of a reference to the national law applicable to the contract of carriage, might conflict with the subsequent suggestion in paragraph 143 of A/CN.9/526 to refer generally in the first sentence to the "applicable law" rather than to "the provisions of the national law applicable" in order to avoid potentially complex conflict of law issues. Thus, the alternative suggestion, to delete the final words "by the transferor or the transferee" was preferable, and these words have been placed in square brackets. Further, the suggestion to insert a reference to the applicable law in the first sentence has been adopted, and the entire article has been placed in square brackets, as suggested.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

issued includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor shall not be discharged from liability unless with the consent of the carrier.]²⁰⁷

CHAPTER 13. RIGHTS OF SUIT

Article 63.

Variant A²⁰⁸

Without prejudice to articles 64 and 65, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

- (a) the shipper,
- (b) the consignee,
- (c) any third party to which the shipper or the consignee has transferred²⁰⁹ its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage,
- (d) any third party that has acquired rights under the contract of carriage by 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.²¹⁰

²⁰⁷ As noted in paragraph 148 of A/CN.9/526, in light of the discussion with respect to draft article 12 (now chapter 12) and to paragraph 12.4 (now article 62) in particular, the Working Group requested the Secretariat to prepare and place in square brackets a revised draft of paragraph 12.4 (now article 62), with due consideration being given to the views expressed. The relevant suggestion made in the paragraphs 147 of A/CN.9/526 is that the liability of the transferor and the transferee should not necessarily be joint and several. It has been suggested, as an alternative, that the transferor shall not be discharged from liability without the consent of the carrier.

In addition, the Working Group may wish to consider the following alternative text to replace articles 61 and 62:

“Article 61 *bis*.

1. If no negotiable transport document and no negotiable electronic record is issued, the transfer of rights under a contract of carriage is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer. [However, the transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage.]

2. Regardless of the law applicable pursuant to paragraph 1, the transfer may be made by electronic means, and it must, in order to be valid, be notified to the carrier [either by the transferor or by the transferee].

3. If the transfer includes 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.”

²⁰⁸ Variant A of article 63 is based on the original text of the draft instrument.

²⁰⁹ This change is suggested to make the language in this article consistent with those under this chapter.

²¹⁰ As noted in paragraph 157 of A/CN.9/526, while strong support was expressed for the deletion of paragraph 13.1 (now article 63), the Working Group decided to defer any decision regarding paragraph 13.1 (now article 63) until it had completed its review of the draft articles and

Transport Law

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, where that person suffered loss or damage.²¹¹

Article 64.

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, irrespective of it itself having suffered loss or damage. ~~If such holder did not suffer the loss or damage itself, it is to be deemed to act on behalf of the party that suffered such loss or damage.~~²¹²

Article 65.

In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is not 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 the loss or damage in respect of which the claim is made.²¹³

CHAPTER 14. TIME FOR SUIT

Article 66.Variant A²¹⁴

The carrier shall be discharged from all liability in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of [one] year. The shipper shall 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.²¹⁵

further discussed the scope of application of the draft instrument.

²¹¹ As noted in paragraph 157 of A/CN.9/526, the Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage. The Working Group may wish to consider whether this language adequately deals with the situation of the freight forwarder.

²¹² Although no request appears to have been made to the Secretariat in respect of paragraph 13.2 (now article 64) (see articles 160 and 161 of A/CN.9/526), from a drafting perspective, the language could be improved as suggested. Moreover, it is questionable whether the last sentence is necessary. In fact, if the right of the holder is recognized irrespective of such holder having suffered loss or damage, the relation between the holder and the person who has suffered the loss or damage remains outside the scope of the draft instrument.

²¹³ As noted from the discussion of this provision in paragraph 162 of A/CN.9/526, the Secretariat has not been requested to make a new draft. However, certain drafting changes are suggested as indicated.

²¹⁴ Variant A of article 66 is based on the original text of the draft instrument.

²¹⁵ As noted in paragraph 169 of A/CN.9/526, the Working Group requested the Secretariat to place "one" in square brackets, and to prepare a revised draft of paragraph 14.1 (now article 66), with due consideration being given to the views expressed.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Variant B

All [rights] [actions] relating to the carriage of goods under this instrument shall be extinguished [time-barred] if judicial or arbitral proceedings have not been commenced within the period of [one] year.

Article 67.

The period mentioned in article 66 commences on the day on which the carrier has completed delivery to the consignee of the goods concerned pursuant to article 7(3) or 7(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 period commences is not included in the period.²¹⁶

Concern was raised in paragraph 166 of A/CN.9/526 regarding why the time for suit for shippers referred only to shipper liability pursuant to article 7 (now chapter 7) of the draft instrument, and why it did not also refer to shipper liability pursuant to other articles, such as article 9 (now chapter 9). A further suggestion was made that all persons subject to liability under the contract of carriage should be included in paragraph 14.1 (now article 66). It could be suggested that while not all liability arising out of the contract of carriage is regulated in the draft instrument, e.g. the liability of the carrier for its failure to ship the goods, it might be appropriate that article 14 (now chapter 14) would apply to all liabilities regulated in the draft instrument.

The suggestion in paragraph 166 of A/CN.9/526 to simply state that any suit relating to matters dealt with in the draft instrument is barred (or any right extinguished) might be a good solution.

Concern was also raised in paragraph 167 of A/CN.9/526 whether the lapse of time extinguishes the right or bars the action. The lapse of time extinguishes the right under the Hague-Visby Rules (article 3(6)), COTIF-CIM (article 47), Warsaw (article 29) and probably CMR (article 32). It extinguishes the action under the Hamburg Rules (article 20), the 1980 Multimodal Convention (article 25), CMNI (article 24) and Montreal (article 35). It might be advisable if at present both alternatives should be considered. Therefore, an alternative text has been suggested in Variant B.

²¹⁶ As noted in paragraph 174 of A/CN.9/526, the Working Group requested the Secretariat to retain the text of paragraph 14.2 (now article 67), with consideration being given to possible alternatives to reflect the views expressed.

Concern was raised in paragraph 170 of A/CN.9/526 that since the date of delivery “in the contract of carriage” might be much earlier than the date of actual delivery, the date of actual delivery was a preferred point of reference. However, concern was raised that delivery could be unilaterally delayed by the consignee. The text refers to the day “on which the carrier has completed delivery”, which is the day of actual delivery. Considering the language in subparagraph 4.1.1 (now article 7(1)) the words “to the consignee” might be added for consistency.

Concern was also raised in paragraph 171 of A/CN.9/526 with respect to the “last day” on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It may be difficult to find an alternative to this phrase, and in any event, since when goods have not been delivered the “last day” is even more difficult to establish. It is suggested that these words be deleted.

The concern was also raised in paragraph 172 of A/CN.9/526 that the plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It would be possible to prevent this either through inclusion of counterclaims under subparagraph 14.4(b)(ii) (now article 69(b)(ii)) as noted in paragraph 172, or in a separate paragraph of the draft instrument. See *infra* the alternative text for paragraph 14.5 (now article 71).

It was also suggested in paragraph 173 of A/CN.9/526 that different commencement dates should be fixed in respect of claims against the carrier and against the shipper. This would seem to be an unnecessary complication.

Article 68.

The person against whom a claim is made at any time during the running of the period may extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.²¹⁷

Article 69.

An action for indemnity by a person held liable under this instrument may be instituted even after the expiration of the period mentioned in article 66 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) Variant A²¹⁸

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.

Variant B

90 days commencing from the day when either

(i) the person instituting the action for indemnity has settled the claim; or

(ii) a final judgment not subject to further appeal has been issued against the person instituting the action for indemnity.²¹⁹

Article 70.

A counterclaim by a person held liable under this instrument may be instituted even after the expiration of the limitation period mentioned in article 66 if it is instituted within 90 days commencing from the day when the person making the counterclaim has been served with process in the action against itself.²²⁰

²¹⁷ As noted in paragraph 175 of A/CN.9/526, the Working Group found the substance of paragraph 14.3 (now article 68) to be generally acceptable.

²¹⁸ Variant A of article 69 is based on the original text of the draft instrument.

²¹⁹ As noted in paragraph 178 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of paragraph 14.4 (now article 69), with due consideration being given to the views expressed.

It was noted in paragraph 176 of A/CN.9/526 that in certain civil law countries, it was not possible to commence an indemnity action until after the final judgment in the case had been rendered, and it was suggested that the 90-day period be adjusted to commence from the date the legal judgment is effective. Alternative language was offered that the 90-day period should run from the day the judgment against the recourse claimant became final and unreviewable. These suggestions are reflected in Variant B.

²²⁰ It was reiterated in paragraph 177 of A/CN.9/526 that provision should be made in respect of counterclaims, either pursuant to subparagraph 14.4(b)(ii) (now article 69(b)(ii)) or in a separate subparagraph, but they should be treated in similar fashion to subparagraph 14.4(b)(ii) (now article 69(b)(ii)). Paragraph 14.4 *bis* (now article 70) sets out this provision as a separate article.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 71.

If the registered owner of a vessel defeats the presumption that it is the carrier under article 36(3), an action against the bareboat charterer may be instituted even after the expiration of the period mentioned in article 66 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.]²²¹

CHAPTER 15. JURISDICTION²²²

Variant A

Article 72.

In judicial proceedings relating to carriage of goods under this instrument the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

²²¹ As noted in paragraph 182 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of paragraph 14.5 (now article 71), with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain subparagraph 8.4.2 (now article 36(3)) in square brackets, and that it therefore requested the Secretariat to retain paragraph 14.5 (now article 71) in square brackets, bearing in mind that the fate of the latter article was linked to that of the former.

The link between paragraph 14.5 (now article 71) and subparagraph 8.4.2 (now article 36(3)) was noted in paragraph 179 of A/CN.9/526, and the square brackets around paragraph 14.5 (now article 71) have been retained.

Concern was raised in paragraph 180 of A/CN.9/526 that the 90 day period would not be of assistance if the cargo claimant experienced difficulties in identifying the carrier. It is thought that this problem is solved by the present subparagraph 14.5(b)(ii) (now paragraph (b)(ii)).

It was also suggested that subparagraphs (i) and (ii) of subparagraph 14.5(b) (now paragraph (b)) be combined into one, since subparagraph (ii) could be considered a sufficiently rigorous condition to subsume subparagraph (i). A revised text is proposed.

²²² As noted in paragraph 159 of A/CN.9/526, the Working Group requested the Secretariat to prepare draft provisions on issues of jurisdiction and arbitration, with possible variants reflecting the various views and suggestions expressed in the course of the discussion.

Two alternative versions of the provisions on jurisdiction and arbitration have been prepared, both based on articles 21 and 22 of the Hamburg Rules with the necessary language changes. Variant A of chapters 15 and 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 15 and 16 omits the paragraphs that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted (see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356).

[(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or]²²³

(c) The place of receipt or the place of delivery; or

(d) Any additional place designated for that purpose in the transport document or electronic record.

Article 73.

Notwithstanding article 72, an action may be instituted in the courts of any port or place in a State Party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law.

Article 74.

No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72 or 73. This article does not constitute an obstacle to the jurisdiction of the States Parties for provisional or protective measures.

Article 75.

1. Where an action has been instituted in a court competent under article 72 or 73 or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.

2. For the purpose of this chapter the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

3. For the purpose of this chapter, the removal of an action to a different court within the same country, or to a court in another country, in accordance with article 73, is not to be considered as the starting of a new action.

Article 75 bis.

Notwithstanding the preceding articles of this chapter, an agreement made by the parties, after a claim under the contract of carriage has arisen, which designates the place where the claimant may institute an action, is effective.

Variant B

Article 72.

In judicial proceedings relating to carriage of goods under this instrument the plaintiff, at his option, may institute an action in a court which, according to

²²³ See *supra* note 30.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

[(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or]²²⁴

(c) The place of receipt or the place of delivery; or

(d) Any additional place designated for that purpose in the transport document or electronic record.

Article 73.

Notwithstanding article 72, an action may be instituted in the courts of any port or place in a State Party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law.

Article 74.

No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72 or 73 of this article. This paragraph does not constitute an obstacle to the jurisdiction of the States Parties for provisional or protective measures.

Article 75.

Notwithstanding the preceding articles of this chapter, an agreement made by the parties, after a claim under the contract of carriage has arisen, which designates the place where the claimant may institute an action, is effective.

CHAPTER 16. ARBITRATION ²²⁵

Variant A

Article 76.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this Instrument applies shall be referred to arbitration.

Article 77.

If a negotiable transport document or a negotiable electronic record has been

²²⁴ See *supra* note 30.

²²⁵ See *supra* note 222. Variant A of chapter 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 16 omits the paragraphs that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted.

issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a negotiable transport document or a negotiable electronic record issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.

Article 78.

The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

- (a) A place in a State within whose territory is situated:
 - (i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
 - [(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or]²²⁶
 - (iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or
- (b) Any other place designated for that purpose in the arbitration clause or agreement.

Article 79.

The arbitrator or arbitration tribunal shall apply the rules of this instrument.

Article 80.

Article 77 and 78 shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 80 bis.

Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

Variant B

Article 76.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this instrument applies shall be referred to arbitration.

²²⁶ See *supra* note 30.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 77.

If a negotiable transport document or a negotiable electronic record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a negotiable transport document or a negotiable electronic record issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.²²⁷

Article 78.²²⁸Article 79.

The arbitrator or arbitration tribunal shall apply the rules of this instrument.

Article 80.

Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

CHAPTER 17. GENERAL AVERAGE

Article 81.

Nothing in this instrument prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.²²⁹

Article 82.

1. [With the exception of the provision on time for suit,] the provisions of this instrument relating to the liability of the carrier for loss of or damage to the goods shall 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.
2. All [actions for] [rights to] contribution in general average shall be [time-

²²⁷ The amended text of article 73 of the provision on arbitration in Variant B is not a reproduction of Article 22.2 of the Hamburg Rules, since it was thought that Article 22.2 of the Hamburg Rules was too specific.

²²⁸ In order that Variant B accurately reflects the deliberations of the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea, this paragraph has been omitted. No decision was reached by the CMI regarding a suitable replacement paragraph. (Again, see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356.)

²²⁹ As noted in paragraph 186 of A/CN.9/526, there was broad support in the Working Group for the continued incorporation of the York-Antwerp Rules on general average into the contract of carriage. The substance of paragraph 15.1 (now article 81) was found to be generally acceptable.

barred] [extinguished] if judicial or arbitral proceedings have not been instituted within a period of [one year] from the date of the issuance of the general average statement.²³⁰

CHAPTER 18. OTHER CONVENTIONS

Article 83.

Subject to article 86, nothing contained in this instrument shall prevent a contracting state from applying any other international instrument which is already in force at the date of this instrument and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea.²³¹

Article 84.

As between parties to this instrument its provisions prevail over those of an earlier treaty to which they may be parties [that are incompatible with those of this instrument].²³²

Article 85.

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~~]²³³ ships.

²³⁰ As noted in paragraph 188 of A/CN.9/526, it was suggested that the fact that the time for suit provisions of the draft instrument do not apply to general average should be expressed more clearly. Since paragraph 15.2 (now paragraph 1) states that the provisions on liability of the carrier determine whether the consignee may refuse contribution in general average and the liability of the carrier, the reference to the time for suit provision is confusing. It is suggested that it should be deleted. This is particularly the case if a specific time for suit provision is added.

As further suggested in paragraph 188 of A/CN.9/526, a separate provision could be established in respect of time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. A text has been prepared and added to the end of paragraph 15.2 (now paragraph 2). Such a provision should probably cover both claims for contribution and claims for indemnities.

In paragraph 189 of A/CN.9/526, the question was raised whether paragraph 15.2 (now paragraph 1) should also include liability for loss due to delay and demurrage. No decision appears to have been made by the Working Group in this regard.

²³¹ As previously mentioned in connection with subparagraph 4.2.1 (now article 8) and discussions relating to the relationship of the draft instrument with other transport conventions and with domestic legislation (see note 42 *supra*), the Secretariat was also instructed in paragraphs 247 and 250 of A/CN.9/526 to prepare a conflict of convention provision for possible insertion in article 16 (now chapter 18). It is suggested that this should not adversely affect the suggestion that appears in the following note, but should instead supplement that suggestion. The language of this new paragraph 16.1 *bis* (now article 83) is taken from article 25(5) of the Hamburg Rules.

²³² The suggestion in paragraph 196 of A/CN.9/526 that it would be helpful if paragraph 16.1 (now article 85) were amended to add language stating that the draft instrument would prevail over other transport conventions except in relation to States that are not member of the instrument is in line with the provisions of article 30(4) of the Vienna Convention. It is suggested, however, that this new provision should be added in a separate paragraph, rather than to the present paragraph 16.1 (now article 85), that deals with a different and more specific problem and settles such problem in the opposite direction. This new provision appears as paragraph 16.2 *bis* (now article 84).

²³³ The word “seagoing” in paragraph 16.1 (now article 85) has been deleted, as suggested in paragraph 197 of A/CN.9/526.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 86.

No liability arises under this instrument for any loss of 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]²³⁴.

Article 87.

No liability arises under this instrument for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, 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 or the Convention on Supplementary Compensation for Nuclear Damage.²³⁵

CHAPTER 19. [LIMITS OF CONTRACTUAL FREEDOM]
[CONTRACTUAL STIPULATIONS]²³⁶

Article 88.

1. Unless otherwise specified in this instrument, any contractual stipulation that derogates from this instrument is null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or

²³⁴ As instructed in paragraph 199 of A/CN.9/526, square brackets have been placed around the words “by sea”.

²³⁵ As noted in paragraph 202 of A/CN.9/526, the Working Group requested the Secretariat to update the list of conventions and instruments in paragraph 16.3 (now article 87), and to prepare a revised draft of paragraph 16.3 (now article 87), with due consideration being given to the views expressed.

In paragraph 200 of A/CN.9/526, it is pointed out that the list of conventions in paragraph 16.3 (now article 83) is not complete and reference is made to the 1998 Protocol to amend the 1963 Vienna Convention.

It is noted in paragraph 201 of A/CN.9/526 that the suggestion was made that other conventions touching on liability could be added to those listed in paragraph 16.3 (now article 87), such as those with respect to pollution and accidents. However, some objections were raised in this respect, and, as a consequence, it is suggested that the review mentioned in the subsequent paragraph 202 of A/CN.9/526 should relate only to conventions in the area of nuclear damage.

²³⁶ As noted in paragraph 204 of A/CN.9/526, it was suggested that the title of this draft article should be revised to reflect more accurately the contents of the provision, which did not deal with “limits of contractual freedom” in general, but dealt with clauses limiting or increasing the level of liability incurred by the various parties involved in the contract of carriage. A possible

increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee under this instrument.²³⁷

2. Notwithstanding paragraph 1, the carrier or a performing party may increase its responsibilities and its obligations under this instrument.²³⁸

3. Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.²³⁹

Article 89.

Notwithstanding chapters 4 and 5 of this instrument, both the carrier and any performing party may by the terms of the contract of carriage:

(a) exclude or limit their liability if the goods are live animals except where it is proved that the loss, damage or delay resulted from an action or omission of the carrier or its servants or agents done recklessly and with knowledge that such loss, damage or delay would probably occur, or

(b) exclude or limit their liability for loss or damage to the goods if 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.²⁴⁰

alternative is the title of article 23 of the Hamburg Rules, "Contractual stipulations". Otherwise the title might indicate the basic mandatory nature of the provisions of the Instrument.

²³⁷ As noted in paragraph 213 of A/CN.9/526, the Working Group decided to maintain the text of subparagraph 17.1 (a) (now paragraph 1) in the draft instrument, including the words "or increase" in square brackets, for continuation of the discussion at a future session, possibly on the basis of one or more new proposals. It was indicated, as noted in paragraph 212 of A/CN.9/526 that a proposal for a draft provision excluding "competitively negotiated contracts between sophisticated parties" would be made available to the Secretariat before the next session of the Working Group, and that the concerns noted in paragraphs 205 to 211 of A/CN.9/526 would be borne in mind when drafting that proposal.

²³⁸ As noted in paragraph 214 of A/CN.9/526, the Working Group found the substance of subparagraph 17.1 (b) (now paragraph 2) to be generally acceptable. It was decided that the square brackets around that provision should be removed.

²³⁹ As noted in paragraph 215 of A/CN.9/526, the Working Group found the substance of subparagraph 17.1 (c) (now paragraph 3) to be generally acceptable.

²⁴⁰ As noted in paragraph 217 of A/CN.9/526, the Working Group decided that the substance of subparagraph 17.2 (a) (now paragraph (a)) should be maintained in the draft instrument for continuation of the discussion at a future session. The Secretariat was requested to prepare alternative wording to limit the ability of the carrier and the performing party carrying live animals to exonerate themselves from liability in case of serious fault of misconduct. Further, it was noted in paragraph 218 of A/CN.9/526 that the Working Group found the substance of subparagraph 17.2 (b) (now paragraph (b)) to be generally acceptable. The suggested different treatment of subparagraphs 17.2 (a) and (b) (now paragraphs (a) and (b)) requires a change in the chapeau. As regards live animals, it is suggested that language similar to that used in respect of the loss of the right to limit liability could be used, however, extending the reckless behaviour to servants or agents.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 17. Calculation of compensation	148	(29)	87-90
Article 18. Limits of liability	149	(30)	91-93
Article 19. Loss of the right to limit liability	150	(31)	94
Article 20. Notice of loss, damage, or delay	150	(32)	95-101
Article 21. Non-contractual claims	151	(32)	102
<i>Chapter 6: Additional provisions relating to carriage by sea</i>	151	(33)	103-113
Article 22. Liability of the carrier	152	(33)	104-108
Article 23. Deviation	153	(34)	109-112
Article 24. Deck cargo	153	(35)	113
<i>Chapter 7: Obligations of the shipper</i>	154	(35)	114-126
Article 25.	154	(35)	114-116
Article 26.	154	(36)	117
Article 27.	155	(36)	118
Article 28.	155	(37)	119
Article 29.	155	(37)	120
Article 30.	156	(38)	123-125
Article 31.	156	(38)	
Article 32.	157	(38)	126
<i>Chapter 8: Transport documents and electronic records</i>	157	(39)	127-146
Article 33. Issuance of the transport document or the electronic record	157	(39)	127
Article 34. Contract particulars	158	(39)	128-131
Article 35. Signature	159	(41)	132-133
Article 36. Deficiencies in the contract particulars	159	(41)	134-138
Article 37. Qualifying the description of the goods in the contract particulars	160	(41)	139-142
Article 38. Reasonable means of checking and good faith	162	(43)	143
Article 39. Prima facie and conclusive evidence	162	(44)	144-145
Article 40. Evidentiary effect of qualifying clauses	163	(44)	146
<i>Chapter 9: Freight</i>	163	(45)	147-159
Article 41.	163	(45)	148
Article 42.	164	(46)	149-151
Article 43.	164	(46)	152
Article 44.	165	(47)	153-158
Article 45.	166	(48)	159
<i>Chapter 10: Delivery to the consignee</i>	166	(48)	160-179
Article 46.	166	(48)	160-162
Article 47.	167	(49)	163
Article 48.	167	(49)	164-167
Article 49.	168	(50)	168-174
Article 50.	170	(52)	175-176
Article 51.	171	(53)	177
Article 52.	171	(53)	178-179
<i>Chapter 11: Right of control</i>	171	(53)	180-200
Article 53.	171	(53)	180-183
Article 54.	172	(54)	184-190

Transport Law

Article 55.	174 (56)	191-197
Article 56.	176 (58)	198
Article 57.	176 (58)	199
Article 58.	175 (58)	200
<i>Chapter 12: Transfer of rights</i>	177 (59)	201-207
Article 59.	177 (59)	201-202
Article 60.	177 (59)	203-205
Article 61.	178 (60)	206
Article 62.	178 (60)	207
<i>Chapter 13: Rights of suit</i>	179 (61)	208-213
Article 63.	179 (61)	208-211
Article 64.	180 (62)	212
Article 65.	180 (62)	213
<i>Chapter 14: Time for suit</i>	180 (62)	214-221
Article 66.	180 (62)	214-215
Article 67.	181 (63)	216
Article 68.	182 (63)	217
Article 69.	182 (64)	218-219
Article 70.	182 (64)	220
Article 71.	183 (64)	221
<i>Chapter 15: Jurisdiction</i>	183 (65)	222-224
Article 72.	183 (65)	223-224
Article 73.	184 (66)	
Article 74.	184 (66)	
Article 75.	184 (66)	
Article 75 bis.	184 (66)	
<i>Chapter 16: Arbitration</i>	185 (67)	225-228
Article 76.	185 (67)	
Article 77.	185 (67)	227
Article 78.	186 (68)	226 and 228
Article 79.	186 (68)	
Article 80.	186 (68)	
Article 80 bis.	186 (68)	
<i>Chapter 17: General average</i>	187 (69)	229-230
Article 81.	187 (69)	229
Article 82.	187 (69)	230
<i>Chapter 18: Other conventions</i>	188 (70)	231-235
Article 83.	188 (70)	231
Article 84.	188 (70)	232
Article 85.	188 (70)	233
Article 86.	189 (70)	234
Article 87.	189 (71)	235
<i>Chapter 19: Limits of contractual freedom</i>	189 (71)	236-240
Article 88.	189 (71)	237-239
Article 89.	190 (72)	240

Introduction

1. At its thirty-fourth session, in 2001, the Commission established Working Group III (Transport Law) and entrusted it with the task of preparing, in close cooperation with interested international organizations, a legislative instrument on issues relating to the international carriage of goods such as the scope of application, the period of responsibility of the carrier, obligations of the carrier, liability of the carrier, obligations of the shipper and transport documents.ⁱ At its thirty-fifth session, in 2002, the Commission approved the working assumption that the draft instrument on transport law should cover door-to-door transport operations, subject to further consideration of the scope of application of the draft instrument after the Working Group had considered the substantive provisions of the draft instrument and come to a more complete understanding of their functioning in a door-to-door context.ⁱⁱ

2. At its thirty-sixth session, in July 2003, the Commission had before it the reports of the tenth (Vienna, 16-20 September 2002) and eleventh (New York, 24 March-4 April 2003) sessions of the Working Group (A/CN.9/525 and A/CN.9/526, respectively).

3. The Commission was mindful of the magnitude of the project undertaken by the Working Group and expressed appreciation for the progress accomplished so far. It was widely felt that, having recently completed its first reading of the draft instrument on transport law, the Working Group had reached a particularly difficult phase of its work. The Commission noted that a considerable number of controversial issues remained open for discussion regarding the scope and the individual provisions of the draft instrument. Further progress would require a delicate balance being struck between the various conflicting interests at stake. A view was stated that a door-to-door instrument might be achieved by a compromise based on uniform liability, choice of forum and negotiated contracts, which would not deal with actions against performing inland parties. It was also stated that involving inland road and rail interests was critical to achieve the objectives of the text. A view was expressed that increased flexibility in the design of the proposed instrument should continue to be explored by the Working Group to allow for States to opt-in to all or part of the door-to-door regime.

4. The Commission also noted that, in view of the complexities involved in the preparation of the draft instrument, the Working Group had met at its eleventh session for a duration of two weeks, thus making use of additional conference time that had been made available by Working Group I completing its work on privately financed infrastructure projects at its fifth session, in September 2002. The Chairman of Working Group III confirmed that, if progress on the preparation of the draft instrument was to be made within an

acceptable time frame, the Working Group would need to continue holding two-week sessions. After discussion, the Commission authorized Working Group III, on an exceptional basis, to hold its twelfth and thirteenth sessions on the basis of two-week sessions. It was agreed that the situation of the Working Group in that respect would need to be reassessed at the thirty-seventh session of the Commission in 2004. The Working Group was invited to make every effort to complete its work expeditiously and, for that purpose, to use every possibility of holding inter-session consultations, possibly through electronic mail. The Commission realized, however, that the number of issues open for discussion and the need to discuss many of them simultaneously made it particularly relevant to hold full-scale meetings of the Working Group.ⁱⁱⁱ

5. The annex to this note contains revised provisions for a draft instrument on the carriage of goods [wholly or partly] [by sea] prepared by the Secretariat for consideration by the Working Group. Changes to the text previously considered by the Working Group (contained in document A/CN.9/WG.III/WP.21) have been indicated by underlining and strikeout.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Annex

Draft instrument on the carriage of goods [wholly or partly] [by sea]

CHAPTER 1. GENERAL PROVISIONS

Article 1. Definitions¹

For the purposes of this instrument:

- (a) “Contract of carriage”² means a contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly³ by sea from one place to another.
- (b) “Carrier”⁴ means a person that enters into a contract of carriage with a shipper.
- (c) “Consignor”⁵ means a person that delivers the goods to a the carrier or a performing party⁶ for carriage.

¹ Paragraph 72 of the Report of the 9th session of the Working Group on Transport Law (A/CN.9/510) noted that it was generally agreed that the readability of the draft instrument would be improved if the definitions were arranged according to a more logical structure by first listing the various parties that might intervene in the contractual relationships covered by the draft instrument and then listing the technical terms used in the draft provisions. The order of the definitions has been changed as suggested. The Working Group may also wish to consider titles for those articles in the draft instrument that do not currently have them.

² It was suggested in paragraph 83 of A/CN.9/510 that this definition was too simplistic and might require a more detailed consideration of the various obligations of the carrier. It was further suggested that the shipper also be mentioned, and that the definition should refer to a “person” rather than to a “carrier”. No decisions were made on these matters, and the suggestions have not, therefore, been incorporated.

³ It is noted in paragraph 85 of A/CN.9/510 that the Working Group decided that the words “wholly or partly” would be maintained in the draft provision, but that the words “wholly or partly” would be identified by adequate typographical means as one element of the draft instrument that might require particular consideration in line with the final decision to be made regarding the scope of the draft instrument. The Working Group may also wish to consider whether the phrase “wholly or partly” should appear in the title of the draft instrument.

⁴ It was recalled in paragraph 73 of A/CN.9/510 that this definition followed the same principle as the Hague-Visby and Hamburg Rules. Concern was expressed that the definition did not make sufficient reference to parties on whose behalf a contract was made, nor did it adequately cover the case of freight forwarders, nor did it make clear that it intended to cover both legal and natural persons. No agreement was reached on these issues, but it was agreed in paragraph 74 of A/CN.9/510 that the current definition constituted an acceptable basis for continuation of the discussion.

⁵ Support was expressed in paragraph 78 of A/CN.9/510 for the introduction of a mention that the consignor delivered the goods “on behalf” of the shipper. It was also suggested in paragraph 79 of A/CN.9/510 that additional language should be introduced to clarify that the consignor should deliver the goods to the “actual” or “performing” carrier, but the view was expressed that the words “a carrier” sufficiently addressed the possibility that a performing party might intervene in addition to the original carrier. Finally, a view was expressed in paragraph 80 of A/CN.9/510 that the Working Group might consider the text of article 1, paragraph 5 of the Multimodal Convention in revising the definition. The Working Group did not reach any agreement with respect to revising this provision.

(d) “Shipper”⁷ means a person that enters into a contract of carriage with a carrier.

(e) “Performing party”⁸ means a person other than the carrier that physically performs [or undertakes to perform]⁹ ~~for fails to perform in whole or in part~~¹⁰ 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.

(f) “Holder”¹¹ means a person that 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 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

⁶ An oversight was carried over from the original draft of the instrument from CMI, which had intended to correct the phrase “a carrier” to read “the carrier or a performing party” in those situations where such a change was necessary. This adjustment has been made at various points in this iteration of the draft instrument.

⁷ As noted in paragraph 107 of A/CN.9/510, bearing in mind the concerns expressed in the context of the definition of “carrier” in paragraph 1.1 (now paragraph (b)), it was generally agreed that the draft definition of “shipper” constituted an acceptable basis for continuation of the discussion at a future session.

⁸ While some views were expressed to the contrary, it is noted in paragraph 99 of A/CN.9/510 that wide support was expressed for the presence of this notion in the draft instrument; its concept was also widely supported, including the use of the term “physically performs” as a way to limit the categories of persons to be included within the definition. As noted in paragraph 104 of A/CN.9/510, suggestions were made to simplify and shorten the drafting of the definition, and it was suggested to delete the words “regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage” as unclear and as adding nothing substantial to the definition. However, it is unclear whether this suggestion received sufficient support in the Working Group.

⁹ As noted in paragraph 100 of A/CN.9/510, it was suggested that all of the options for the definition of “performing party” contained in the draft text and commentary should be retained for the time being. Paragraph 16 of A/CN.9/WG.III/WP.21 suggested as a possible alternative to the relatively restrictive definition represented in the original text of A/CN.9/WG.III/WP.21, a relatively inclusive definition that might be drafted with the following language at the start of the 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...”.

¹⁰ It is noted in paragraph 104 of A/CN.9/510 that the Working Group considered that these words should be deleted.

¹¹ The suggestion was made in paragraph 91 of A/CN.9/510 that the term “for the time being” was unnecessary, and support was expressed for maintaining a requirement that the holder should be in “lawful” possession of a negotiable transport document. Again, it is unclear whether this suggestion received sufficient support in the Working Group.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

(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 6 able to demonstrate that it has [access to] [control of] such record.

(g) “Right of control”¹² has the meaning given in article 49.

(h) “Controlling party”¹³ means the person that pursuant to article 50 is entitled to exercise the right of control.

(i) “Consignee”¹⁴ means a person entitled to take delivery of the goods under a contract of carriage or a transport document or electronic record.

(j) “Goods” means the wares, merchandise, and articles of every kind [whatsoever that a carrier or a performing party [received for carriage] [undertakes to carry under a contract of carriage]]¹⁵ and includes the packing and any equipment and container not supplied by or on behalf of the carrier or a performing party.

¹² It was noted in paragraph 105 of A/CN.9/510 that this was more a cross-reference than a definition, and it was proposed that it could therefore be deleted. However, it was agreed by the Working Group to retain the definition for further consideration at a later stage. See also *infra* note 13.

The Working Group may wish to consider whether the first sentence of the chapeau in paragraph 11.1 (now article 53) should be moved to paragraph 1.18 (now paragraph (g)) as the definition of “right of control”. Should the Working Group decide to do so, paragraph (g) could read: “‘Right of control’ means (i) the right to give instructions to the carrier under the contract of carriage and (ii) the right to agree with the carrier to a variation of such contract.”

¹³ Noting the concerns expressed in paragraph 87 of A/CN.9/510 regarding the use of index referencing in the definition section, the Working Group agreed that the definition should be retained for further discussions.

¹⁴ As noted in paragraph 75 of A/CN.9/510, it was suggested that the definition might be redrafted along the following lines: “‘Consignee’ means a person entitled to take delivery of the goods under a contract of carriage, which may be expressed by way of a transport document or electronic record”, while another suggestion was that a reference to the controlling party might need to be introduced in the definition of “consignee”. As noted in paragraph 76 of A/CN.9/510, the Working Group took note of those questions, concerns and suggestions for continuation of the discussion at a later stage.

¹⁵ In paragraph 90 of A/CN.9/510, a concern was expressed that the reference in the definition of “goods” that a carrier or a performing party “received for carriage” rather than “undertakes to carry” may mean that the definition failed to cover cases where there was a failure by the carrier to receive the goods or load cargo on board a vessel. It was said that the current reference only to receipt of goods was too narrow, and, alternatively, that the definition should be simplified by removing any reference to receipt of the goods. The Working Group decided that the Secretariat should prepare two alternative texts taking account of each of these approaches, however, the Working Group may wish to consider whether the amendment made above could accommodate the concerns of the Working Group, without the need for either of the two alternative texts.

The Working Group may also wish to note that if the phrase “undertakes to carry under a contract of carriage” is adopted, the complete phrase must be limited to “whatsoever that a carrier undertakes to carry under a contract of carriage”, since the performing party does not undertake to carry the goods under the contract of carriage. However, if the phrase “received for carriage” is adopted, then the complete phrase should be “whatsoever that a carrier or a performing party received for carriage”.

(k) “Transport document”¹⁶ means a document issued pursuant to a contract of carriage by the carrier or a performing party that

(i) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or

(ii) evidences or contains a contract of carriage,

or both.

(l) “Negotiable transport document”¹⁷ 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”.

(m) “Non-negotiable transport document”¹⁸ means a transport document that does not qualify as a negotiable transport document.

(n) “Electronic communication”¹⁹ 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.

(o) “Electronic record”²⁰ 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

(i) evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, or

¹⁶ In paragraph 86 of A/CN.9/510, it was suggested with respect to the paragraph 1.6 (now paragraph (r)) definition of “contract particulars” (see, *infra*, note 23) that the text should indicate more clearly to what the phrase “relating to the contract of carriage” referred. In this respect, it was suggested that when the Working Group considered draft paragraphs 1.9 and 1.20 (now paragraphs (o) and (k)) it consider whether the requirement that an electronic communication or a transport document evidences a contract of carriage was really necessary. This definition may be based on s. 5(1) of the UK Carriage of Goods by Sea Act, 1924, but there does not seem to be any doubt that the transport document is also usually evidence of the contract of carriage. It would not, therefore, seem advisable to place square brackets around articles 1.20(b) (now paragraph (k)(ii)) or 1.9(b) (now paragraph (o)(ii)).

¹⁷ It was suggested in paragraph 93 of A/CN.9/510 that there be a clearer explanation of the differences between negotiability and non-negotiability, particularly in order to provide for appropriate rules on negotiable electronic records. In response, it was noted that whilst it was important to be precise in this area, particularly because it was a new area and was affected by national law, the Working Group should keep in mind that it could not regulate all consequences.

¹⁸ As noted in paragraph 94 of A/CN.9/510, although a suggestion was made that this definition was not necessary and should be deleted, the Working Group agreed to retain the definition for further consideration.

¹⁹ As noted in paragraph 88 of A/CN.9/510, a number of concerns have been raised with respect to this provision and to the definition of “electronic record”. It should be noted that the discussion of the electronic commerce aspects of the draft instrument have been postponed until later in the Working Group’s discussions.

²⁰ See *supra* notes 16 and 19.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

(ii) 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.

(p) “Negotiable electronic record”²¹ 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 6, 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.

(q) “Non-negotiable electronic record”²² means an electronic record that does not qualify as a negotiable electronic record.

(r) “Contract particulars”²³ 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.

(s) “Container” means²⁴ any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, [capable of being carried by sea][designed for carriage by sea] and any equipment ancillary to such unit load.²⁵

²¹ As noted in paragraph 92 of A/CN.9/510, the Working Group accepted the definitions of “negotiable electronic record” and “non-negotiable electronic record” as a sound basis for further discussions.

²² Correction to original text following paragraph 13 of A/CN.9WG.III/WP/21. Also, see *supra* note 21.

²³ In paragraph 86 of A/CN.9/510, it is noted that the Working Group agreed that the following concerns should be considering in redrafting the definition: that the definition could contain contradictions when read together with paragraph 1.20 (now paragraph (k)), and that the text should indicate more clearly to what the phrase “relating to the contract of carriage” referred (see *supra* note 16). However, the existence of a contradiction between the definition of “contract particulars” in paragraph 1.6 (now paragraph (r)) and “transport document” is in paragraph 1.20 (now paragraph (k)) is unclear. Further, the phrase “relating to the contract of carriage” would seem to be clear.

²⁴ It is noted in paragraph 82 of A/CN.9/510 that the Secretariat was requested to prepare a revised definition for “container” with possible variants reflecting the views and concerns expressed. The first such concern expressed in paragraph 81 of A/CN.9/510 was that the word “includes” made the definition open-ended, and the second, expressed in paragraph 82 of A/CN.9/510, was that the definition should be limited to containers designed for sea transport. The suggested changes present alternative language and are an attempt to reflect these views.

²⁵ To avoid the apparent circularity in the words “‘Container’ means any type of container...”, the Working Group may wish to consider the following alternative text: “‘Container’ means any unit load used to consolidate goods that is [capable of being carried by sea][designed for carriage by sea] and any equipment ancillary to such unit load, [such as][including] transportable tank or flat, swapbody, or any similar unit load.”

(t) “Freight”²⁶ means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

Article 2. Scope of application

1. Variant A of paragraph 1²⁷

Subject to²⁸ paragraph 3, this instrument applies 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 receipt²⁹ specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the place of delivery 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]³⁰

(e) the contract of carriage provides that this instrument, or the law of any State giving effect to them, is to govern the contract.

²⁶ A concern was expressed in paragraph 89 of A/CN.9/510 that the definition of freight was incomplete in that it failed to state the person who was liable to pay the freight. However, it was agreed that the role of the definition was simply to describe what freight was and that issues relating to the freight could be dealt with elsewhere.

²⁷ Variant A of paragraph 1 is based on the original text of the draft instrument.

²⁸ The Working Group may wish to review all articles and paragraphs in the draft instrument that begin with the phrase, “Subject to article/paragraph...”, or “Notwithstanding article/paragraph...” and the like, in order to assess whether, in each case, the clause is necessary or whether it may be deleted. In the interests of achieving consistency, it is suggested that this review be completed by examining the instrument as a whole with this sole purpose in mind.

²⁹ It was noted in paragraph 244 of A/CN.9/526 that the Working Group agreed on a provisional basis that the draft instrument should cover any type of multimodal carriage involving a sea leg, and that no further distinction would be needed, based on the relative importance of the various modes of transport used for the purposes of the carriage. It was also agreed that draft article 3 (now article 2) might need to be redrafted to better reflect that the internationality of the carriage should be assessed on the basis of the contract of carriage. The Secretariat was requested to prepare revised provisions, with possible variants, for continuation of the discussion at a future session. However, in view of the definition of “contract of carriage” in paragraph 1.5 (now article 1(a)), there would seem to be no need to change the text of paragraph 3.1(a) and (b) (now articles 2(1)(a) and (b)) except that the words in brackets could be deleted.

³⁰ As noted in paragraph 34 of A/CN.9/510, it was widely held in the Working Group that, in modern transport practice, the place of conclusion of the contract was mostly irrelevant to the performance of the contract of carriage and, if electronic commerce was involved, that place might even be difficult or impossible to determine.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Variant B of paragraph 1³¹

Subject to paragraph 3, this instrument apply to all contracts of carriage of goods by sea³² 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]³³

(e) the contract of carriage provides that this Instrument, or the law of any State giving effect to them, is to govern the contract.

1 *bis*. This instrument also applies to carriage by inland waterway before and after the voyage by sea as well as to carriage by road or by rail from the place of receipt to the port of loading and from the port of discharge to the place of delivery, provided that the goods, during the sea voyage, have been unloaded from the means of transport with which the land segment of the carriage is performed.³⁴

Variant C of paragraph 1³⁵

Subject to paragraph 3, this instrument applies to all contracts of carriage in

³¹ In paragraphs 245 to 249 of A/CN.9/526, the relationship of the draft instrument with other transport conventions and with domestic legislation is discussed. The Working Group instructed the Secretariat in paragraph 250 of A/CN.9/526, *inter alia*, to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1 (now paragraph 1) of the draft instrument (see A/CN.9/WG.III/WP.26). This variant is reflected in Variant B.

³² If Variant B is adopted by the Working Group, the use of the phrase “of goods by sea” may require an amendment to the paragraph 1.5 (now article 1(a)) definition of “contract of carriage”.

³³ See *supra* note 30.

³⁴ The Working Group may wish to consider the relationship of this paragraph 1 *bis* with article 83.

³⁵ A suggestion reflected in paragraph 243 of A/CN.9/526 was that the draft instrument should only apply to those carriages where the maritime leg involved cross-border transport. Under that suggestion, it was said to be irrelevant whether the land legs involved in the overall carriage did or did not involve cross-border transport. The Working Group took note of that suggestion and requested the Secretariat to reflect it, as a possible variant, in the revised draft to

which the port of loading and the port of discharge are in different States if

(a) the port of loading specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the 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]³⁶

(e) the contract of carriage provides that this instrument, or the law of any State giving effect to them, is to govern the contract.³⁷

2. This instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.³⁸

3. This instrument does not apply to charter parties, [contracts of affreightment, volume contracts, or similar agreements].

4. Notwithstanding paragraph 3, 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.

be prepared for continuation of the discussion at a future session. Variant C is intended to reflect this approach. As noted in paragraph 243 of A/CN.9/526, the prevailing view, however, was that, pursuant to draft article 3 (now article 2), the internationality of the carriage should not be assessed in respect of any of the individual unimodal legs but in respect of the overall carriage, with the place of receipt and the place of delivery being in different States.

³⁶ See *supra* note 30.

³⁷ The Working Group may also wish to consider the addition of paragraph 1 *bis* to Variant C, as follows: “1 *bis*. If under the contract of carriage, the goods are carried only partly by sea, this instrument applies however only if (a) the place of receipt and the port of loading are in the same State, and (b) the port of discharge and the place of delivery are in the same State.” This suggestion may be in conflict with subparagraph 4.2.1 (now article 8). In addition, as indicated in note 35, *supra*, the prevailing view in the Working Group was that the internationality of the carriage should not be assessed in respect of any of the individual unimodal legs but in respect of the overall carriage, with the place of receipt and the place of delivery being in different States.

³⁸ It has been suggested that in the interests of uniformity and for the avoidance of doubt, it would be desirable to also include a reference to the applicable law (paragraph 37 of A/CN.9/WG.III/WP.21/Add.1).

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

5. If a contract provides for the future carriage of goods in a series of shipments, this instrument applies to each shipment to the extent that paragraphs 1, 2, 3 and 4 so specify.

CHAPTER 2. ELECTRONIC COMMUNICATION³⁹

Article 3.

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.

Article 4.

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 ceases to have any effect or validity.

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 ceases to have any effect or validity.

Article 5.

The notices and confirmation referred to in articles 20(1), 20(2), 20(3), 34(1)(b) and (c), 47, 51, the declaration in article 68 and the agreement as to weight in article 37(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.

³⁹ The discussion of this chapter has been postponed to a future consideration of the draft instrument. This chapter has been kept in its original position. However the Working Group may wish to consider the optimum placement of it within the draft instrument when its provisions are considered. Further changes to this chapter are expected following those discussions.

Article 6.

The use of a negotiable electronic record is subject to rules of procedure agreed between the carrier and the shipper or the holder mentioned in article 1(p)⁴⁰. 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
 - (ii) pursuant to articles 4(2) or 49(a)(ii) the negotiable electronic record has ceased to have any effect or validity.

CHAPTER 3. PERIOD OF RESPONSIBILITY

Article 7.⁴¹

1. Subject to article 9, 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.

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.

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.

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

⁴⁰ This is a correction to the original version of the draft instrument set out in A/CN.9/WGIII/WP21, which should have made reference to the definition of “negotiable electronic record” in article 1(p).

⁴¹ The Working Group may wish to note paragraph 40 of A/CN.9/510, which sets out the arguments against, and in favour of, the approach taken in article 7.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

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 paragraph 3.

[Article 8. Carriage preceding or subsequent to sea carriage]⁴²

1. 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 [or national law] 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, to the extent that they are mandatory as indicated in (iii) above, prevail over the provisions of this instrument.]

[2. The provisions under article 8 shall not affect the application of article 18(2)]⁴³

⁴² It is noted in paragraph 250 of A/CN.9/526 that the Working Group agreed provisionally to retain the text of subparagraph 4.2.1 (now article 8) as a means of resolving possible conflicts between the draft instrument and other conventions already in force. The Secretariat was instructed to prepare a conflict of convention provision for possible insertion into article 16 (now chapter 18) of the draft instrument, and to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1 (now article 2(1)). The exchange of views regarding the relationship between the draft instrument and national law was inconclusive, and the decision was made to consider this issue further in light of anticipated future proposals. Given the level of support with respect to the issue of national law, however, the Working Group requested the Secretariat to insert a reference to national law in square brackets into the text of subparagraph 4.2.1 (now article 8) for further reflection in the future. Further, both the text of the Swedish proposal with respect to article 3 (now article 2) and a conflict of law provision in article 16 (now chapter 18), have been inserted in the text of the draft instrument in square brackets.

The Working Group may also wish to consider whether this article is appropriately placed within the draft instrument, or whether it should be moved to another chapter, such as, perhaps, chapter 5 on the Liability of the Carrier.

⁴³ In the discussion of the treatment of non-localised damages in paragraphs 264 to 266 of A/CN.9/526, it was suggested in paragraph 266 that the draft instrument might need to reflect more clearly the legal regimes governing localized damages under subparagraph 4.2.1 (now article 8) and non-localized damages under subparagraph 6.7.1 (now article 18(1)). The Secretariat was invited to consider the need for improved consistency between those two provisions when preparing a revised draft of the instrument.

[3. Article 8 applies regardless of the national law otherwise applicable to the contract of carriage.]

Article 9. Mixed contracts of carriage and forwarding⁴⁴

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.
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.

CHAPTER 4. OBLIGATIONS OF THE CARRIER

Article 10.

The carrier shall, subject to this instrument and in accordance with the terms of the contract of carriage, [properly and carefully] carry the goods to the place of destination and deliver them to the consignee.⁴⁵

Article 11.

1. The carrier shall during the period of its responsibility as defined in article 7, and subject to article 8, properly and carefully load, handle, stow, carry, keep, care for and discharge the goods.⁴⁶

The “improved consistency” between subparagraph 4.2.1 and the new provision subparagraph 6.7.1 *bis* (now article 18(2)) suggested in paragraph 264 for insertion after subparagraph 6.7.1 (now article 18(1)) (reading as follows: “Notwithstanding the provisions of subparagraph 6.7.1 (now article 18(1)), if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.”) could be realized by adding paragraph (2) as indicated.

⁴⁴ The Working Group may wish to consider whether article 9 is properly placed within chapter 3 on period of responsibility.

⁴⁵ It was noted in paragraph 116 of A/CN.9/510 that the Working Group provisionally agreed to retain the text of paragraph 5.1 (now article 10) as drafted. It was widely thought that the concerns and drafting suggestions mentioned in paragraphs 113 to 116 of A/CN.9/510 should be revisited at a later stage.

⁴⁶ As discussed in paragraph 117 and as noted in paragraph 119 of A/CN.9/510 that, notwithstanding that there was some support for omitting paragraph 5.2.1 (now article 11(1)), the Working Group provisionally agreed to retain the draft article given the extensive experience with analogous provisions in existing conventions such as article 3(2) of the Hague Rules. It was also agreed that further study of the draft article should be undertaken to assess the interplay and the consistency between paragraph 5.2.1 (now article 11(1)) and draft article 6 (now chapter 5), as well as the effect of the various possible definitions of the period during which the obligation in paragraph 5.2.1 (now article 11(1)) would apply. The Working Group may wish to note that there does not appear to be a particular maritime orientation to the use of the terms in sub paragraph 5.2.1 (now article 11(1)), and that deletion of the terms could result in a provision setting out only a general standard of care.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

[2. The parties may agree that certain of the functions referred to in paragraph 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.]⁴⁷

Article 12.

Variant A⁴⁸

Notwithstanding articles 10, 11, and 13(1), 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.⁴⁹

Variant B

Notwithstanding articles 10, 11, and 13(1), the carrier may unload, destroy or render dangerous goods harmless if they become an actual danger to life or property.

Article 13. Additional obligations applicable to the voyage by sea⁵⁰

1. The carrier shall be⁵¹ bound, before, at the beginning of, [and during]⁵² the voyage by sea, to exercise due diligence to:

⁴⁷ It was noted in paragraph 127 of A/CN.9/510 that it was decided that the provision should be placed between square brackets as an indication that the concept of FIO (free in and out) and FIOS (free in and out, stowed) clauses had to be reconsidered by the Working Group including their relationship to the provisions on the liability of the carrier. The Working Group may wish to review this provision based on any changes that are made to articles 10 and 11(1).

It was suggested that written information about the practice of FIO(S) clauses should be prepared for a future session of the Working Group to assist it in its considerations.

⁴⁸ Variant A of article 12 is based on the original text of the draft instrument.

⁴⁹ It was noted in paragraph 130 of A/CN.9/510 that the Working Group generally agreed that the text of paragraph 5.3 (now article 12) required further improvement. As an alternative to the current text of the provision as represented by Variant A, the Secretariat was requested to prepare a variant, reflected in Variant B, based on the principles expressed in article 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods. It was also agreed that the issue of compensation that might be owed to the carrier or the shipper in such circumstances might need to be further discussed in the context of paragraph 7.5 (now article 29).

⁵⁰ In light of the wide support expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port (see paragraph 239 of A/CN.9/526), it was thought that separating out provisions of the draft instrument that should apply only to carriage by sea might assist the restructuring of the draft instrument. As a consequence, articles 5 and 6 (now chapters 4 and 5, and a new chapter 6, entitled "Additional provisions relating to carriage by sea [or by other navigable waters]") of the draft instrument have been reorganized in this fashion.

⁵¹ This is the first of several instances where mandatory language has been inserted into the draft instrument in order to use a consistent approach throughout.

⁵² As noted in paragraph 131 of A/CN.9/510, the Working Group confirmed its broad support for imposing upon the carrier an obligation of due diligence that was continuous throughout the voyage by retaining the words that were currently between square brackets "and during" and "and keep". However, a concern was reiterated that the extension of the carrier's

- (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 where⁵³ supplied by the carrier, in or upon which the goods are carried fit and safe for their reception, carriage and preservation.⁵⁴

[2. Notwithstanding articles 10, 11, and 13(1), the carrier ~~in the case of carriage by sea or by inland waterway~~⁵⁵ 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.]⁵⁶

CHAPTER 5. LIABILITY OF THE CARRIER

Article 14. Basis of liability⁵⁷

Variant A of paragraphs 1 and 2⁵⁸

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 chapter 3, unless the carrier proves that neither its fault nor that of any person referred to in article 15(3) caused or contributed to the loss, damage or delay.⁵⁹

obligation to exercise due diligence in respect of the whole voyage put a greater burden on carriers and could lead to the associated costs being passed on in the form of higher freights.

⁵³ The Working Group may wish to consider whether "where" should be changed to "when", since the place in which the containers are supplied is not relevant.

⁵⁴ It was noted in paragraph 136 of A/CN.9/510 that the Working Group agreed that the current text of paragraph 5.4 (now paragraph (1)) constituted a workable basis for continuation of its deliberations. The Working Group took note of the various suggestions that had been expressed in respect of the draft provision. It was generally agreed that the draft provision would need to be further considered in light of similar or comparable provisions in other unimodal transport conventions.

⁵⁵ This phrase would become redundant if this paragraph were placed under the heading "Additional obligations applicable to the voyage by sea" as suggested in the text.

⁵⁶ It was noted in paragraph 143 of A/CN.9/510 that the Working Group was divided between those who favoured the elimination of the subparagraph, and those who preferred to retain it but to further consider its substance. The Working Group decided to place the draft article between square brackets.

⁵⁷ Once the Working Group decides upon the preferred variant for paragraphs 1 and 2, it may be advisable to split paragraphs 1, 2 and 3 into separate articles.

⁵⁸ Variant A of paragraphs 1 and 2 are based on the original text of the draft instrument.

⁵⁹ (a) It was noted in paragraph 34 of A/CN.9/525 that strong support was expressed for the substance of paragraph 6.1 (now article 14). It was also noted in paragraph 34 of A/CN.9/525 that the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made. Variants B and C to subparagraphs 6.1.1 and 6.1.3 (now paragraphs 1 and 2) are presented as possible solutions to the views and suggestions expressed, as noted in the remainder of this note, as well as in notes 61 to 66, *infra*.

(b) The suggestion was noted in paragraph 31 of A/CN.9/525 that subparagraph 6.1.1 (now article 14(1)) was closer in substance to the approach taken in article 4.2(q) of the Hague-Visby Rules

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

[6.1.2 ⁶⁰]

2.⁶¹ Notwithstanding paragraph 1, if the carrier proves that it has complied

than the approach taken in article 5.1 of the Hamburg Rules, which required that the carrier prove that it, its servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences. However, there was some criticism that the reference to the “period of the carrier’s responsibility as defined in article 4 (now chapter 3)” would allow the carrier to restrict its liability to a considerable extent, since, as noted in paragraph 40 of A/CN.9/510, some reservations were expressed with the approach taken in article 7, according to which the precise moment of the receipt and delivery of goods was a matter of contractual arrangements between the parties of a matter to be decided upon by reference to customs or usages.

(c) As further noted in paragraph 31 of A/CN.9/525, some concern was expressed as to why it had been considered necessary to deviate from the language used in the Hamburg Rules. It was suggested that the reason for the difference in wording from both the Hague Rules and the Hamburg Rules was to improve and provide greater certainty (e.g. as to the fact that the liability of the carrier was based on presumed fault, a matter that had required clarification by way of the common understanding adopted by the drafters of the Hamburg Rules). A contrary view was that combining different languages from both the Hague and Hamburg Rules might increase uncertainty as it was not clear how the provision would be interpreted. Since the views differed, and there is no evidence that one of them prevailed over the other, it does not seem possible to reflect them in the text.

(d) A suggestion was made in paragraph 31 of A/CN.9/525 that the basis of liability should be simplified by abolishing the standard of due diligence and replacing it with liability stemming from use of the vessel as such. This suggestion would entail a very strict, if not objective, standard of liability. Since support was expressed in paragraph 31 of A/CN.9/525 for the requirement of fault-based liability on the carrier, the change that has been suggested would seem to clash with the majority view.

(e) Paragraph 32 of A/CN.9/525 suggested that, whilst a higher standard of liability had been adopted in instruments dealing with other modes of transport (such as COTIF), a higher standard would not be acceptable in the maritime context. In this regard, support was expressed for features in addition to paragraph 6.1 (now article 14), such as draft article 5 (now chapter 4), which set out the positive obligations of the carrier. This suggestion appeared to have the support of the Working Group, and should be taken into consideration.

(f) The original text as presented in Variant A has no clear linkage between article 5 (now chapter 4) and article 6 (now chapter 5) of the draft instrument, i.e. between the breach of the obligations set out in article 5 (now chapter 4) (as well as the allocation of the burden of proof) and the liability of the carrier in accordance with article 6 (now chapter 5). The suggestion that was made is to create such a linkage.

(g) It was noted in paragraph 31 of A/CN.9/525 that if the draft instrument were to apply on a door-to-door basis, conflict with unimodal land transport conventions (such as COTIF and CMR) would be inevitable given that both imposed a higher standard of liability on the carrier. However it was suggested that these conflicts could be reduced by adopting suitable wording in paragraph 6.4 (now article 16) as well as the language used in respect of the performing carrier. More generally, doubts were expressed as to whether default liability rules applicable in the context of door-to-door transport should be based on the lower maritime standard instead of relying on the stricter standard governing land transport.

⁶⁰ Moved to new chapter 6 (now chapter 5) under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

⁶¹ Paragraph 45 of A/CN.9/525 notes that the Secretariat was requested to take the suggestions, views and concerns in paragraphs 38 to 44 of A/CN.9/525 into consideration when preparing a future draft of the provision. The prevailing view noted in paragraph 39 was that this provision should be maintained. An attempt has been made in this text to take into account the comments and suggestions made by the Working Group, as noted in paragraphs 40 to 43 of A/CN.9/525.

with its obligations under chapter 4⁶² and that loss of or damage to the goods or delay in

delivery has been caused [solely]⁶³ 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]⁶⁴ that loss, damage or delay]⁶⁵ [the carrier shall not be liable, except where proof is given of its fault or of the fault of a performing party, for such loss, damage or delay].⁶⁶

(a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

(b) quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process];

(c) act or omission of the shipper, the controlling party or the consignee;

(d) strikes, lock-outs, stoppages or restraints of labour;

[(v) ... ⁶⁷;]

(e) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(f) insufficiency or defective condition of packing or marking;

(g) latent defects not discoverable by due diligence.

(h) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

(i) acts of the carrier or a performing party in pursuance of the powers conferred by article 12 and 13(2) when the goods have been become a danger to persons, property or the environment or have been sacrificed;

[(xi) ... ⁶⁸;]

⁶² Paragraph 42 of A/CN.9/525 made reference to concerns that the chapeau of subparagraph 6.1.3 (now paragraph (2)) insufficiently addressed cases where the carrier proved an event in the list under subparagraph 6.1.3 (now paragraph (2)), but there was an indication that the vessel might not have been seaworthy. See also the comments under paragraph 6.1 (now article 14), as noted in note 59, *supra*.

⁶³ It was suggested in paragraph 42 of A/CN.9/525 that the word “solely” be added to the subparagraph, particularly if the events listed were to be treated as exonerations.

⁶⁴ It was suggested in paragraph 42 of A/CN.9/525 Report that the words “or contributed to cause” be deleted, again, particularly if the events listed were to be treated as exonerations.

⁶⁵ This is the first alternative based on the “presumption regime” suggested in paragraphs 41 and 42 of A/CN.9/525.

⁶⁶ As noted in paragraph 41 of A/CN.9/525, this is the second alternative, based on the traditional exoneration regime, but subject to proof being given of the carrier’s fault.

⁶⁷ Moved to new chapter 6 under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

⁶⁸ Moved to new chapter 6 under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Variant B of paragraphs 1 and 2:

1. The carrier is relieved from liability if it proves that:
 - (i) it has complied with its obligations under article 13.1 [or that its failure to comply has not caused [or contributed to]⁶⁹ the loss, damage or delay], and
 - (ii) neither its fault, nor the fault of its servants or agents has caused [or contributed to]⁷⁰ the loss, damage or delay, or

that the loss, damage or delay has been caused by one of the following events:

 - (a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;
 - (b) quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];
 - (c) act or omission of the shipper, the controlling party or the consignee;
 - (d) strikes, lock-outs, stoppages or restraints of labour;
 - [(v) ... ⁷¹];
 - (e) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;
 - (f) insufficiency or defective condition of packing or marking;
 - (g) latent defects not discoverable by due diligence.
 - (h) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;
 - (i) acts of the carrier or a performing party in pursuance of the powers conferred by article 12 and 13(2) when the goods have been become a danger to persons, property or the environment or have been sacrificed;
 - [(xi) ... ⁷²];

The carrier shall, however, be liable for the loss, damage or delay if the shipper proves that the fault of the carrier or the fault of its servants or agents has caused [or contributed to]⁷³ the loss, damage or delay.

Variant C of paragraphs 1 and 2

1. The carrier shall be liable for loss resulting from loss of or damage to the

⁶⁹ See note 64, *supra*.

⁷⁰ *Ibid.*

⁷¹ Moved to new chapter 6 under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

⁷² Moved to new chapter 6 under the heading “Additional provisions relating to carriage by sea [or by other navigable waters]”. See *supra* note 50.

⁷³ See note 64, *supra*.

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 chapter 3.

2. The carrier is relieved of its liability under paragraph 1 if it proves that neither its fault nor that of any person referred to in article 15(3) caused [or contributed to]⁷⁴ the loss, damage or delay.

2.bis It shall be presumed that neither its fault nor that of any person referred to in article 15(3) caused the loss, damage or delay if the carrier proves that loss of or damage to the goods or delay in delivery has been caused [solely]⁷⁵ by one of the following events:

(a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

(b) quarantine restrictions; interference by or impediments created by governments, public authorities rulers or people [including interference by or pursuant to legal process];

(c) act or omission of the shipper, the controlling party or the consignee;

(d) strikes, lock-outs, stoppages or restraints of labour;

[(v) ... 76;]

(e) wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

(f) insufficiency or defective condition of packing or marking;

(g) latent defects not discoverable by due diligence.

(h) handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;

(i) acts of the carrier or a performing party in pursuance of the powers conferred by article 12 and 13(2) when the goods have been become a danger to persons, property or the environment or have been sacrificed;

[(xi) ... 77;]

The presumption is rebutted if the claimant proves that the loss, damage or delay was caused by the fault of the carrier or any person referred to in article

⁷⁴ See note 64, *supra*.

⁷⁵ See note 63, *supra*.

⁷⁶ Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

⁷⁷ Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

15 (3). Furthermore the presumption is rebutted if the claimant proves that the loss, damage or delay was caused by one of the cases listed in article 13 (1)(a), (b) or (c). However, in such a case, the carrier is relieved of liability if it proves compliance with the duty under article 13.

3. If loss, damage or delay in delivery is caused in part by an event⁷⁸ 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.

79

[6.2 Calculation of compensation⁸⁰]

Article 15. Liability of performing parties⁸¹

⁷⁸ As noted in paragraph 55 of A/CN.9/525, one concern raised was the ambiguous nature of the “event”, and whether it was intended to be limited to “cause”, and whether it would be limited to the list of presumptions in subparagraph 6.1.3 (now paragraph 2).

⁷⁹ The text that has been deleted was included as a second alternative in the first draft of the draft instrument. As noted in paragraph 56 of A/CN.9/525, the first alternative received the strongest support in the Working Group and the decision was made to maintain only the first alternative in the draft instrument for the continuation of the discussion at a later stage. However, the Working Group decided to preserve the second alternative as a note or in the comments to the draft text, to permit further consideration of that alternative at a later stage:
[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.]

⁸⁰ As suggested in paragraph 60 of A/CN.9/525, paragraph 6.2 (now article 17) has been moved after article 6.4 (now article 16) in order to ensure its closer connection with paragraph 6.7 (now article 18).

⁸¹ (a) As noted in paragraph 64 of A/CN.9/525, it was agreed that paragraph 6.3 (now article 15) should be retained, subject to a revision of the text taking account of the concerns expressed and to considering whether further changes were necessary if the draft instrument ultimately applied on a door-to-door basis.

An analysis of the “concerns” summarized in paragraph 64 follows in order to ascertain which may be taken into account in the preparation of a revised text.

(b) A concern was expressed that the coverage of performing parties was a novel rule which created a direct right of action as against a party with whom the cargo interests did not have a contractual relationship. It was strongly argued that this innovation should be avoided as it had the potential for serious practical problems. Disagreement was expressed with respect to the statement in paragraph 94 of document A/CN.9/WG.III/WP.21 that a performing party was not liable in tort. In this respect, it was argued that liability of the performing party in tort was a matter of national law to which the present instrument did not extend. Since the Working Group decided to retain this provision, the above concerns cannot be considered.

(c) Also it was submitted that it was not clear under which conditions liability could be imposed upon the performing party. It was said that even though it appeared that the loss or damage had to be “localized” with the performing party (i.e. the loss or damage had to have occurred when the

1. Variant A of paragraph 1⁸²

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 (a) during the period in which it has custody of the goods; and (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage.

Variant B of paragraph 1

A performing party is 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:

- (a) during the period in which it has custody of the goods; or
- (b) at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage provided the loss, damage or delay occurred during the performance of such activities.

The responsibilities and liabilities imposed on the carrier under this instrument

goods were in the performing party's custody), it was less than clear how the burden of proof on this point was to be dealt with. It was suggested that one interpretation could require that the performing party prove that the loss or damage occurred at a time when the goods were not in that party's custody. The burden of proof should be on the claimant and this should be stated. An effort to remedy this concern was made in the suggested alternative text for subparagraph 6.3.1(a) (now article 15(1)).

(d) As well it was suggested that, whilst subparagraph 6.3.4 (now article 15(6)) created joint and several liabilities, it did not indicate how the recourse action as between the parties was to be determined. This was particularly ambiguous given that there was not necessarily a contractual relationship between the parties concerned. However, it is thought that it may be preferable to avoid regulating the recourse actions between parties who are jointly and severally liable. This has not been done in the Hague-Visby Rules (article 4 bis) nor in the Hamburg Rules (article 7).

(e) For these reasons, it was suggested in paragraph 64 of A/CN.9/525 that paragraph 6.3 (now article 15) and the definition of "performing party" in draft article 1 should be deleted or, in the alternative, that the definition should be clarified so as to ensure that it was limited to "physically" performing parties. Support was expressed for limiting the scope of paragraph 6.3 (now article 15) to "physically" performing parties. In this respect it was suggested that the words "or undertakes to perform" should be deleted from subparagraph 6.3.2(a)(ii) (now paragraph 3(b)). However, the existing definition of "performing party" in paragraph 1.17 (now paragraph 1(e)) of the draft instrument clearly states that such is a party that physically performs any of the carrier's responsibilities, so no changes to this provision would seem to be necessary.

(f) It should be noted that in paragraphs 251 to 255 of A/CN.9/526, when discussing the scope of application of the instrument, the Working Group also considered the issue of the treatment of performing parties. As noted in paragraph 256 of A/CN.9/526, it was agreed that the treatment of performing parties under the draft instrument was an important matter that would shape the entire instrument, and could help in the solution of other problems, such as the inclusion of mandatory national law in subparagraph 4.2.1 (now article 8). The anticipation of a more refined written proposal on this issue prevented a clear final or interim decision from being made at that stage. That proposal is now contained in A/CN.9/WG.III/WP.34. In light of this proposal, the Working Group may wish to consider the treatment of performing parties, as well as the other issues discussed therein.

⁸² Variant A of paragraph 1 is based on the original text of the draft instrument.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

and the carrier's rights and immunities provided by this instrument shall apply in respect of performing parties.

2. 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 16(2), 24(4), and 18, a performing party shall not be bound by this agreement unless the performing party expressly agrees to accept such responsibilities or such limits.

3. Subject to paragraph 5, the carrier shall be responsible for the acts and omissions of

(a) any performing party, and

(b) 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. The 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.

4. Subject to paragraph 5, 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.⁸³

5. If an action is brought against any person, other than the carrier, mentioned in paragraphs 3 and 4, 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.

6. 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 16, 24 and 18.

7. Without prejudice to article 19, the aggregate liability of all such persons shall not exceed the overall limits of liability under this instrument

Article 16. Delay⁸⁴

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

⁸³ Language correction to reflect that used in 6.3.2(a) and 6.3.3 (now paragraphs 3, 4 and 5).

⁸⁴ As noted in paragraph 70 of A/CN.9/525, the Working Group agreed that the text of paragraph 6.4 (now article 16) would remain as currently drafted for continuation of the discussion at a later stage.

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].

2. If delay in delivery causes loss not resulting from loss of or damage to the goods carried and hence not covered by article 17, the amount payable as compensation for such loss shall be limited to an amount equivalent to [. . . times the freight payable on the goods delayed]. The total amount payable under this provision and article 18(1) shall not exceed the limit that would be established under article 18(1) in respect of the total loss of the goods concerned.

[6.5 Deviation⁸⁵]

[6.6 Deck cargo⁸⁶]

Article 17. Calculation of compensation⁸⁷

1. Subject to article 18⁸⁸, the compensation payable by the carrier for loss of or damage to the goods shall be calculated by reference to the value of such goods at the place and time of delivery according to the contract of carriage.

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.

3. In case of loss of or damage to the goods ~~and save as provided for in article 16~~⁸⁹, the carrier shall not be liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 except where the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of article 18⁹⁰.

Article 18. Limits of liability⁹¹

⁸⁵ Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

⁸⁶ Moved to new chapter 6 under the heading "Additional provisions relating to carriage by sea [or by other navigable waters]". See *supra* note 50.

⁸⁷ See *supra* note 80.

⁸⁸ A linkage between the provisions relating to the calculation of compensation and the limits of liability was suggested in paragraph 60 of A/CN.9/525.

⁸⁹ The words that have been stricken out do not seem necessary, since paragraph 6.4 (now article 16) deals only with financial loss.

⁹⁰ Further to paragraphs 57 to 59 of A/CN.9/525, this phrase was intended to include a provision standardizing the calculation of the compensation, and that this calculation should take account of the intention of the parties as expressed in the contract of carriage. As noted in paragraph 58 of A/CN.9/525, it was suggested that whether or not consequential damages should be included in the compensation payable should depend on what was the intention of the parties.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

1. Subject to article 16(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, ~~for where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.~~⁹²

[2. Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply.]⁹³

⁹¹ It was noted in paragraph 85 of A/CN.9/525 that the Working Group decided to retain the entire text of paragraph 6.7 (now article 18) in the draft instrument for continuation of the discussion at a later stage.

During the 11th session of the Working Group, the scope of application of the instrument was discussed, and in conjunction with that discussion, the subject of limits of liability was also discussed. As noted in paragraphs 257 to 263 of A/CN.9/526, several suggestions were made with respect to limits of liability, but at this stage no instructions were given to the Secretariat. As noted in paragraph 257 of A/CN.9/526, there was, however, wide support for the suggestions that no attempt should be made to reach an agreement on any specific amount for the limits of liability under this provision at the current stage of the discussion, and that a rapid amendment procedure for the limit on liability should be established by the draft instrument.

⁹² As noted in paragraph 259 of A/CN.9/526, the Working Group recalled that the final phrase in subparagraph 6.7.1 (now paragraph 1) was bracketed pending a decision as to whether any mandatory provision should be one-sided or two-sided mandatory, and that the Working Group agreed provisionally that the square brackets should be removed.

The Working Group may also wish to consider the following alternative language for paragraph 1: "Subject to article 16(2) ~~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~~ ~~However,~~ where the nature and value of the goods has been declared by the shipper before shipment and included in the contract particulars, ~~for where a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper,~~ the compensation payable is limited to such amount." The Working Group may wish to note that the final additional phrase of this alternative text should be reassessed in light of article 88, as it may be unnecessary if article 88 is adopted. The Working Group may wish to consider the method that should be used for determining an amount, possibly through the use of statistical data.

⁹³ Further, when discussing the issue relating to the treatment of non-localised damages, the proposal was made in paragraph 264 of A/CN.9/526, and adopted by the Working Group in paragraph 267, to insert this paragraph after subparagraph 6.7.1 (now paragraph 1) in square brackets. It now appears as paragraph 2.

The following presents several different alternatives for paragraph 2: "Notwithstanding paragraph 1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during [the carriage preceding or subsequent to the sea carriage][either of the periods referred to in article 8(1)(a) and (b)], the highest limit of liability [in the international [and national] mandatory provisions that govern the different parts of the transport][provided for in any

3. 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.

4. 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.

Article 19 Loss of the right to limit liability

Neither the carrier nor any of the persons mentioned in article 15(3) and (4) shall be entitled to limit their liability as provided in articles [16(2)] 24(4), and 18 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]⁹⁴ 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.

Article 20 Notice of loss, damage, or delay

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 notice⁹⁵ of loss of or damage to [or in connection with]⁹⁶ the goods, indicating the general nature of such loss or damage, shall have been given [by

international convention [or national law] that may apply in accordance with article 8][that would have governed any contract which would have been concluded between the parties for each part of the carriage which involved one mode of transport][that would have been applicable had a specific contract been made for that mode of transport] shall apply.”

⁹⁴ During the initial discussion of this provision, as noted in paragraph 92 of A/CN.9/525, the Working Group took note of the comments and suggestions made and decided to maintain the text of paragraph 6.8 (now article 19) in the draft instrument for continuation of the discussion at a later stage. As noted in paragraphs 260 and 261 of A/CN.9/526, however, after a discussion concerning the reference to the “personal act or omission” of the person claiming the right to the liability limit, the Working Group agreed to place the word “personal” between square brackets for continuation of the discussion at a later stage.

⁹⁵ Paragraph 94 of A/CN.9/525 instructs the Secretariat to take account both the broad support for written notice and for the accommodation of electronic communications when preparing the revised draft of the text. Paragraph 2.3 (now article 5) of the draft instrument states that the notice in, *inter alia*, subparagraph 6.9.1 (now paragraph 1) may be made using electronic communication; otherwise, it must be made in writing.

⁹⁶ In accordance with the comments in paragraph 97 of A/CN.9/525, the words “or in

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

or on behalf of the consignee]⁹⁷ 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][a reasonable time][__ working days at the place of delivery][__ consecutive days]⁹⁸ after the delivery of the goods. Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection⁹⁹ of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.

2. No compensation shall be payable under article 16 unless notice of such loss¹⁰⁰ was given to the person against whom liability is being asserted within 21 consecutive days following delivery of the goods.

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 was given to the carrier, and notice given to the carrier shall have the same effect as a notice given to the performing party that delivered the goods.

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 and [for][must provide] access to records and documents relevant to the carriage of the goods¹⁰¹.

Article 21 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 and delay in delivery of such goods¹⁰², whether the action is founded in contract, in tort, or otherwise.

CHAPTER 6. ADDITIONAL PROVISIONS RELATING TO CARRIAGE BY SEA [OR BY OTHER NAVIGABLE WATERS]¹⁰³

connection with” have been placed in square brackets and the words “by or on behalf of the consignee” have been added. It is possible that such comments have not met with sufficient support.

⁹⁷ *Ibid.*

⁹⁸ Paragraph 95 of A/CN.9/525 instructed the Secretariat to place “three working” in square brackets, together with other possible alternatives.

⁹⁹ It was suggested in paragraph 95 of A/CN.9/525 that “concurrent inspection” or “*inspection contradictoire*” might be more appropriated phrases in a civil law context.

¹⁰⁰ The Working Group may wish to consider whether language should be added to indicate that this loss should be limited to the loss for delay.

¹⁰¹ Paragraph 100 of A/CN.9/525 noted that the provision should also include reference to providing access to records and documents relevant to the carriage of goods. The words in square brackets indicate two alternatives: the first link the access to the obligation to give “reasonable facilities”, the second is independent and the notion of reasonability is not applied to it.

¹⁰² Paragraph 102 of A/CN.9/525 noted wide support for the inclusion of a reference to delay in delivery.

¹⁰³ As noted in note 50, *supra*, in light of the wide support expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port

Article 22. Liability of the carrier¹⁰⁴Variant A¹⁰⁵

1. [Notwithstanding the provisions of article 14(1) the carrier shall not be liable for loss, damage or delay arising or resulting from fire on the ship, unless caused by the fault or privity of the carrier.]¹⁰⁶

2. Article 14 shall also apply in the case of the following events:

(a) saving or attempting to save life or property at sea; and

[(b) perils, dangers and accidents of the sea or other navigable waters;]

Variant B

Article 14 shall also apply in the case of the following events¹⁰⁷

(a) saving or attempting to save life or property at sea;

[(b) perils, dangers and accidents of the sea or other navigable waters;]
[and]

[(c) fire on the ship, unless caused by fault or privity of the carrier;]¹⁰⁸

(see paragraph 239 of A/CN.9/526), it was thought that separating out provisions of the draft instrument that should apply only to the carriage by sea might assist the restructuring of the draft instrument. As a consequence, the following provisions in article 6 (now chapter 5) have been moved from their position in the original draft to be grouped together under this heading: subparagraph 6.1.2 (now article 22) and the relevant portions of subparagraph 6.1.3 (now also in article 22) on the basis of liability, paragraph 6.5 (now article 23) on deviation, and paragraph 6.6 (now article 24) on deck cargo.

¹⁰⁴ If Variant B or C for articles 14(1) and (2) is adopted, the Working Group may wish to re-examine this article with a view to adopting a consistent approach in terms of the shifting presumptions.

¹⁰⁵ Variant A of article 22 is based on the original text of the draft instrument.

¹⁰⁶ Subparagraph 6.1.2(a) has been deleted in view of the statements in paragraphs 36 and 37 of A/CN.9/525 that it was widely felt that the removal of that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. It was also emphasized that such a step might be essential in the context of establishing international rules for door-to-door transport. A related view was that, although it was probably inevitable to do away with the general exception based on error in navigation, subparagraph (a) should be maintained in square brackets pending a final decision to be made at a later stage on what was referred to as “the liability package” (i.e., the various aspects of the liability regime applicable to the various parties involved). After discussion, however, the Working Group decided that subparagraph (a) should be deleted. Subparagraph 6.1.2(b) (now article 22(1)) was kept in square brackets pursuant to the decision of the Working Group in paragraph 37 of A/CN.9/525.

In paragraph 43 of A/CN.9/525, it is noted that the suggestion was made that if the case of fire on the ship were to be maintained, it should be moved from subparagraph 6.1.2 to subparagraph 6.1.3 (now both contained in article 22). This has not been done in Variant A, but it has been done in Variant B.

¹⁰⁷ See *supra* note 106.

¹⁰⁸ In paragraph 43 of A/CN.9/525, it is noted that the suggestion was made that if the case of fire on the ship were to be maintained, it should be moved from subparagraph 6.1.2 to subparagraph 6.1.3 (now article 22).

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 23. Deviation

1. The carrier is not liable for loss, damage, or delay in delivery caused by a deviation¹⁰⁹ to save or attempt to save life [or property]¹¹⁰ at sea[, or by any other [reasonable] deviation]¹¹¹.
2. Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach only has effect consistently with this instrument.¹¹²

Article 24. Deck cargo¹¹³

1. Goods may be carried on or above deck only if
 - (a) such carriage is required by applicable laws or administrative rules or regulations, or
 - (b) they are carried in or on containers on decks that are specially fitted to carry such containers, or
 - (c) in cases not covered by paragraphs (a) or (b) 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.
2. If the goods have been shipped in accordance with paragraphs 1(a) and (c), 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 paragraph 1(b), 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 paragraph 1, the carrier shall be liable, irrespective of article 14, for loss of or damage to the goods or delay in delivery that are exclusively the consequence of their carriage on deck.

¹⁰⁹ The Working Group may wish to consider whether, as noted in paragraph 73 of A/CN.9/525, the phrase "authorized by the shipper or a deviation" should be inserted after the phrase "...in delivery caused by a deviation" should be added.

¹¹⁰ Further to paragraph 72 of A/CN.9/525, reference to salvage of property has been placed in square brackets because objections were raised to the inclusion of salvage of property..

¹¹¹ The reference to any other reasonable deviation has been placed in square brackets since concerns were raised with respect to its use in paragraph 73 of A/CN.9/525. It was also suggested in paragraph 72 of A/CN.9/525 that the draft article could include language to the effect that, when goods are salvaged as a result of the deviation, compensation received as a result of the salvage could be used as compensation for loss caused by the resulting delay.

¹¹² Alternative language for this paragraph could read as follows: "Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this instrument." If such language is adopted, the Working Group may wish to consider whether paragraph 1 is necessary.

¹¹³ Further to paragraph 80 of A/CN.9/525, the Working Group decided to retain the structure and content of paragraph 6.6 (now article 24) for continuation of the discussion at a later stage. The Working Group may wish to note that this article depends heavily on the definition of "container" in article 1(s).

3. If the goods have been shipped in accordance with paragraph 1(c), 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 paragraph 1(c) 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.

4. If the carrier under this article 24 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 16 and 18; 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.

CHAPTER 7. OBLIGATIONS OF THE SHIPPER

Article 25.

[Subject to the provisions of the contract of carriage,]¹¹⁴ the shipper shall deliver the goods ready for carriage ~~and~~¹¹⁵ 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.¹¹⁶

Article 26.

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 25.¹¹⁷

¹¹⁴ As noted in paragraph 148 of A/CN.9/510, the Working Group agreed to place the phrase "Subject to the provisions of the contract of carriage" in square brackets pending further consultations and discussions on the scope of the obligation of the carrier and the extent to which it was subject to freedom of contract.

¹¹⁵ Paragraphs 145 and 148 of A/CN.9/510 noted the Working Group's agreement to remove the word "and".

¹¹⁶ The suggestion in paragraph 148 of A/CN.9/510 to prepare alternative wording based on articles 12, 13 and 17 of the Hamburg Rules was noted by the Working Group.

¹¹⁷ As noted in paragraph 151 of A/CN.9/510, some doubts were expressed as to whether the draft provision, which focused on the duties of the carrier, was properly placed in the chapter covering the obligations of the shipper. However, it was considered that, in view of the close link between draft article 7.2 (now, article 26) and the other provisions of draft chapter 7 (now, articles 25-32), the placing of the draft provision was not necessarily inappropriate. Subject to the other observations expressed in paragraphs 149 to 151 of A/CN.9/510, the Working Group decided to retain the draft provision with a view to considering its details at a future session (paragraph 152 of A/CN.9/510).

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 27.

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 34(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.¹¹⁸

Article 28.

The information, instructions, and documents that the shipper and the carrier provide to each other under articles 26 and 27 must be given in a timely manner, and be accurate and complete.¹¹⁹

Article 29.

Variant A¹²⁰

The shipper and the carrier are liable¹²¹ 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 26, 27, and 28¹²²

¹¹⁸ As noted in paragraph 153 of A/CN.9/510, the Working Group approved the text of paragraph 7.3 (now article 27) as a sound basis for continuation of the discussion at a later stage.

¹¹⁹ As noted in paragraph 154 of A/CN.9/510, the Working Group agreed that the text should be retained for further consideration.

¹²⁰ Variant A of article 29 is based on the original text of the draft instrument.

¹²¹ As noted in paragraph 156 of A/CN.9/510, a concern was raised that the type of liability established by paragraph 7.5 (now paragraph 1) was inappropriate given that the obligations set out in paragraphs 7.2, 7.3 and 7.4 (now, articles 26, 27 and 28) were not absolute and involved subjective judgements. Imposing strict liability for failure to comply with what were described as flexible and imprecise obligations seemed excessive to some delegations. It was also stated that as currently drafted, the provision was ambiguous and that it was not clear what its effect would be either as to liability to a consignee or a controlling party or as to whether a carrier would be liable to a consignee for the shipper's failure to provide adequate particulars and vice versa.

¹²² Other concerns expressed in paragraph 157 A/CN.9/510 were that the provision did not accommodate the situation where both the shipper and the carrier were concurrently liable by allowing for shared liability, and that the provision was ambiguous in that it was not clear what was meant by "loss or damage", when, for example, compared to paragraph 7.6 (now, article 30) which referred to "loss damage or injury". Paragraph 158 of A/CN.9/510 noted that the Working Group concluded that paragraph 7.5 (now article 29) should be placed between square brackets, pending its re-examination in the light of the concerns and suggestions noted in paragraphs 156 and 157. The Secretariat was requested to prepare a revised draft, with possible alternative texts to take

Variant B

[1. The shipper is liable to the carrier, the consignee and the controlling party for any loss or damage [or injury] caused by its failure to comply with its obligations under articles 27 and 28.

2. The carrier is liable to the shipper, the consignee and the controlling party for any loss or damage [or injury] caused by its failure to comply with its obligations under articles 26 and 28.

3. When loss or damage [or injury] is caused jointly by the failure of the shipper and of the carrier to comply with their respective obligations, the shipper and the carrier shall be jointly liable to the consignee or the controlling party for any such loss or damage [or injury].]

Article 30.Variant A¹²³

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 25, 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.

Variant B

A shipper is not [responsible][liable] for loss or damage sustained by the carrier or a ship from any cause without the act, fault or neglect of the shipper[, its agents or servants].¹²⁴

Variant C

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 25 unless the shipper proves it did not cause or contribute to the loss or damage.¹²⁵

Article 31.

If a person identified as “shipper” in the contract particulars, although not the

account of the suggestions made. At the close of the discussion, the Working Group generally agreed that in revising the draft provision, due consideration should be given to the fact that the information referred to in paragraph 7.5 (now article 29) might be communicated by way of electronic messages, i.e., fed into an electronic communication system and replicated with or without change in the transmission process. In view of the comments made, the alternative texts in Variant B have been prepared.

¹²³ Variant A of article 30 is based on the original text of the draft instrument.

¹²⁴ As noted in paragraphs 161 and 170 of A/CN.9/510, it was agreed that this alternative text appear along with the original text of paragraph 7.6 (now Variant A) so that both texts could be considered again at a future session of the Working Group. Paragraph 166 of A/CN.9/510 also noted that it might be necessary to delete the reference in this alternative text to “agents or servants” of the shipper, as the matter might be dealt with in paragraph 7.8 (now article 32).

¹²⁵ This alternative is intended to mirror the language used in Variant C for articles 14(1) and (2). The Working Group may wish to consider mirror language for this provision based on which alternative for articles 14(1) and (2) it adopts.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

shipper as defined in article 1(d), 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 57, and (b) entitled to the shipper's rights and immunities provided by this chapter and by chapter 13.

Article 32.

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.¹²⁶

CHAPTER 8. TRANSPORT DOCUMENTS AND ELECTRONIC RECORDS

Article 33. Issuance of the transport document or the electronic record

Upon delivery of the goods to the carrier or performing party

(a) 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;

(b) the shipper or, if the shipper so indicates to the carrier, the person referred to in article 31, 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 3 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.¹²⁷

¹²⁶ As noted in paragraphs 169 and 170 of A/CN.9/510, the Working Group agreed that paragraph 7.8 (now article 32) was a basis on which to continue discussions whilst keeping in mind the various concerns that had been expressed as to its current wording. At the close of the discussion, it was suggested that paragraph 7.8 (now article 32) should be narrowed so as to apply only to shipper obligations that were delegable rather than those obligations that were non-delegable. It was agreed that the text in paragraph 7.8 (now article 32) should be retained along with the proposal set out at paragraph 161 of A/CN.9/510 as an alternative for the current text of paragraph 7.6 (now article 30) so that both texts could be considered again at a future session of the Working Group.

¹²⁷ As noted in paragraph 25 of A/CN.9/526, the Working Group found the substance of paragraph 8.1 (now article 33) to be generally acceptable. In addition, with respect to subparagraph (i) (now paragraph (a)), a suggestion was made that the words "transport document" should be replaced by the word "receipt". While the term "transport document" was generally preferred for reasons of consistency in terminology, it was acknowledged that, since not all transport documents as defined under paragraph 1.20 (now article 1(k)) served the function of

Article 34. Contract Particulars

1. The contract particulars in the document or electronic record referred to in article 33 must include

a description of the goods;

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, as furnished by the shipper before the carrier or a performing party receives the goods¹²⁸ and

(ii) the weight as¹²⁹ 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.¹³⁰

evidencing receipt of the goods by the carrier, it was important to make it abundantly clear that, under subparagraph 8.1(i) (now paragraph (a)), the transport document should serve the receipt function. Further, as noted in paragraph 26 of A/CN.9/526, a question was raised as to whether paragraph 8.1 (now article 33) might interfere with various existing practices regarding the use of specific types of transport documents such as “received for shipment” and “shipped on board” bills of lading. It was stated in response that paragraph 8.1 (now article 33) had been drafted broadly to encompass any type of transport document that might be used in practice, including any specific types of bill of lading or even certain types of non-negotiable waybills.

¹²⁸ As noted in paragraph 27 of A/CN.9/526 the Working Group agreed that these words be added. As noted in paragraph 28 of A/CN.9/526, a concern was expressed that the addition of this phrase might be read as placing a heavy liability on the shipper, particularly if article 8 (now articles 33 to 40) was to be read in combination with paragraph 7.4 (now article 28). It was pointed out in response that subparagraph 8.2.1 (now paragraph 1) was not to be read as creating any liability for the shipper under draft article 7 (now chapter 7).

¹²⁹ The concern was expressed in paragraph 28 of A/CN.9/526 that the words “as furnished by the shipper before the carrier or a performing party receives the goods” might be read as placing a heavy burden on the shipper, and the response that this provision was not intended to create any liability for the shipper. The Working Group may wish to consider replacing the phrase “as furnished by the shipper” with the phrase “if furnished by the shipper”, and that care should be taken with respect to the use of those phrases in each of the relevant provisions.

¹³⁰ As noted in paragraph 75 of A/CN.9/526, it was suggested that the Working Group should consider redrafting subparagraph 8.2.1 (now paragraph 1) to include the name and address of the consignee in the contract particulars that must be put into the transport document. See also the suggested changes to subparagraph 10.3.1 (now article 48), *infra*. The Working Group may wish to determine whether the name and address of the consignee belong on a list of mandatory

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

2. The phrase “apparent order and condition of the goods” in paragraph 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.¹³¹

Article 35 Signature¹³²

(a) A transport document shall be signed by 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 authorization of the electronic record.¹³³

Article 36. Deficiencies in the contract particulars¹³⁴

1. The absence of one or more of the contract particulars referred to in article 34(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.¹³⁵

2. If the contract particulars include the date but fail to indicate the significance thereof, then the date is 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

elements. The Working Group may also wish to discuss the sanction for failure to provide mandatory information. Such sanctions may be different according to whether a transport document is negotiable or not.

¹³¹ Paragraph 31 of A/CN.9/526 noted that the Working Group found the substance of subparagraph 8.2.2 (now paragraph 2) to be generally acceptable.

¹³² The Working Group may wish to consider whether “signature” should be defined as, for example, in article 14(3) of the Hamburg Rules, particularly in light of modern practice.

¹³³ As noted in paragraph 32 of A/CN.9/526, the Working Group agreed that the substance of subparagraph 8.2.3 (now article 35) was generally acceptable, but that the provision might need to be further discussed at a later stage with a view to verifying its consistency with the UNCITRAL Model Law on Electronic Signatures 2001. In redrafting, it may be useful to bear in mind articles 14(2) and (3) of the Hamburg Rules.

¹³⁴ For improved consistency, this provision has been moved here from its original location.

¹³⁵ As noted in paragraph 34 of A/CN.9/526, the Working Group found the substance of subparagraph 8.2.4 (now paragraph 1) to be generally acceptable.

loaded on board a vessel, the date on which the carrier or a performing party received the goods.¹³⁶

3. 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.]]¹³⁷

4. 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 39, 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.¹³⁸

Article 37. Qualifying the description of the
goods in the contract particulars

The carrier, if acting in good faith when issuing a transport document or an electronic record, may qualify the information mentioned in article 34(1)(a),¹³⁹ 34(1)(b) or 34(1)(c) in the circumstances and in the manner set out below in order to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper:

- (a) For non-containerized goods
- (i) if the carrier can show that it had no reasonable means of checking the information furnished by the shipper, it may so state in the contract particulars, indicating the information to which it refers, or

¹³⁶ As noted in paragraph 55 of A/CN.9/526, the Working Group found the substance of subparagraph 8.4.1 (now paragraph 2) to be generally acceptable, taking into account the issue raised with respect to electronic records that the terms “transport document or electronic record” are repeated throughout the provisions of chapter 8 of the draft instrument, and that the repetition of this phrase emphasized the distinction between transport documents and electronic records, rather than focusing on the content of the document, as intended in the mandate of the Working Group.

¹³⁷ As noted in paragraph 60 of A/CN.9/526, the prevailing view in the Working Group was the subparagraph 8.4.2 (now paragraph 3) identified a serious problem that must be treated in the draft instrument, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep subparagraph 8.4.2 (now paragraph 3) in square brackets in the draft instrument, and to discuss it in greater detail at a future date.

¹³⁸ As noted in paragraph 61 of A/CN.9/526, the Working Group found the substance of subparagraph 8.4.3 (now paragraph 4) to be generally acceptable.

¹³⁹ The addition of a reference to subparagraph 8.2.1(a) (now article 34(1)(a)) was suggested in paragraph 36 of A/CN.9/526.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

(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 or a performing party in a closed container, unless¹⁴⁰ 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 before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate¹⁴¹, the carrier may include a 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.

(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
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, or
- (ii) the carrier can show that there was no commercially reasonable means of checking the weight of the container.¹⁴²

¹⁴⁰ The phrase “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 before issuing the transport document, provided, however, that in such case the carrier may include such clause if it reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate” has been moved to this position in the chapeau from its original position at the end of the paragraph in order to clarify that it is intended to apply to the entire paragraph.

¹⁴¹ As noted in paragraph 36 of A/CN.9/526, another suggestion was that language along the lines of subparagraph 8.3.1(a)(ii) (now paragraph (a)(ii)) should be included also in subparagraph 8.3.1(b) (now paragraph b) to address the situation where the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. The Working Group may also wish to note the suggestions made in paragraph 37 of A/CN.9/526 that the carrier who decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification, that the draft instrument should deal with the situation where the carrier accepted not to qualify the description of the goods, for example not to interfere with a documentary credit, but obtained a guarantee from the shipper. Another suggestion was that, where the carrier acting in bad faith had voluntarily avoided to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

¹⁴² As noted in paragraph 36 of A/CN.9/526, it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container. The Working Group may wish to note that this subparagraph is intended to align with the provision on the reasonable means of checking, in article 38.

Article 38 Reasonable means of checking and good faith

For purposes of article 37:

(a) a “reasonable means of checking” must be not only physically practicable but also commercially reasonable;

(b) the 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.

(c) The burden of proving whether the 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.¹⁴³

Article 39. Prima facie and conclusive evidence

Except as otherwise provided in article 40, 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) Variant A of paragraph (b)(ii)¹⁴⁴

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].

Variant B of paragraph (b)(ii)

if no negotiable transport document or no negotiable electronic record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars.¹⁴⁵

¹⁴³ As noted in paragraph 43 of A/CN.9/526, the Working Group found the substance of subparagraph 8.3.2 (now article 38) to be generally acceptable.

¹⁴⁴ Variant A of paragraph (b)(ii) is based on the original text of the draft instrument.

¹⁴⁵ As noted in paragraph 48 of A/CN.9/526, the prevailing view in the Working Group was to retain subparagraph 8.3.3(b)(ii) (now paragraph (b)(ii)) in square brackets and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made in paragraphs 45 to 47.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 40. Evidentiary effect of qualifying clauses

If the contract particulars include a qualifying clause that complies with the requirements of article 37, then the transport document will not constitute *prima facie* or conclusive evidence under article 39 to the extent that the description of the goods is qualified by the clause.¹⁴⁶

CHAPTER 9. FREIGHT¹⁴⁷

Article 41.

[1. Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 7(3), [and is payable when it is earned,]]¹⁴⁸

¹⁴⁶ As noted in paragraphs 50 to 52 of A/CN.9/526, while some support was expressed for redrafting subparagraph 8.3.4 (now article 40), the prevailing view was that it should be retained in substance for continuation of the discussion at a future session.

The Working Group may also wish to consider the alternative language for subparagraph 8.3.4 (now article 40) suggested in paragraphs 153 and 154 of A/CN.9/WG.III/WP.21:

40(1) "If the contract particulars include a qualifying clause, then the transport document will not constitute *prima facie* or conclusive evidence under article 39 ~~8.3.3~~, to the extent that the description of the goods is qualified by the clause, when the clause is "effective" under paragraph ~~2 8.3.5~~."

It would then be necessary to add a new article 8.3.5 (perhaps as paragraph 2), which might provide:

2. "A qualifying clause in the contract particulars is effective for the purposes of paragraph ~~1 8.3.4~~ under the following circumstances:

(a) For non-containerized goods, a qualifying clause that complies with the requirements of article ~~37 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 ~~37 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."

¹⁴⁷ It was said by way of general comment in paragraph 172 of A/CN.9/510, that neither the Hague nor the Hamburg regimes contained provisions on freight and that it was questionable whether the draft instrument would benefit from dealing with this issue. Further reservations were noted in that paragraph as to the inclusion of freight provisions were based on the fact that practices varied widely between different trades. Paragraph 183 of A/CN.9/510 noted that the draft provision should be restructured, with paragraphs 9.1(a) (now article 41(1)) and 9.2(b) (now article 42(2)) being combined in a single provision, paragraph 9.1(b) (now article 41(2)) standing alone and paragraphs 9.2(b) and (c) (now articles 42(2) and (3)) also being combined. It was also provisionally agreed that appropriate clarification should be introduced to limit the application of paragraphs 9.2(b) and (c) (now articles 42(2) and (3)) to cases where specific agreement had been concluded between the parties.

¹⁴⁸ As noted in paragraph 174 of A/CN.9/510, there was general agreement that the principle of freedom of contract should apply to determining when the payment of freight was earned as well as when the payment of freight became due. See also *ibid*, paragraph 183 of A/CN.9/510.

unless the parties have agreed that the freight is earned, wholly or partly, at an earlier point in time.

2. Unless otherwise agreed, no freight becomes due for any goods that are lost before the freight for those goods is earned.

Article 42.

Variant A¹⁴⁹

1. 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.

2. 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.

3. 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].

Variant B¹⁵⁰:

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, unless otherwise agreed, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery, nor is payment of freight 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 of which has not yet been agreed or established]¹⁵¹.

Article 43.

1. Unless otherwise agreed, the shipper is liable to pay the freight and other charges incidental to the carriage of the goods.

2. 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:

- (a) with respect to any liability under chapter 7 of the shipper or a person mentioned in article 31; or
- (b) with respect to any amounts payable to the carrier under the contract

¹⁴⁹ Variant A of article 42 is based on the original text of the draft instrument.

¹⁵⁰ See *supra* note 147, paragraph 183 of A/CN.9/510.

¹⁵¹ As noted in paragraph 182 of A/CN.9/510, wide support was expressed for including in the draft provision the words currently between square brackets, "the indebtedness or the amount of which has not yet been agreed or established".

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

of carriage, except to the extent that the carrier has adequate security pursuant to article 45 or otherwise for the payment of such amounts.

(c) to the extent that it conflicts with article 62.¹⁵²

Article 44.

1. If the contract particulars in a negotiable¹⁵³ transport document or a[n] negotiable¹⁵⁴ 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.

[If the contract particulars in a non-negotiable transport document or in a non-negotiable electronic record contain a statement “freight prepaid” or a statement of a similar nature, then it shall be presumed that the shipper is liable for the payment of the freight.]¹⁵⁵

2.

Variant A of paragraph 2¹⁵⁶

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][the right of the consignee to obtain delivery of the goods is conditional on the payment of freight].¹⁵⁷

Variant B of paragraph 2

If the contract particulars in a transport document or an electronic record contain the statement “freight collect”, or a statement of a similar nature, that constitutes a provision that, in addition to the shipper, any holder or consignee who takes delivery of the goods or exercises any right in relation to the goods will thereupon become liable for the freight.¹⁵⁸

¹⁵² As noted in paragraph 189 of A/CN.9/510, the Working Group took note of the criticism of provision 9.3(b) (now paragraph 2) (noted in paragraphs 185 to 188 of A/CN.9/510) and decided to postpone its decision on the matter until the issue, including the practical context in which the provision was to operate, was further studied.

¹⁵³ Paragraph 110 of A/CN.9/525 noted the suggestion that the declaration in subparagraph 9.4(a) (now paragraph 1) was too radical in freeing the holder and consignee of any responsibility for the payment of freight, and instead that it would be better to create a presumption of the absence of a debt for freight. However, the alternative view was expressed that subparagraph 9.4(a) (now paragraph 1) should not create a presumption that the freight had been prepaid. A possible answer to this suggestion reported in paragraph 110 would be to draw a distinction between negotiable and non-negotiable transport documents or electronic records.

¹⁵⁴ *Ibid.*

¹⁵⁵ See *supra* note 153.

¹⁵⁶ Variant A of paragraph 2 is based on the original text of the draft instrument.

¹⁵⁷ See *supra* note 153.

¹⁵⁸ As noted in paragraph 111 of A/CN.9/525, it was said that draft articles 12.2.2 and 12.2.4 (now articles 60(2) and 62) were intimately linked with subparagraph 9.4(b) (now paragraph 2), and that consideration of these provisions should be undertaken at the same time. It was suggested that if the consignee took any responsibility for the delivery of the goods, it should also be

Article 45.

1. [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

(a) freight, deadfreight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods,

(b) any damages due to the carrier under the contract of carriage,

(c) 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.

2. If the payment as referred to in paragraph 1 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.¹⁵⁹

CHAPTER 10. DELIVERY TO THE CONSIGNEE

Article 46.

When the goods have arrived at their destination, the consignee [that exercises any of its rights under the contract of carriage]¹⁶⁰ shall accept delivery of the goods at the time and location mentioned in article 7(3). [If the consignee, in breach of this obligation, leaves the goods in the custody of the carrier or the performing party, the 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

responsible for the freight. At the same time, it was noted that subparagraph 9.4(b) (now paragraph 2) could serve to provide information or a warning that freight was still payable. However, it was suggested that the payment of freight should be a condition for the consignee to obtain delivery of the goods, rather than an obligation. It was further noted that subparagraph 9.4(b) (now paragraph 2) should focus on the payment of freight in fact, rather than on who should bear the obligation for the unpaid freight. As noted in paragraph 112 of A/CN.9/525, one proposal to remedy the perceived problem was to replace the words “such a statement puts the consignee on notice that it may be liable for the payment of the freight” with the words, “the payment of freight is a condition for the exercise by the consignee of the right to obtain delivery of the goods.” Paragraph 113 of A/CN.9/525 noted the alternative suggestion used in order to overcome the problems outlined in paragraphs 111 and 112.

¹⁵⁹ Although the text of paragraph 9.5 (now article 45) was heavily criticised in paragraphs 115 to 122 of A/CN.9/525, it does not appear that the Secretariat has been requested to prepare a new draft or an alternative draft. Paragraph 123 of A/CN.9/525 noted that the Working Group decided that paragraph 9.5 (now article 45) should be retained in the draft instrument for continuation of the discussion at a later stage.

¹⁶⁰ As noted in paragraph 67 of A/CN.9/526, a preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

omission of the carrier [or of the performing party]¹⁶¹ done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result.¹⁶²

Article 47.

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.¹⁶³

Article 48.

If no negotiable transport document or no negotiable electronic record has been issued:

(a) If the name and address of the consignee is not mentioned in the contract particulars the controlling party shall advise the carrier thereof, prior to or upon the arrival of the goods at the place of destination;¹⁶⁴

(b) Variant A of paragraph (b)¹⁶⁵

The carrier shall deliver the goods at the time and location mentioned in article 7(3) to the consignee upon the consignee's production of proper identification;¹⁶⁶

Variant B of paragraph (b)

As a requisite for delivery, the consignee shall produce proper identification.

Variant C of paragraph (b)

The carrier may refuse delivery if the consignee does not produce proper identification.

¹⁶¹ As noted in paragraph 70 of A/CN.9/526, it was suggested that the concern that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of paragraph 10.1 (now article 46) could be clarified with the addition of the phrase "or of the performing party" after the phrase "personal act or omission of the carrier".

¹⁶² As noted in paragraph 67 of A/CN.9/526, suggestions were made that paragraph 10.1 (now article 46) and 10.4 (now articles 50, 51 and 52) could be merged, or that to reduce the confusion caused by the interplay of paragraphs 10.1 (now article 46) and 10.4 (now articles 50, 51, and 52), the second sentence of paragraph 10.1 (now article 46) could be deleted, and paragraph 10.4 (now articles 50, 51, and 52) could be left to stand on its own. The second of these alternatives has been chosen, and the last sentence has been placed in square brackets.

¹⁶³ As noted in paragraph 73 of A/CN.9/526, the Working Group found the substance of paragraph 10.2 (now article 47) to be generally acceptable.

¹⁶⁴ As noted in paragraph 77 of A/CN.9/526, the Working Group found the principles embodied in subparagraph 10.3.1 (now article 48) to be generally acceptable. The Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

The suggestion made in paragraph 75 of A/CN.9/526, regarding the identity of the consignee has been incorporated in the text. See also the note to subparagraph 8.2.1 (now article 34(1)), *supra*, note 130.

¹⁶⁵ Variant A of paragraph (b) is based on the original text of the draft instrument.

¹⁶⁶ The suggestion made in paragraph 76 of A/CN.9/526 that subparagraph 10.3.1(ii) (now paragraph b) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier has been incorporated in the text of both Variant B and C.

(c) If the consignee 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 the controlling party, the shipper, accordingly. In such event such controlling party or shipper shall give 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 31 shall be deemed to be the shipper for purposes of this paragraph.¹⁶⁷

Article 49.

If a negotiable transport document or a negotiable electronic record has been issued, the following provisions shall apply:

(a) (i) Without prejudice to article 46 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 7(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 cease to have any effect or validity.

(ii) Without prejudice to article 46 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 7(3) to such holder if it demonstrates in accordance with the rules of procedure mentioned in article 6 that it is the holder of the electronic record. Upon such delivery, the electronic record ceases to have any effect or validity.¹⁶⁸

(b) 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 accordingly the controlling party or, if, after reasonable effort, it is unable to identify or find the controlling party, the shipper. In such event the 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 31 shall be deemed to be the shipper for purposes of this paragraph.¹⁶⁹

¹⁶⁷ As noted in paragraph 82 of A/CN.9/526, a suggestion was made during the consideration of subparagraph 10.3.2(b) (now article 49(b)) that the principles expressed therein should also apply in cases where no negotiable instrument had been issued. A provision to this effect has been added as subparagraph 10.3.1(iii) (now paragraph (c)).

¹⁶⁸ Subject to the note of caution raised in paragraph 80 of A/CN.9/526, that the Working Group would have to carefully examine the balance of different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution, as noted in paragraph 81 of A/CN.9/526, the Working Group found the substance of subparagraphs 10.3.2(a)(i) and (ii) (now paragraphs (a)(i) and (ii)) to be generally acceptable.

¹⁶⁹ The first suggestion made in paragraph 82 of A/CN.9/526, that the carrier should have

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

(c) [Notwithstanding the provision of paragraph (d) of this article,]¹⁷⁰ the carrier that delivers the goods upon instruction of the controlling party or the shipper in accordance with paragraph (b) 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 6, that it is the holder.

(d) [Except as provided in paragraph (c) above]¹⁷¹ 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 (a) (ii) 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 [against the carrier]¹⁷² 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. [This paragraph does not

the obligation of accepting the negotiable transport document and of notifying the controlling party if the holder of the document did not claim delivery. These concerns appear to be already addressed by the text of subparagraph 10.3.2(b) (now paragraph b). The second suggestion in paragraph 82 of A/CN.9/526 that this subparagraph should set out the consequences for the carrier when it failed to notify the controlling party or the shipper or the deemed shipper has met with objections and, therefore, has not been included in the revised text.

¹⁷⁰ As noted in paragraph 83 of A/CN.9/526, it was suggested that it was unclear how subparagraphs 10.3.2(c) and (d) (now paragraphs (c) and (d)) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. It was requested that the drafting in this regard be clarified. It should be noted that a link between subparagraphs 10.3.2(c) and (d) (now paragraphs (c) and (d)) already exists, since subparagraph 10.3.2(c) (now paragraph (c)) starts with the words, "Notwithstanding the provision of paragraph (d) of this article". This is a technique used in other provisions of the draft instrument, such as paragraphs 5.3 (now article 12) and 6.1.3 (now article 14(2)). Other alternatives are possible, for example, to start subparagraph (d) with the words "Except as provided" or to add at the end of that paragraph a new sentence reading "The provisions of this paragraph (d) do not apply where the goods are delivered by the carrier pursuant to paragraph (c) of this article." The various alternatives are provisionally inserted in square brackets.

¹⁷¹ As noted in paragraph 83 of A/CN.9/526. See *supra* note 170.

¹⁷² Various comments and explanations with respect to subparagraph 10.3.2(d) (now paragraph d) are noted in paragraphs 83 to 88 of A/CN.9/526. The first concern expressed in paragraph 88 of A/CN.9/526 is that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. It is thought that a solution might be to indicate in subparagraph (d) that the rights are acquired against the carrier, and this language has been inserted into the provision. It could also be added that such rights arise from the failure of the carrier to fulfil its obligation under paragraph 5.1 (now article 10), but this may not be advisable. In addition, attention is drawn to the new much wider provision suggested for paragraph 13.1 (now article 59), *infra*. The second concern expressed in paragraph 88 of A/CN.9/526 that there was a lack of certainty regarding the phrase "could not reasonably have had knowledge of such delivery" has not specifically been addressed.

apply where the goods are delivered by the carrier pursuant to paragraph (c) above.]¹⁷³

(e) If the controlling party or the shipper does not give the carrier adequate instructions as to the delivery of the goods [or in cases where the controlling party or the shipper cannot be found]¹⁷⁴, the carrier is entitled, without prejudice to any other remedies that the carrier may have against such controlling party or shipper, to exercise its rights under articles 50, 51 and 52.

Article 50.

1. If the goods have arrived at the place of destination and

(a) the goods are not actually taken over by the consignee at the time and location mentioned in article 7(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]¹⁷⁵; or

(b) 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 2.

2. Under the circumstances specified in paragraph 1, the carrier is entitled, at the risk and account and at the expense¹⁷⁶ of the person entitled to the goods, to exercise some or all of the following rights and remedies:

(a) to store the goods at any suitable place;

(b) 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

(c) 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.

3. If the goods are sold under paragraph 2(c), the carrier may deduct from the proceeds of the sale the amount necessary to

¹⁷³ As noted in paragraph 83 of A/CN.9/526. See *supra* note 170.

¹⁷⁴ This addition has been made on the basis of the suggestion in paragraph 89 of A/CN.9/526 that subparagraph 10.3.2(e) (now paragraph (e)) should be aligned with subparagraph 10.3.2(b) (now paragraph (b)) through the insertion of this phrase.

¹⁷⁵ As noted in paragraph 92 of A/CN.9/526, concern was expressed with respect to the phrase “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” as confusing, since it could be seen to concern a contract for warehousing if it is one that “succeeds to the contract of carriage”, and the notion of “express or implied” was also said to be difficult to understand. The phrase has thus been placed in square brackets for possible future deletion.

¹⁷⁶ As noted in paragraph 97 of A/CN.9/526, concern was expressed that when the carrier exercised its rights under subparagraph 10.4.1 (now article 50) it could result in costs in addition to those arising from loss or damage, and that the value of the goods might not in some cases cover the costs incurred. The addition of the phrase “and at the expense” adding in subparagraph 10.4.1(b) (now paragraph 2) is intended to meet these concerns.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

- (a) pay or reimburse any costs incurred in respect of the goods; and
 - (b) pay or reimburse the carrier any other amounts that are referred to in article 45(1) 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.

Article 51.

The carrier is only allowed to exercise the right referred to in article 46 after it has given a reasonable advance¹⁷⁷ 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.

Article 52.

When exercising its rights referred to in article 50(2), the carrier or performing party shall be liable¹⁷⁸ for loss of or damage to these goods, only if the loss or damage results from [an act or omission of the carrier or of the performing party done with the intent to cause such loss or damage, or recklessly, with the knowledge that such loss or damage probably would result]¹⁷⁹.

CHAPTER 11. RIGHT OF CONTROL

Article 53.

[The right of control [means][includes][comprises] the right to agree with the carrier to a variation of the contract of carriage and the right¹⁸⁰ under the

¹⁷⁷ As noted in paragraph 93 of A/CN.9/526, the question was raised why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights. The addition of the phrase “a reasonable advance” before the word “notice” in subparagraph 10.4.2 (now article 51) is intended to meet these concerns.

¹⁷⁸ The concern expressed in paragraph 94 of A/CN.9/526 that the wording of subparagraph 10.4.3 (now article 52) could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. The deletion of the words “acts as an agent of the person entitled to the goods but without any liability” and the addition of the words “shall only be liable”, is intended to meet this concern.

¹⁷⁹ As noted in paragraph 94 of A/CN.9/526, it was suggested that the phrase “or of the performing party” be added after the phrase “personal act or omission of the carrier”, and that the word “personal” be deleted. Both of these suggestions have been adopted in the text. The suggestion in paragraph 96 of A/CN.9/526 that subparagraphs 10.4.3 (now article 52) and 10.4.1 (now article 50) had similarities in their content that should be reflected in their language was not thought to have received enough support for reflection in the text.

¹⁸⁰ The concerns raised in paragraph 103 of A/CN.9/526 that subparagraph (iv) (now paragraph (d)) should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was suggested that this provision served a useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the

contract of carriage to give the carrier instructions in respect of the goods during the period of its responsibility as stated in article 7(1)]¹⁸¹ Such right to give the carrier instructions comprises rights to:

- (a) give or modify instructions in respect of the goods [that do not constitute a variation of the contract of carriage]¹⁸²;
- (b) demand delivery of the goods before their arrival at the place of destination;
- (c) replace the consignee by any other person including the controlling party;
- [(d) agree with the carrier to a variation of the contract of carriage.] ¹⁸³

Article 54.

1. When no negotiable transport document or no negotiable electronic record is issued, the following rules apply:

(a) 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] [designates the consignee or another person as the controlling party]¹⁸⁴.

(b) 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]¹⁸⁵ shall notify the carrier of such transfer.

(c) When the controlling party exercises the right of control in accordance with article 53, it shall produce proper identification.

counterpart of the carrier during the voyage. These concerns could be met by placing subparagraph (iv) (now paragraph (d)) in square brackets, and by inserting a phrase such as that in subparagraph (iv) (now paragraph (d)) in the chapeau of paragraph 11.1 (now article 53). It should also be noted that the first sentence of the chapeau will have to be adjusted if a definition based upon it is included in article 1(g).

¹⁸¹ The Working Group may wish to consider whether this sentence should be somewhat altered and moved to the article 1(g) definition of “right of control”. Should the Working Group decide to move the sentence, the suggested modifications to the chapeau and to subparagraph (d), *supra* note 180, should be readdressed.

¹⁸² The concern was raised in paragraph 102 of A/CN.9/526 that the phrase “give or modify instructions...that do not constitute a variation of the contract” might be read as contradicting themselves. It was stated in response that a clear distinction should be made in substance between what was referred to as a minor or “normal” modification of instructions given in respect of the goods and a more substantive variation of the contract of carriage. These concerns could be reflected by deleting the words placed in square brackets, since they would seem to be unnecessary in light of the limits within which the right can be exercised are set out in subparagraph 11.3(a) (now article 55(1)).

¹⁸³ See *supra*, note 180.

¹⁸⁴ The question was raised in paragraph 105 of A/CN.9/526 why the consent of the consignee was required to designate a controlling party other than the shipper, when the consignee was not a party to the contract of carriage. Further, it was observed that if the contract provided for the shipper to be the controlling party, subparagraph (ii) (now paragraph 1(b)) conferred to him the power to unilaterally transfer his right of control to another person. These concerns were addressed by placing the words that follow the words “unless the shipper” in square brackets for possible deletion and inserting instead, in square brackets, the text “designates the consignee or another person as the controlling party”.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

[(d) The right of control [terminates] [is transferred to the consignee] when the goods have arrived at destination and the consignee has requested delivery of the goods.]¹⁸⁶

2. When a negotiable transport document is issued, the following rules apply:

(a) The holder¹⁸⁷ or, in the event that more than one original of the negotiable transport document is issued, the holder of all originals is the sole controlling party.

(b) The holder is entitled to transfer the right of control by passing the negotiable transport document to another person in accordance with article 59, 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.

(c) 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 the document was issued, all originals [except those that the carrier already holds on behalf of the person seeking to exercise a right of control] shall be produced, failing which the right of control cannot be exercised¹⁸⁸.

(d) Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated on the negotiable transport document.

3. When a negotiable electronic record is issued:

(a) 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 6, upon which transfer the transferor loses its right of control.

(b) 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

¹⁸⁵ The concern mentioned in paragraph 107 of A/CN.9/526 that in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier could be met by deleting the words “or the transferee” in subparagraph 11.2(a)(ii) (now paragraph 1(b)). This phrase placed in square brackets.

¹⁸⁶ As mentioned in paragraph 106 of A/CN.9/526 and in paragraph 188 of A/CN.9/WG.III/WP.21, the controlling party remained in control of the goods until their final delivery. However, nothing is said in paragraph 11.2 (now article 54) regarding the time until which the right of control can be exercised in case non-negotiable transport document or electronic record is issued. It is thought that something could be said to take care of the observation that has been made, and subparagraph 11.2(a)(iv) (now paragraph 1(d)) has been added. Note, however, that paragraph 106 of A/CN.9/526 also notes the concern that the common shipper’s instruction to the carrier not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected could be frustrated. Further, since article 53 states that the right of control is the right to give the carrier instructions during the period of responsibility as set out under article 7, it may be unnecessary to state when the right of control ends.

¹⁸⁷ As noted in paragraph 109 of A/CN.9/526, the concern raised in respect of the reference to the “holder” does not seem to be justified in consideration of the definition of “holder” in paragraph 1.12 (now article 1(f)).

in article 6, that it is the holder.

(c) Any instructions as referred to in article 53(b), (c) and (d) given by the holder upon becoming effective in accordance with article 55 shall be stated in the electronic record.¹⁸⁹

4. Notwithstanding article 62, a person, not being the shipper or the person referred to in article 31, 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.¹⁹⁰

Article 55.

1. Variant A of paragraph 1¹⁹¹

Subject to paragraphs 2 and 3 of this article, if any instruction mentioned in article 53(a), (b) or (c)

(a) can reasonably be executed according to its terms at the moment that the instruction reaches the person to perform it;

(b) will not interfere with the normal operations of the carrier or a performing party; and

(c) 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 sub-paragraphs (a), (b), (c) of this paragraph is not satisfied, then the carrier is under no obligation to execute the instruction.¹⁹²

¹⁸⁸ As noted in paragraph 110 of A/CN.9/526, the Working Group was in agreement that subparagraph 11.2(b)(iii) (now paragraph 2(c)) did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier, and that in such cases, the carrier should be free to refuse to follow the instructions given by the controlling party. The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised, and that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. In order to meet these concerns, it is suggested that the phrases noted should be added to subparagraph 11.2(b)(iii) (now paragraph 2(c)).

¹⁸⁹ As noted in paragraph 112 of A/CN.9/526, the Working Group deferred consideration of subparagraph 11.2(c) (now paragraph 3) until it had come to a more precise understanding of the manner in which the issues of electronic commerce would be addressed.

¹⁹⁰ As noted in paragraph 113 of A/CN.9/526, the Working Group found the substance of subparagraph 11.2(d) (now paragraph 4) to be generally acceptable.

¹⁹¹ Variant A of paragraph 1 is based on the original text of the draft instrument.

¹⁹² As noted in paragraph 117 of A/CN.9/526, the Working Group generally agreed that subparagraph 11.3(a) (now paragraph 1) should be recast to reflect the views and suggestions in paragraphs 114 to 116. It was agreed that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Variant B of paragraph 1

Subject to paragraphs 2 and 3 of this article, the carrier shall be bound to execute the instructions mentioned in article 53(a), (b), and (c) if:

- (a) the person giving such instructions is entitled to exercise the right of control;
- (b) the instructions can reasonably be executed according to their terms at the moment that they reach the carrier;
- (c) the instructions will not interfere with the normal operations of the carrier or a performing carrier.¹⁹³

2. In any event, the controlling party shall reimburse¹⁹⁴ the carrier, performing parties, and any persons interested in other goods carried on the same voyage for any additional expense that they may incur and indemnify them against any loss, or damage that may suffer as a result of executing any instruction under this article.¹⁹⁵

3. [If the carrier

(a) reasonably expects that the execution of an instruction under this article will cause additional expense, loss, or damage; and

(b) is nevertheless willing to execute the instruction,
then the carrier is entitled to obtain security from the controlling party] If requested by the carrier, the controlling party shall provide security¹⁹⁶ for the amount of the reasonably expected additional expense, loss, or damage.

4. The carrier shall be liable for loss of or damage to the goods resulting from its failure to comply with the instructions of the controlling party in

¹⁹³ As noted in paragraph 114 of A/CN.9/526, to avoid a contradiction between subparagraphs 11.3(a)(iii) (now paragraph 1(c)) and subparagraph 11.1(ii) (now article 53(b)) with respect to the right of control and the possible generation of “additional expenses”, it was suggested that either the carrier should be under no obligation to execute the instruction received under subparagraph 11.1(ii) (now article 53(b)) or that subparagraph 11.3(a)(iii) (now paragraph 1(c)) should limit the obligation of the carrier to execute to cases where the instruction would not cause “significant” additional expenses. Further, as noted in paragraph 115 of A/CN.9/526, broad support was expressed in the Working Group for the deletion of subparagraph 11.3(a)(iii) (now paragraph 1(c)). In view of these suggestions, subparagraph 11.3(a) (now paragraph 1) could be reworded as indicated, and the right of the carrier under subparagraph 11.3(c) (now paragraph 3) could be made more stringent, as indicated *infra* note 196. In addition, subparagraph 11.3(a)(iii) (now paragraph 1(c)) has been deleted.

¹⁹⁴ As noted in paragraph 56 of A/CN.9/510 and in paragraph 118 of A/CN.9/526, the notion of “indemnity” inappropriately suggested that the controlling party might be exposed to liability, and that notion should be replaced by that of “remuneration”, which was more in line with the rightful exercise of its right of control by the controlling party.

¹⁹⁵ The changes to subparagraph 11.3(b) (now paragraph 2) have been made in view of the suggestion in paragraph 117 of A/CN.9/526 that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions.

¹⁹⁶ Although subparagraph 11.3(c) (now paragraph 3) was found “generally acceptable”, as noted in paragraph 119 of A/CN.9/526, the changes indicated have been made in connection with the comments on subparagraph 11.3(a) (now article 51(1)). See note 193 *supra*.

breach of its obligation under paragraph 1 of this article.¹⁹⁷

Article 56.

Goods that are delivered pursuant to an instruction in accordance with article 53(b) are deemed to be delivered at the place of destination and the provisions relating to such delivery, as laid down in chapter 10, are applicable to such goods.¹⁹⁸

Article 57.

If during the period that the carrier or a performing party holds the goods in its custody, the carrier or a performing party reasonably requires information, instructions, or documents in addition to those referred to in article 27(a), the controlling party, on request of the carrier or such performing party, shall provide such information.¹⁹⁹ 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 31.

Article 58.

Articles 53(b) and (c) and 55 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 54(1)(b). If a negotiable transport document or a negotiable electronic record is issued, any agreement referred to in this

¹⁹⁷ As noted in paragraph 116 of A/CN.9/526 a question was raised regarding the nature of the obligation incurred by the carrier under paragraph 11.3 (now article 55), and whether the carrier should be under an obligation to perform or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party. The view was expressed that the former, more stringent obligation, should be preferred. However, the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft instrument should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract. In furtherance of these views, a new subparagraph 11.3(d) (now paragraph 4) has been added. As regards the consequences of the non-execution of the instructions, obviously where such execution should have taken place, it is assumed that the implied intention was to provide that the carrier would be liable in damages. If the Working Group decides to include a provision to that effect, it may also wish to consider whether there should be a limitation on such liability.

¹⁹⁸ As noted in paragraph 120 of A/CN.9/526, the Working Group found the substance of paragraph 11.4 (now article 56) to be generally acceptable.

¹⁹⁹ As noted in paragraph 121 of A/CN.9/526, the suggestion that paragraph 11.5 (now article 57) should allow the carrier the choice to seek instructions from “the shipper or the controlling party” was not supported. As noted in paragraph 122 of A/CN.9/526, the suggestion to add reference to the performing party in addition to the carrier, to the performing party was generally supported. In view also of the recommendation mentioned in paragraph 123 of A/CN.9/526, changes have been made in an attempt to clarify the formulation of the subparagraph 11.5 (now article 57).

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

paragraph must be stated or incorporated²⁰⁰ in the contract particulars.

CHAPTER 12. TRANSFER OF RIGHTS

Article 59.

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,

(a) if an order document, duly endorsed either to such other person or in blank, or,

(b) if a bearer document or a blank endorsed document, without endorsement, or,

(c) 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.²⁰¹

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 6.²⁰²

Article 60.

1. Without prejudice to article 57, 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.²⁰³

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

²⁰⁰ As noted in paragraph 126 of A/CN.9/526, there was broad support in the Working Group that the revised draft of paragraph 11.6 (now article 58) should avoid suggesting any restriction to the freedom of parties to derogate from article 11 (now chapter 11). Further, it appears to be implied that the last sentence of subparagraph 11.6 (now article 58) should apply only if a negotiable document or electronic record is issued. This has consequently been mentioned in the revised text, together with the suggested reference to agreements incorporated by reference.

²⁰¹ As noted in paragraph 133 of A/CN.9/526, there was strong support in the Working Group to maintain the text of subparagraph 12.1.1 (now article 59(1)) as drafted in order to promote harmonization and to accommodate negotiable electronic records. The concern raised in paragraph 132 of A/CN.9/526 regarding nominative negotiable documents under certain national laws was noted.

²⁰² As noted in paragraph 134 of A/CN.9/526, the Working Group took note that subparagraph 12.1.2 (now paragraph 2) would be discussed at a later date in conjunction with the other provisions in the draft instrument regarding electronic records.

²⁰³ As noted in paragraph 136 of A/CN.9/526, there was some support in the Working Group for the view that the concept in subparagraph 12.2.1 (now paragraph 1) was superfluous. However, it does not appear that there was enough support in the Working Group for this conclusion.

of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic record] [the liabilities imposed on the controlling party under chapter 11 and the liabilities imposed on the shipper for the payment of freight, dead freight, demurrage and damages for detention to the extent that such liabilities are incorporated in the negotiable transport document or the negotiable electronic record]²⁰⁴.

3. Any holder that is not the shipper and that

(a) under article 4 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

(b) under article 59 transfers its rights, does not exercise any right under the contract of carriage for the purpose of paragraphs 1 and 2.²⁰⁵

Article 61.

The transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record is issued shall be effected in accordance with the provisions of the applicable law. 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].²⁰⁶

Article 62.

If the transfer of rights under a contract of carriage pursuant to which no negotiable transport document or no negotiable electronic record has been

²⁰⁴ As noted in paragraph 140 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of subparagraph 12.2.2 (now paragraph 2) with due consideration being given to the views expressed. However, the views expressed in the preceding paragraphs 137 to 139 are not consistent. Those that favoured a revision of the text requested that the subparagraph stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract. Despite there being opposition to such an itemization, an attempt has been made to revise the text. It should be noted that there is a relevant type of liability that ought perhaps to be considered: the liability in respect of loss, damage or injury caused by the goods (but excluding in any event that for breach of the shipper's obligations under paragraph 7.1 (now article 25)).

²⁰⁵ As noted in paragraph 141 of A/CN.9/526, the Working Group found the substance of subparagraph 12.2.3 (now paragraph 3) to be generally acceptable.

²⁰⁶ As noted in paragraph 142 of A/CN.9/526, concern was raised with respect to a conflict that could arise between paragraph 12.3 (now article 61) and national law in countries where notice of transfer of rights must be given by the transferor, and may not be given by the transferor or the transferee. Alternative suggestions were made in paragraph 142 of A/CN.9/526, but the first suggestion, consisting in the addition at the end of the final sentence of a reference to the national law applicable to the contract of carriage, might conflict with the subsequent suggestion in paragraph 143 of A/CN.9/526 to refer generally in the first sentence to the "applicable law" rather than to "the provisions of the national law applicable" in order to avoid potentially complex conflict of law issues. Thus, the alternative suggestion, to delete the final words "by the transferor or the transferee" was preferable, and these words have been placed in square brackets. Further, the suggestion to insert a reference to the applicable law in the first sentence has been adopted, and the entire article has been placed in square brackets, as suggested.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

issued includes the transfer of liabilities that are connected to or flow from the right that is transferred, the transferor shall not be discharged from liability unless with the consent of the carrier.]²⁰⁷

CHAPTER 13. RIGHTS OF SUIT

Article 63.

Variant A²⁰⁸

Without prejudice to articles 64 and 65, rights under the contract of carriage may be asserted against the carrier or a performing party only by:

- (a) the shipper,
- (b) the consignee,
- (c) any third party to which the shipper or the consignee has transferred²⁰⁹ its rights, depending on which of the above parties suffered the loss or damage in consequence of a breach of the contract of carriage,

(d) any third party that has acquired rights under the contract of carriage by 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.²¹⁰

²⁰⁷ As noted in paragraph 148 of A/CN.9/526, in light of the discussion with respect to draft article 12 (now chapter 12) and to paragraph 12.4 (now article 62) in particular, the Working Group requested the Secretariat to prepare and place in square brackets a revised draft of paragraph 12.4 (now article 62), with due consideration being given to the views expressed. The relevant suggestion made in the paragraphs 147 of A/CN.9/526 is that the liability of the transferor and the transferee should not necessarily be joint and several. It has been suggested, as an alternative, that the transferor shall not be discharged from liability without the consent of the carrier.

In addition, the Working Group may wish to consider the following alternative text to replace articles 61 and 62:

“Article 61 *bis*.

1. If no negotiable transport document and no negotiable electronic record is issued, the transfer of rights under a contract of carriage is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer. [However, the transferability of the rights purported to be transferred is governed by the law applicable to the contract of carriage.]

2. Regardless of the law applicable pursuant to paragraph 1, the transfer may be made by electronic means, and it must, in order to be valid, be notified to the carrier [either by the transferor or by the transferee].

3. If the transfer includes 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.”

²⁰⁸ Variant A of article 63 is based on the original text of the draft instrument.

²⁰⁹ This change is suggested to make the language in this article consistent with those under this chapter.

²¹⁰ As noted in paragraph 157 of A/CN.9/526, while strong support was expressed for the deletion of paragraph 13.1 (now article 63), the Working Group decided to defer any decision regarding paragraph 13.1 (now article 63) until it had completed its review of the draft articles and

Transport Law

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, where that person suffered loss or damage.²¹¹

Article 64.

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, irrespective of it itself having suffered loss or damage. ~~If such holder did not suffer the loss or damage itself, it is to be deemed to act on behalf of the party that suffered such loss or damage.~~²¹²

Article 65.

In the event that a negotiable transport document or negotiable electronic record is issued and the claimant is not 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 the loss or damage in respect of which the claim is made.²¹³

CHAPTER 14. TIME FOR SUIT

Article 66.Variant A²¹⁴

The carrier shall be discharged from all liability in respect of the goods if judicial or arbitral proceedings have not been instituted within a period of [one] year. The shipper shall 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.²¹⁵

further discussed the scope of application of the draft instrument.

²¹¹ As noted in paragraph 157 of A/CN.9/526, the Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage. The Working Group may wish to consider whether this language adequately deals with the situation of the freight forwarder.

²¹² Although no request appears to have been made to the Secretariat in respect of paragraph 13.2 (now article 64) (see articles 160 and 161 of A/CN.9/526), from a drafting perspective, the language could be improved as suggested. Moreover, it is questionable whether the last sentence is necessary. In fact, if the right of the holder is recognized irrespective of such holder having suffered loss or damage, the relation between the holder and the person who has suffered the loss or damage remains outside the scope of the draft instrument.

²¹³ As noted from the discussion of this provision in paragraph 162 of A/CN.9/526, the Secretariat has not been requested to make a new draft. However, certain drafting changes are suggested as indicated.

²¹⁴ Variant A of article 66 is based on the original text of the draft instrument.

²¹⁵ As noted in paragraph 169 of A/CN.9/526, the Working Group requested the Secretariat to place "one" in square brackets, and to prepare a revised draft of paragraph 14.1 (now article 66), with due consideration being given to the views expressed.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Variant B

All [rights] [actions] relating to the carriage of goods under this instrument shall be extinguished [time-barred] if judicial or arbitral proceedings have not been commenced within the period of [one] year.

Article 67.

The period mentioned in article 66 commences on the day on which the carrier has completed delivery to the consignee of the goods concerned pursuant to article 7(3) or 7(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 period commences is not included in the period.²¹⁶

Concern was raised in paragraph 166 of A/CN.9/526 regarding why the time for suit for shippers referred only to shipper liability pursuant to article 7 (now chapter 7) of the draft instrument, and why it did not also refer to shipper liability pursuant to other articles, such as article 9 (now chapter 9). A further suggestion was made that all persons subject to liability under the contract of carriage should be included in paragraph 14.1 (now article 66). It could be suggested that while not all liability arising out of the contract of carriage is regulated in the draft instrument, e.g. the liability of the carrier for its failure to ship the goods, it might be appropriate that article 14 (now chapter 14) would apply to all liabilities regulated in the draft instrument.

The suggestion in paragraph 166 of A/CN.9/526 to simply state that any suit relating to matters dealt with in the draft instrument is barred (or any right extinguished) might be a good solution.

Concern was also raised in paragraph 167 of A/CN.9/526 whether the lapse of time extinguishes the right or bars the action. The lapse of time extinguishes the right under the Hague-Visby Rules (article 3(6)), COTIF-CIM (article 47), Warsaw (article 29) and probably CMR (article 32). It extinguishes the action under the Hamburg Rules (article 20), the 1980 Multimodal Convention (article 25), CMNI (article 24) and Montreal (article 35). It might be advisable if at present both alternatives should be considered. Therefore, an alternative text has been suggested in Variant B.

²¹⁶ As noted in paragraph 174 of A/CN.9/526, the Working Group requested the Secretariat to retain the text of paragraph 14.2 (now article 67), with consideration being given to possible alternatives to reflect the views expressed.

Concern was raised in paragraph 170 of A/CN.9/526 that since the date of delivery “in the contract of carriage” might be much earlier than the date of actual delivery, the date of actual delivery was a preferred point of reference. However, concern was raised that delivery could be unilaterally delayed by the consignee. The text refers to the day “on which the carrier has completed delivery”, which is the day of actual delivery. Considering the language in subparagraph 4.1.1 (now article 7(1)) the words “to the consignee” might be added for consistency.

Concern was also raised in paragraph 171 of A/CN.9/526 with respect to the “last day” on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It may be difficult to find an alternative to this phrase, and in any event, since when goods have not been delivered the “last day” is even more difficult to establish. It is suggested that these words be deleted.

The concern was also raised in paragraph 172 of A/CN.9/526 that the plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It would be possible to prevent this either through inclusion of counterclaims under subparagraph 14.4(b)(ii) (now article 69(b)(ii)) as noted in paragraph 172, or in a separate paragraph of the draft instrument. See *infra* the alternative text for paragraph 14.5 (now article 71).

It was also suggested in paragraph 173 of A/CN.9/526 that different commencement dates should be fixed in respect of claims against the carrier and against the shipper. This would seem to be an unnecessary complication.

Article 68.

The person against whom a claim is made at any time during the running of the period may extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.²¹⁷

Article 69.

An action for indemnity by a person held liable under this instrument may be instituted even after the expiration of the period mentioned in article 66 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) Variant A²¹⁸

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.

Variant B

90 days commencing from the day when either

(i) the person instituting the action for indemnity has settled the claim; or

(ii) a final judgment not subject to further appeal has been issued against the person instituting the action for indemnity.²¹⁹

Article 70.

A counterclaim by a person held liable under this instrument may be instituted even after the expiration of the limitation period mentioned in article 66 if it is instituted within 90 days commencing from the day when the person making the counterclaim has been served with process in the action against itself.²²⁰

²¹⁷ As noted in paragraph 175 of A/CN.9/526, the Working Group found the substance of paragraph 14.3 (now article 68) to be generally acceptable.

²¹⁸ Variant A of article 69 is based on the original text of the draft instrument.

²¹⁹ As noted in paragraph 178 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of paragraph 14.4 (now article 69), with due consideration being given to the views expressed.

It was noted in paragraph 176 of A/CN.9/526 that in certain civil law countries, it was not possible to commence an indemnity action until after the final judgment in the case had been rendered, and it was suggested that the 90-day period be adjusted to commence from the date the legal judgment is effective. Alternative language was offered that the 90-day period should run from the day the judgment against the recourse claimant became final and unreviewable. These suggestions are reflected in Variant B.

²²⁰ It was reiterated in paragraph 177 of A/CN.9/526 that provision should be made in respect of counterclaims, either pursuant to subparagraph 14.4(b)(ii) (now article 69(b)(ii)) or in a separate subparagraph, but they should be treated in similar fashion to subparagraph 14.4(b)(ii) (now article 69(b)(ii)). Paragraph 14.4 *bis* (now article 70) sets out this provision as a separate article.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 71.

If the registered owner of a vessel defeats the presumption that it is the carrier under article 36(3), an action against the bareboat charterer may be instituted even after the expiration of the period mentioned in article 66 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.]²²¹

CHAPTER 15. JURISDICTION²²²

Variant A

Article 72.

In judicial proceedings relating to carriage of goods under this instrument the plaintiff, at his option, may institute an action in a court which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

²²¹ As noted in paragraph 182 of A/CN.9/526, the Working Group requested the Secretariat to prepare a revised draft of paragraph 14.5 (now article 71), with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain subparagraph 8.4.2 (now article 36(3)) in square brackets, and that it therefore requested the Secretariat to retain paragraph 14.5 (now article 71) in square brackets, bearing in mind that the fate of the latter article was linked to that of the former.

The link between paragraph 14.5 (now article 71) and subparagraph 8.4.2 (now article 36(3)) was noted in paragraph 179 of A/CN.9/526, and the square brackets around paragraph 14.5 (now article 71) have been retained.

Concern was raised in paragraph 180 of A/CN.9/526 that the 90 day period would not be of assistance if the cargo claimant experienced difficulties in identifying the carrier. It is thought that this problem is solved by the present subparagraph 14.5(b)(ii) (now paragraph (b)(ii)).

It was also suggested that subparagraphs (i) and (ii) of subparagraph 14.5(b) (now paragraph (b)) be combined into one, since subparagraph (ii) could be considered a sufficiently rigorous condition to subsume subparagraph (i). A revised text is proposed.

²²² As noted in paragraph 159 of A/CN.9/526, the Working Group requested the Secretariat to prepare draft provisions on issues of jurisdiction and arbitration, with possible variants reflecting the various views and suggestions expressed in the course of the discussion.

Two alternative versions of the provisions on jurisdiction and arbitration have been prepared, both based on articles 21 and 22 of the Hamburg Rules with the necessary language changes. Variant A of chapters 15 and 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 15 and 16 omits the paragraphs that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted (see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356).

[(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or]²²³

(c) The place of receipt or the place of delivery; or

(d) Any additional place designated for that purpose in the transport document or electronic record.

Article 73.

Notwithstanding article 72, an action may be instituted in the courts of any port or place in a State Party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law.

Article 74.

No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72 or 73. This article does not constitute an obstacle to the jurisdiction of the States Parties for provisional or protective measures.

Article 75.

1. Where an action has been instituted in a court competent under article 72 or 73 or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.

2. For the purpose of this chapter the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;

3. For the purpose of this chapter, the removal of an action to a different court within the same country, or to a court in another country, in accordance with article 73, is not to be considered as the starting of a new action.

Article 75 bis.

Notwithstanding the preceding articles of this chapter, an agreement made by the parties, after a claim under the contract of carriage has arisen, which designates the place where the claimant may institute an action, is effective.

Variant B

Article 72.

In judicial proceedings relating to carriage of goods under this instrument the plaintiff, at his option, may institute an action in a court which, according to

²²³ See *supra* note 30.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

(a) The principal place of business or, in the absence thereof, the habitual residence of the defendant; or

[(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or]²²⁴

(c) The place of receipt or the place of delivery; or

(d) Any additional place designated for that purpose in the transport document or electronic record.

Article 73.

Notwithstanding article 72, an action may be instituted in the courts of any port or place in a State Party at which the carrying vessel [or any of the carrying vessels] or any other vessel owned by the carrier may have been arrested in accordance with applicable rules of the law of that State and of international law.

Article 74.

No judicial proceedings relating to carriage of goods under this instrument may be instituted in a place not specified in article 72 or 73 of this article. This paragraph does not constitute an obstacle to the jurisdiction of the States Parties for provisional or protective measures.

Article 75.

Notwithstanding the preceding articles of this chapter, an agreement made by the parties, after a claim under the contract of carriage has arisen, which designates the place where the claimant may institute an action, is effective.

CHAPTER 16. ARBITRATION ²²⁵

Variant A

Article 76.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this Instrument applies shall be referred to arbitration.

Article 77.

If a negotiable transport document or a negotiable electronic record has been

²²⁴ See *supra* note 30.

²²⁵ See *supra* note 222. Variant A of chapter 16 reproduces fully the provisions of the Hamburg Rules, while Variant B of chapters 16 omits the paragraphs that the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea suggested should be deleted.

issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a negotiable transport document or a negotiable electronic record issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.

Article 78.

The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

- (a) A place in a State within whose territory is situated:
 - (i) The principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
 - [(ii) The place where the contract of carriage was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or]²²⁶
 - (iii) The place where the carrier or a performing party has received the goods for carriage or the place of delivery; or
- (b) Any other place designated for that purpose in the arbitration clause or agreement.

Article 79.

The arbitrator or arbitration tribunal shall apply the rules of this instrument.

Article 80.

Article 77 and 78 shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 80 bis.

Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

Variant B

Article 76.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this instrument applies shall be referred to arbitration.

²²⁶ See *supra* note 30.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 77.

If a negotiable transport document or a negotiable electronic record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a negotiable transport document or a negotiable electronic record issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.²²⁷

Article 78.²²⁸Article 79.

The arbitrator or arbitration tribunal shall apply the rules of this instrument.

Article 80.

Nothing in this chapter shall affect the validity of an agreement on arbitration made by the parties after the claim relating to the contract of carriage has arisen.

CHAPTER 17. GENERAL AVERAGE

Article 81.

Nothing in this instrument prevents the application of provisions in the contract of carriage or national law regarding the adjustment of general average.²²⁹

Article 82.

1. [With the exception of the provision on time for suit,] the provisions of this instrument relating to the liability of the carrier for loss of or damage to the goods shall 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.
2. All [actions for] [rights to] contribution in general average shall be [time-

²²⁷ The amended text of article 73 of the provision on arbitration in Variant B is not a reproduction of Article 22.2 of the Hamburg Rules, since it was thought that Article 22.2 of the Hamburg Rules was too specific.

²²⁸ In order that Variant B accurately reflects the deliberations of the CMI International Sub-Committee on Uniformity of the Law of Carriage by Sea, this paragraph has been omitted. No decision was reached by the CMI regarding a suitable replacement paragraph. (Again, see CMI Yearbook 1999, p. 113 and, for greater detail, CMI Yearbook 1997, p. 350-356.)

²²⁹ As noted in paragraph 186 of A/CN.9/526, there was broad support in the Working Group for the continued incorporation of the York-Antwerp Rules on general average into the contract of carriage. The substance of paragraph 15.1 (now article 81) was found to be generally acceptable.

barred] [extinguished] if judicial or arbitral proceedings have not been instituted within a period of [one year] from the date of the issuance of the general average statement.²³⁰

CHAPTER 18. OTHER CONVENTIONS

Article 83.

Subject to article 86, nothing contained in this instrument shall prevent a contracting state from applying any other international instrument which is already in force at the date of this instrument and which applies mandatorily to contracts of carriage of goods primarily by a mode of transport other than carriage by sea.²³¹

Article 84.

As between parties to this instrument its provisions prevail over those of an earlier treaty to which they may be parties [that are incompatible with those of this instrument].²³²

Article 85.

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~~]²³³ ships.

²³⁰ As noted in paragraph 188 of A/CN.9/526, it was suggested that the fact that the time for suit provisions of the draft instrument do not apply to general average should be expressed more clearly. Since paragraph 15.2 (now paragraph 1) states that the provisions on liability of the carrier determine whether the consignee may refuse contribution in general average and the liability of the carrier, the reference to the time for suit provision is confusing. It is suggested that it should be deleted. This is particularly the case if a specific time for suit provision is added.

As further suggested in paragraph 188 of A/CN.9/526, a separate provision could be established in respect of time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. A text has been prepared and added to the end of paragraph 15.2 (now paragraph 2). Such a provision should probably cover both claims for contribution and claims for indemnities.

In paragraph 189 of A/CN.9/526, the question was raised whether paragraph 15.2 (now paragraph 1) should also include liability for loss due to delay and demurrage. No decision appears to have been made by the Working Group in this regard.

²³¹ As previously mentioned in connection with subparagraph 4.2.1 (now article 8) and discussions relating to the relationship of the draft instrument with other transport conventions and with domestic legislation (see note 42 *supra*), the Secretariat was also instructed in paragraphs 247 and 250 of A/CN.9/526 to prepare a conflict of convention provision for possible insertion in article 16 (now chapter 18). It is suggested that this should not adversely affect the suggestion that appears in the following note, but should instead supplement that suggestion. The language of this new paragraph 16.1 *bis* (now article 83) is taken from article 25(5) of the Hamburg Rules.

²³² The suggestion in paragraph 196 of A/CN.9/526 that it would be helpful if paragraph 16.1 (now article 85) were amended to add language stating that the draft instrument would prevail over other transport conventions except in relation to States that are not member of the instrument is in line with the provisions of article 30(4) of the Vienna Convention. It is suggested, however, that this new provision should be added in a separate paragraph, rather than to the present paragraph 16.1 (now article 85), that deals with a different and more specific problem and settles such problem in the opposite direction. This new provision appears as paragraph 16.2 *bis* (now article 84).

²³³ The word “seagoing” in paragraph 16.1 (now article 85) has been deleted, as suggested in paragraph 197 of A/CN.9/526.

Draft Instrument on the Carriage of Goods [Wholly or Partly] [by Sea]

Article 86.

No liability arises under this instrument for any loss of 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]²³⁴.

Article 87.

No liability arises under this instrument for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the additional Protocol of 28 January 1964, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963, as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988, and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, 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 or the Convention on Supplementary Compensation for Nuclear Damage.²³⁵

CHAPTER 19. [LIMITS OF CONTRACTUAL FREEDOM]
[CONTRACTUAL STIPULATIONS]²³⁶

Article 88.

1. Unless otherwise specified in this instrument, any contractual stipulation that derogates from this instrument is null and void, if and to the extent it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or

²³⁴ As instructed in paragraph 199 of A/CN.9/526, square brackets have been placed around the words “by sea”.

²³⁵ As noted in paragraph 202 of A/CN.9/526, the Working Group requested the Secretariat to update the list of conventions and instruments in paragraph 16.3 (now article 87), and to prepare a revised draft of paragraph 16.3 (now article 87), with due consideration being given to the views expressed.

In paragraph 200 of A/CN.9/526, it is pointed out that the list of conventions in paragraph 16.3 (now article 83) is not complete and reference is made to the 1998 Protocol to amend the 1963 Vienna Convention.

It is noted in paragraph 201 of A/CN.9/526 that the suggestion was made that other conventions touching on liability could be added to those listed in paragraph 16.3 (now article 87), such as those with respect to pollution and accidents. However, some objections were raised in this respect, and, as a consequence, it is suggested that the review mentioned in the subsequent paragraph 202 of A/CN.9/526 should relate only to conventions in the area of nuclear damage.

²³⁶ As noted in paragraph 204 of A/CN.9/526, it was suggested that the title of this draft article should be revised to reflect more accurately the contents of the provision, which did not deal with “limits of contractual freedom” in general, but dealt with clauses limiting or increasing the level of liability incurred by the various parties involved in the contract of carriage. A possible

increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee under this instrument.²³⁷

2. Notwithstanding paragraph 1, the carrier or a performing party may increase its responsibilities and its obligations under this instrument.²³⁸

3. Any stipulation assigning a benefit of insurance of the goods in favour of the carrier is null and void.²³⁹

Article 89.

Notwithstanding chapters 4 and 5 of this instrument, both the carrier and any performing party may by the terms of the contract of carriage:

(a) exclude or limit their liability if the goods are live animals except where it is proved that the loss, damage or delay resulted from an action or omission of the carrier or its servants or agents done recklessly and with knowledge that such loss, damage or delay would probably occur, or

(b) exclude or limit their liability for loss or damage to the goods if 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.²⁴⁰

alternative is the title of article 23 of the Hamburg Rules, "Contractual stipulations". Otherwise the title might indicate the basic mandatory nature of the provisions of the Instrument.

²³⁷ As noted in paragraph 213 of A/CN.9/526, the Working Group decided to maintain the text of subparagraph 17.1 (a) (now paragraph 1) in the draft instrument, including the words "or increase" in square brackets, for continuation of the discussion at a future session, possibly on the basis of one or more new proposals. It was indicated, as noted in paragraph 212 of A/CN.9/526 that a proposal for a draft provision excluding "competitively negotiated contracts between sophisticated parties" would be made available to the Secretariat before the next session of the Working Group, and that the concerns noted in paragraphs 205 to 211 of A/CN.9/526 would be borne in mind when drafting that proposal.

²³⁸ As noted in paragraph 214 of A/CN.9/526, the Working Group found the substance of subparagraph 17.1 (b) (now paragraph 2) to be generally acceptable. It was decided that the square brackets around that provision should be removed.

²³⁹ As noted in paragraph 215 of A/CN.9/526, the Working Group found the substance of subparagraph 17.1 (c) (now paragraph 3) to be generally acceptable.

²⁴⁰ As noted in paragraph 217 of A/CN.9/526, the Working Group decided that the substance of subparagraph 17.2 (a) (now paragraph (a)) should be maintained in the draft instrument for continuation of the discussion at a future session. The Secretariat was requested to prepare alternative wording to limit the ability of the carrier and the performing party carrying live animals to exonerate themselves from liability in case of serious fault of misconduct. Further, it was noted in paragraph 218 of A/CN.9/526 that the Working Group found the substance of subparagraph 17.2 (b) (now paragraph (b)) to be generally acceptable. The suggested different treatment of subparagraphs 17.2 (a) and (b) (now paragraphs (a) and (b)) requires a change in the chapeau. As regards live animals, it is suggested that language similar to that used in respect of the loss of the right to limit liability could be used, however, extending the reckless behaviour to servants or agents.

**REPORT OF THE SEVENTH MEETING OF THE
INTERNATIONAL SUB-COMMITTEE ON ISSUES OF
TRANSPORT LAW HELD IN LONDON ON
27th-28th FEBRUARY 2003**

The International Sub-Committee on Issues of Transport Law held its seventh meeting in London at the offices of Clyde & Co. on 27th and 28th February 2003.

Representatives from ten national member associations and six industry organizations attended the meeting. (The attendance list is attached as Annex I.) Mr. Bartaletti of Argentina sent his regrets, explaining that he was unable to attend due to a conflict at the IMO. Mr. Alcántara sent his regrets and provided written comments on behalf of the Spanish Maritime Law Association.

Preliminary Matters

The International Sub-Committee first approved (1) the report of its sixth meeting (Madrid, 12-13 November 2001), which had been published as a draft report in the 2001 Yearbook at pages 305-356, and (2) the proposed agenda for the current meeting, which Mr. Beare had circulated in advance. Prior to the meeting, Mr. Beare had also circulated a list of documents that had been prepared in conjunction with the work of the United Nations Commission on International Trade Law (UNCITRAL), and which related to the work of the International Sub-Committee. All of these documents are available on the UNCITRAL website at www.uncitral.org.

Update from UNCITRAL

Mr. Sorieul, from the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), and the secretary of the UNCITRAL Working Group on Transport Law, reported to the International Sub-Committee on the current status of the project at UNCITRAL. The next meeting of the UNCITRAL Working Group will be held at United Nations Headquarters in New York from 24 March to 4 April 2003. The first week will be devoted to a continuation of the detailed “first reading” of the provisions of the Draft Instrument, which began at the first meeting in New York in April 2002 and continued at the Vienna meeting in September 2002. Mr. Sorieul hoped that it would be possible to finish the “first reading” at next month’s meeting, but recognized that this might not be possible. The Secretariat’s plan is to prepare a new draft of the Instrument after the first reading is completed.

The three working days during the second week of next month’s meeting (i.e., 31 March to 2 April) will be devoted to a detailed discussion of the scope of the Draft Instrument. After next month’s meeting, the next meeting of the

UNCITRAL Working Group has been tentatively scheduled (subject to approval by the Commission) for 6 to 17 Oct. 2003 in Vienna.

Mr. Sorieul explained that the Secretariat's only interest was to produce a document that will be widely adopted. For this to happen, the text must be convincing on its own merit. The convention could not be imposed on anyone. He recognized that this would take time – maybe another two or three years, maybe even five years. Of course, if the project were taking too long, that might be a sign that it had failed and should be terminated.

The Draft Instrument's provisions on electronic commerce may require the attention of a special group that will focus on that subject.

Mr. Sorieul concluded with the observation that the Secretariat's background paper on the Draft Instrument's scope of application (A/CN.9/WG.III/WP.29) was essentially a compilation of various contributions that had been furnished to the Secretariat. As the project progressed, he hoped that the Secretariat would be able to make a stronger intellectual contribution to the work. The Secretariat had no wish to impose its views on anyone, but it hoped to be able to assist in the task of building consensus.

Scope of Application of the Draft Instrument

Door-to-Door versus Port-to-Port Coverage

The International Sub-Committee proceeded to the principal subject on its agenda a discussion of the scope of the Draft Instrument, beginning with the question whether coverage should be on a door-to-door rather than a port-to-port basis. Most of the delegates saw no need for another port-to-port convention. Ultimately, all but one of the national Maritime Law Associations agreed that the Draft Instrument should facilitate door-to-door carriage (while still applying port-to-port, or even tackle-to-tackle, when the parties contract on a port-to-port or tackle-to-tackle basis). The carrier organizations also supported door-to-door coverage. FIATA, on the other hand, preferred a solution based on the UNCTAD-ICC Rules, but would not be inflexible regarding a door-to-door system.

The Draft Instrument's Limited Network Solution

Prof. van der Ziel opened the discussion of the network system with a brief explanation of the current text. Draft article 4.2, which gives effect to the conclusions reached at the 2001 Singapore Conference, was designed to create only a "limited" network system. Draft article 4.2.1 had been drafted as a conflict-of-convention provision in light of the English court of appeal decision in *Quantum Ltd. v. Plane Trucking Ltd.*, [2001] 2 Lloyd's Rep. 133, which adopted an expansive view of CMR coverage. Draft article 4.2.1 was also limited to liability issues in order to avoid such problems as transforming a negotiable instrument into a nonnegotiable instrument when the goods are transferred from a vessel to a truck.

A wide range of views was expressed on the limited network solution. Several delegates commented that the network system was inelegant, but that

it was effective in practice. A few delegates questioned the correctness of the English *Quantum* decision, but there was no consensus on the appropriate response. Several delegates expressed the view that *Quantum* was inapposite because the Draft Instrument would operate on a different level. Under this view, CMR would operate between the contracting carrier and its European road carrier sub-contractors, but the Instrument could operate between the shipper and the contracting carrier under the door-to-door contract. Other delegates rejected this view. Yet others suggested that *Quantum* was distinguishable because in that case the Warsaw Convention (the alternative to CMR) had not been compulsorily applicable to the relevant leg.

A number of specific suggestions were made. One delegate mentioned that it might be appropriate to have an exception for situations in which a long road voyage was combined with a short sea voyage, such as crossing the English Channel. A few delegates suggested that the problem should be resolved by amending the other unimodal conventions (such as CMR), in conjunction with the preparation of the Draft Instrument, in order to coordinate coverage.

In the end, no firm conclusions were reached on this issue. But it was agreed that confusion has arisen because different people have used the term “network system” to mean different things, and that the CMI could help to clarify this confusion. The Draft Instrument’s network system is a “limited” one. It applies only to liability issues, for example, and it recognizes other liability regimes only when their source is a mandatory international convention. Some use the term “network system” more broadly when they express support for the concept. The Swedish proposal (A/CN.9/WG.III/WP.26) supports the network system, but would extend the coverage to include mandatory national law. Some would base the inland liability rule on the contracting carrier’s rights against the performing inland carrier under their actual contract, while others would base it on the rights that the cargo owner would have had against the performing inland carrier under a hypothetical contract that they might have concluded if they had contracted directly for the inland carriage. A network system that gave effect to any national law and looked to actual contracts could have the effect of eliminating a carrier’s liability completely (if the national law permitted freedom of contract).

Options Based on the Treatment of Performing Parties

The UNCITRAL Secretariat’s background paper on the scope of application (A/CN.9/WG.III/WP.29) described three options (paragraphs 159-185). During the International Sub-Committee’s discussion, none of these three options received the support of a clear majority. Although no one advocated the distinctive aspect of option 2 – using the Draft Instrument to preempt actions against performing parties that would otherwise be available under national law – several delegates expressed the view that the Draft Instrument should not create new causes of action against performing parties that did not currently exist under national law.

Several delegates spoke favorably of option 1. Prof. Berlingieri noted that

it was similar in many ways to the Italian proposal (A/CN.9/WG.III/WP.25), which also called for the uniform coverage of the Instrument on a door-to-door basis as between the contracting parties, and in actions against the maritime performing parties. He suggested that it might be possible to permit cargo interests to proceed against performing carriers (on a network basis) by using some form of subrogation, whereby the cargo interests obtained the same rights against the carrier's subcontractors as the carrier could have asserted. This idea would need to be studied in more detail if the basic concept is accepted.

Some national Maritime Law Associations and all of the carrier interests supported a variation of option 2 in which the Instrument applied on a network basis and the only cause of action recognized under the Instrument was against the contracting carrier. Unlike option 2, these delegates recognized that direct actions against other performing parties would continue to be governed by national law.

There appeared to be a wide consensus for the concept of uniform coverage within the port-to-port area. Several delegates expressed the view that the final Instrument must be a door-to-door convention when appropriate, but that it must also be the unimodal convention for the maritime mode. Thus this Instrument should provide the governing rules in all actions involving maritime performing parties. There was also some dissent, at least at the margins. One delegate suggested, for example, that States should be allowed to opt out of coverage for pilots.

Mixed Contracts of Carriage and Forwarding

It was agreed that confusion has arisen because people have misunderstood the purpose and effect of draft article 4.3. The CMI should help to clarify that article 4.3.1 is not a mechanism for a carrier to escape its liability for the agreed carriage of the goods. It instead provides legitimate protection, which the carrier can already obtain under current law if it structures the transaction appropriately, and at the same time enables the carrier to accommodate the commercial needs of the cargo interests.

No one doubts that a carrier can agree to transport goods only as far as an ocean port, leaving the cargo owner with the responsibility for arranging transport from the port to the desired inland destination. If a cargo owner wishes to move goods from the Far East to Calgary, for example, it may contract with an ocean carrier to take them as far as Vancouver, and then contract with a road or rail carrier to transport them from Vancouver to Calgary. Similarly, current law would permit this same cargo owner to contract with the ocean carrier to move the goods to Vancouver, and then – in a separate contract – to retain the ocean carrier (acting as its agent) to arrange the inland carriage with the road or rail carrier.

For commercial reasons, many shippers prefer to structure the transaction in this way (with the ocean carrier acting as the principal for the ocean voyage and merely as an agent to arrange the inland carriage), but to have a single document evidencing both of the carrier's two independent obligations. Draft article 4.3.1 accommodates this desire and provides the

legal framework to clarify the parties' rights and obligations.

The risk of structuring the transaction in this way, with a single document evidencing two independent obligations, is that an innocent third party might fail to recognize the separate obligations, and instead conclude that the carrier was responsible for the performance of both legs of the journey. Paragraph 56 of the commentary accordingly stresses the importance of the parties' "express" agreement to this type of arrangement. Of course, it will still be necessary to decide exactly what should be required to satisfy this requirement, but it would clearly be something more than a standard-form clause on the back of a bill of lading.

Freedom of Contract and the Application of the Instrument to Charter Parties and Other Types of Contracts

Article 3.3.1 of the Draft Instrument recognizes the possibility that the traditional charter party exception of the Hague and Hague-Visby Rules might be extended to "contracts of affreightment, volume contracts, or similar agreements." It has also been proposed that these agreements between sophisticated parties (other than charter parties) might be dealt with under chapter 17, which addresses freedom of contract. Under this proposal, contracts of affreightment, volume contracts, and similar agreements would be subject to the Instrument as a default rule, but the parties would have the freedom – as between themselves – to derogate from the Instrument in whole or in part.

The majority of delegates who spoke on this issue favored the total exclusion of these agreements under chapter 3 rather than the freedom of contract solution under chapter 17. Mr. Larsen was particularly concerned by the possibility that addressing the issue under chapter 17 would gradually lead to the coverage of charter parties under the Instrument. There was also wide support for the proposition that any solution to this problem should not adversely affect third parties. Just as bills of lading issued under charter parties must comply with the Hague and Hague-Visby Rules, so third parties who acquire rights under transport documents should be protected by the new Instrument.

The Swedish Proposal

Several issues were raised by the Swedish proposal (A/CN.9/WG.III/WP.26). Perhaps the most prominent was the proposed extension of the network system to preserve mandatory national law (in addition to mandatory international conventions). A wide range of views was expressed. Some were concerned that such a recognition of national law would too greatly undermine uniformity. A possible solution to this concern would be to preserve mandatory national law that was directly based on a mandatory international convention. This would be adequate to address the needs of European countries (such as Sweden) with domestic legislation modeled on CMR. Others, in contrast, suggested that political constraints might require the preservation of all national law, not just mandatory national

law. In the United States, for example, railroads and truckers might well object to the mandatory coverage of the Instrument.

Several delegates felt that the Italian proposal (A/CN.9/WG.III/WP.25) would be adequate to protect the legitimate interests addressed by the Swedish proposal. The Italian proposal would give Swedish cargo claimants (or indeed any cargo claimants willing to come to Sweden to bring suit) the ability to recover from road carriers in Sweden on the basis of the Swedish CMR-style legislation. The only cargo claimants that would not be protected would be those that were unwilling to sue in Sweden, and it was hard to see what interest Sweden would have in protecting these foreign parties.

The Swedish proposal to calculate compensation based on the value of the goods at the place of receipt rather than the place of delivery was criticized by every delegate who addressed the issue.

Finally, the Swedish proposal advocated, in cases when the place of damage cannot be established, that the limitation amount should be based on the highest amount that might govern. This proposal was also criticized by every delegate who addressed the issue.

Concluding Issues

The International Sub-Committee decided that it would probably be unnecessary to hold another meeting until after the fall UNCITRAL meeting in Vienna. It was thought that the next meeting should be held after a new draft was available, that this would not happen until the UNCITRAL Working Group had finished its “first reading” of the entire Draft Instrument, and that this was unlikely to happen at the New York meeting this spring. Mr. Beare noted that the Working Group would need to decide when it was appropriate to reconvene the International Sub-Committee, but added that these views would certainly be considered.

Mr. Beare reminded the International Sub-Committee that a CMI Colloquium would be held in Bordeaux in June, and that Issues of Transport Law was on the agenda for Thursday morning, 12 June, at 9:00 o'clock. He invited delegates to make suggestions as to the subjects that should be covered at this session.

Finally, Mr. Beare thanked Clyde & Co. for their hospitality and logistical support during the International Sub-Committee's deliberations.

Annex I

Attendance List

S.N. Beare	Chairman of the International Sub-Committee snb@richardsbutler.com
Michael Sturley	Rapporteur msturley@mail.law.utexas.edu
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Document 4

**DRAFT REPORT OF THE EIGHTH MEETING OF
THE INTERNATIONAL SUB-COMMITTEE ON ISSUES OF
TRANSPORT LAW HELD IN LONDON ON
17th NOVEMBER 2003**

The International Sub-Committee on Issues of Transport Law held its eighth meeting in London at the offices of Clyde & Co. on 17th November 2003.

Representatives from sixteen national member associations and four industry organizations attended the meeting. (The attendance list is attached as Annex I.)

Preliminary Matters

The International Sub-Committee first approved (1) the report of its seventh meeting (London, 27-28 February 2003), which Prof. Sturley had circulated prior to the meeting, and (2) the proposed agenda for the current meeting, which Mr. Beare had circulated in advance. The International Sub-Committee agreed that the report of this meeting should be in the same format as the report of its seventh meeting.

Chairman's Report on the 12th Session of UNCITRAL Working Group III

Mr. Beare reported that Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) had held its 12th session in Vienna the previous month, 6-17 October. He had attended the first week of this session and Mr. von Ziegler had attended the second week as representatives of the CMI. He noted that Prof. Berlingieri, Prof. van der Ziel, Mr. Gombrii, and Prof. Sturley had also attended the meeting as delegates of Italy, the Netherlands, Norway, and the United States, respectively.

The official report of the session will in due course be published on the UNCITRAL website <www.uncitral.org>.¹ The official documents prepared for the session were the revised Draft Instrument (A/CN.9/WG.III/WP.32), the proposals of the Netherlands (A/CN.9/WG.III/WP.33) and the United States (A/CN.9/WG.III/WP.34), and an addendum to A/CN.9/WG.III/WP.28. Italy and the Netherlands circulated an unofficial statement supporting paragraphs 5-7 of WP.34 and the United States circulated papers on Proportionate Fault and Cargo Value. A number of revised draft provisions were also circulated. These will be set out in UNCITRAL's report of the session.

¹ The official report of the session has now been published as A/CN.9/544 (16 December 2003).

On the proposal of Finland, supported by the Scandinavian countries, the Working Group agreed to discuss core issues rather than to debate WP.32 article by article. The following core issues were accordingly discussed:

1. Performing Parties. Strong support was expressed for the general principle in paragraphs 5-9 of WP.34. Non-maritime performing parties will thus be excluded from the liability regime. New definitions have been proposed. They will provide a basis for further discussion.
2. Non-localized damage – Article 18(2). Opinions were divided and article 18(2) will therefore remain in square brackets pending the consideration of article 18(1).
3. Scope of application – Article 1(a) (the definition of “contract of carriage”) and Article 2(1). It was agreed by most delegations that the scope of the Draft Instrument should be further restricted so that it applied to the door-to-door carriage of goods only when (1) the carriage included a sea leg and (2) the sea leg involved international transport. This had been a minority view in New York (A/CN.9/526 at para. 243) but it was reflected in variant C of Article 2(1). There was considerable debate as to how this general policy decision should be reflected in a re-draft to replace Variants A, B, and C. In the end, the Secretariat was instructed to prepare a revised draft. In general, the majority view appeared to be that the carrier must undertake in the contract of carriage to carry the goods by sea from a place in one state to a place in another state.
4. Freedom of contract and Ocean Liner Service Agreements (“OLSAs”) – Article 2(3) and paragraphs 18-29 of WP.34. No firm conclusions were reached, although some sympathy was clearly expressed for the U.S. proposal. Two days will be set aside for continuing the debate at the Working Group’s 13th session in New York in May 2004. Meanwhile, it is proposed that a seminar be held on these issues in late February 2004.
5. Basis of the carrier’s liability – Article 14. This topic was discussed at length and a number of re-drafts to replace Variants A, B, and C were considered. Mr. Beare did not attempt to summarize the discussion, but referred the International Sub-Committee to the official report. The UNCITRAL Secretariat will prepare a revised draft. Further discussion has been adjourned until the 14th session (which is tentatively scheduled to be held in Vienna 29 November to 10 December 2004) to allow a full year for consultation.
6. Seaworthiness – Article 13(1). The Working Group decided to remove all the square brackets. This means that the seaworthiness obligation will be a continuing one, applying throughout the voyage.
7. Sacrifice of goods – Article 13(2). This provision will be retained in square brackets.
8. Liability of performing parties – Article 15. Broad support was expressed for Variant A of article 15(1) and for the substance of article 15(2), which should be restricted to maritime performing parties. Article 15(6) should also be restricted to maritime performing parties. Broad support was also expressed for the substance of article 15(3), the structure of which should be reflected in article 15(4). Time was called before article 15(7) could be

discussed. With the possible exception of article 15(7), further debate on article 15 has been adjourned until the 14th session.

The discussion of core issues is expected to continue in New York in May 2004. It should include the remaining issues relating to the carrier's obligations (articles 10, 11, and 12) and liabilities (articles 16-24), the shipper's obligations (chapter 7), forum selection, jurisdiction, and arbitration (chapters 15 and 16 and paragraphs 30-35 of WP.34), delivery (chapter 10), and rights of control (chapter 11). This agenda sounds ambitious, particularly as two days will be allocated to freedom of contract. Past experience, however, indicates that such agendas are far from fixed.

At the conclusion of his report, Mr. Beare invited Mr. Sorieul to add anything that he thought might be relevant. In response to questions, Mr. Sorieul explained that there was no plan to take two days from a regular session to discuss e-commerce (as some had proposed). He suggested that it would be preferable to have an Experts Group meeting on the subject between Working Group sessions. He added that it was unlikely that there would be a joint session for Working Groups III and IV in the near future. He noted that Working Group IV has already proposed articles 16 & 17 of the Model Law. Moreover, Working Group IV does not currently have transport law specialists but rather electronic commerce specialists. The transport law specialists with relevant expertise were already active in Working Group III. Thus there seemed to be little point in involving Working Group IV in this project at this time.

February 2004 Seminar on Freedom of Contract

Mr. Beare reiterated his comment that the UNCITRAL Working Group had agreed that it would be helpful to hold a seminar to address freedom of contract and Ocean Liner Service Agreements ("OLSAs") in late February 2004. He invited Prof. Berlingieri to discuss this seminar.

Prof. Berlingieri explained that the idea for this seminar arose in conjunction with the bracketed language in article 2(3) and the U.S. OLSA proposal. Both relate to the more general question of freedom of contract. In view of the support for the seminar that had been expressed in Vienna, the Italian government had agreed to support the proposal of Prof. Berlingieri who will therefore act as host and issue invitations. The meeting would be held on 20th February 2004 in London at the offices of Ince & Co. Although supported by UNCITRAL, it would be a private initiative (meaning that attendees would come as private individuals, not necessarily as government delegates). Prof. Berlingieri promised that invitations would go out soon, although the agenda would be distributed sometime later. All delegates and observers will be invited, but he suggested that it would be even more important to have industry representatives. Speaking personally, he felt the meeting should also be open to national maritime law associations whose governments were not represented at UNCITRAL, but he would need to check with Rome on this.

Mr. Sorieul added that the UNCITRAL Secretariat would be happy to cooperate in any way possible (although they could not take the initiative in planning the seminar because it would not be an official UNCITRAL meeting).

A general discussion followed on topics that might be included in the seminar. Mr. Larsen, for example, suggested that charter parties should not be discussed. The rules governing charter parties were a commercial matter, not something that should be addressed in an international instrument. Several others disagreed, saying that this seminar would be an excellent opportunity to discuss the extent to which charter parties should be in or out of the new Instrument.

Article 2(1) – Scope of Application

Mr. Beare opened a discussion of some of the provisions of the revised Draft Instrument (WP.32) with a more detailed explanation of article 2(1), which addressed the scope of application. He described how article 2(1) of WP.32 had three variants, labeled A, B & C. Variant A follows the CMI draft. Under this version, international carriage is covered without regard to the internationality of any one leg. So long as the overall carriage is international, even the sea leg could be domestic. Variant B follows the Swedish proposal to address a possible conflict of conventions. The Working Group generally agreed that this issue should be addressed elsewhere. Finally, Variant C follows a minority view expressed during the New York session that the sea leg must be international. In Vienna, Working Group III appeared to agree that the sea leg must be international. But it was still unclear how the new provision should be drafted. A small drafting group prepared a new draft, combining variants A & C. In Vienna, Mr. Beare had also raised the issue of “optional contracts,” under which the carriage could be performed by sea or land. He suggested that it would be unwise to restrict the convention unduly. At the end of the discussion on this issue in Vienna, the Secretariat was instructed to prepare a new draft (which might be different from any of the versions we have yet seen).

Mr. Diamond had prepared a paper expressing his personal views, and he described his approach to the scope of application issue. He noted the conflict-of-convention problem and suggested that no successful solution is possible. He proposed a “maritime plus” convention in order to reduce the conflict. This would mean a maritime convention with inland extensions. Defining the scope would still be a problem. The Hague and Hague-Visby Rules’ “tackle-to-tackle” approach is outdated, while the Hamburg Rules approach is vague. On the “optional contracts” issue, he agreed that the new convention should apply whenever the goods are in fact carried by sea. For inland carriage, the nature of the contract is key. He endorsed the U.S. proposal’s treatment of maritime performing parties and non-maritime performing parties, and its treatment of subcontractors operating in a unimodal context. He would extend the network exception to minimize conflicts, but prefers not to include “national law” as part of the network exception.

A general discussion on the issue followed. Several delegates expressed the strong view that the Instrument must provide door-to-door coverage. If it applied only on a port-to-port basis, it would be better to retain the Hague-Visby Rules.

There was sharp disagreement on whether the Instrument should ever look to what actually happens, or whether coverage should be based solely on

the type of contract. Some argued that a contractual approach was necessary; otherwise it would not be known what rules applied until after the contract had been performed. Others argued that it would be absurd to ignore what actually happened when goods are in fact carried by sea but the contract did not specify any mode of transportation. One solution to the theoretical difficulty was suggested: Although coverage could be based on the type of contract, if the contract was unclear on its face whether carriage by sea was contemplated then it would be permissible to consider how the contract was in fact performed in order to ascertain the parties' presumed intent at the time of the contract. This would avoid the absurdity of allowing the parties to avoid the mandatory application of the Instrument simply by failing to specify that goods would be carried by sea.

In the end, the discussion was inconclusive. There was strong support for the view that the Instrument should cover at least the sea leg when the cargo is in fact carried partially by sea, even if the full multimodal shipment might not be covered. There was also strong support for the view that the Instrument should apply on a door-to-door basis when the intent to carry the goods at least partially by sea could be implied in the door-to-door contract, even if sea carriage was not mentioned explicitly. In addition, a number of practical problems were raised. For example, it will sometimes be clear that a sea leg must be included but it will not be clear whether that sea leg will be international or domestic. A contract to carry a container from Vancouver to Honolulu could go directly from Vancouver to Honolulu by sea (thus attracting the Instrument's coverage) or it could go from Vancouver to Seattle by road and then from Seattle to Honolulu by sea (thus lacking an international sea leg).

Jurisdiction and Arbitration

Mr. Beare opened the discussion of jurisdiction clauses with the suggestion that a discussion of arbitration clauses should follow. He observed that chapter 15 of WP.32 has two variants. Variant A follows the Hamburg Rules; variant B follows Prof. Berlingieri's final report for the CMI's International Sub-Committee on Uniformity.

Several questions were raised about whether either approach was appropriate. It was even questioned whether the Instrument should address this subject at all. In response, Prof. Sturley suggested that the Hamburg Rules approach – in either its original form (variant A) or a modified form (variant B) – was a compromise between two extreme positions under current law. When forum selection clauses in bills of lading are not enforceable, the *cargo claimant* has an almost unfettered choice of forum. A carrier may be sued in any court that will take jurisdiction over the case, whether or not it has any connection with the transaction at issue. When forum selection clauses in bills of lading are enforceable, on the other hand, the *carrier* has an almost unfettered choice of forum. The carrier may be sued only in the court that it has specified in its own bill of lading. The Hamburg Rules approach gives the cargo claimant a choice of reasonable forums that have a connection with the transaction at issue, but still protects the carrier by limiting the cargo claimant's choice to that list of reasonable forums.

Several delegates expressed views on the list of acceptable forums. Mr. De Orchis, for example, felt that it was good to include the places of receipt and delivery on the list, but argued that it was more important to recognize the ports of loading and discharge. They will often be where the witnesses are located.

Several delegates recognized the need for mandatory rules to protect cargo interests, particularly third-party consignees, from unreasonable forum selection clauses in many cases, but argued that sophisticated parties with relatively equal bargaining power should have freedom of contract. These delegates generally supported the U.S. proposal on the treatment of forum selection clauses under OLSAs. Other delegates argued that third parties should always be protected by mandatory rules.

Several delegates raised important questions that need to be considered as the work progresses. For example, how should performing parties be treated? What if a stevedore damages the cargo in a port of transshipment, perhaps in a state that has not ratified the Instrument. Would the Instrument's terms apply in an action against that stevedore? Moreover, it was important to consider how this chapter would relate to the doctrine of *forum non conveniens*. Finally, several delegates recalled the aspect of the U.S. proposal that addressed declaratory judgment actions. Should the mandatory rules protect a carrier who seeks a declaration of non-liability (thus initiating an action as the "plaintiff")? Those delegates who addressed this subject agreed that the mandatory rules should protect cargo claimants, not "plaintiffs" more broadly.

There was much less support for including a Hamburg-like approach for arbitration clauses. Several delegates felt that an agreement to arbitrate in a particular jurisdiction involved an agreement for a particular type of arbitration. It did not imply consent to arbitrate in another forum – even one that was closely connected to the transaction at issue – that would have completely different rules, and thus a different type of arbitration. Some delegates observed that if arbitration clauses were not treated under a Hamburg-like approach in the new Instrument, then it would be necessary to give cargo claimants the option to avoid arbitration entirely. Otherwise, arbitration clauses could become a means of indirectly accomplishing the goals of impermissible forum selection clauses.

The Vancouver Conference

Mr. Beare reminded delegates that the CMI's next conference would be in Vancouver, 30 May – 4 June, 2004, and that Issues of Transport Law may have two days on the agenda. He announced that Alfred Popp had agreed to chair our sessions in Vancouver. He invited delegates to express ideas for the topics that should be included on the Vancouver agenda.

Articles 14 & 15 were mentioned. Some thought that this subject might be too complicated to discuss in a large group. Others thought that it would be strange not to address these provisions, as UNCITRAL had allowed a full year for consultation on the subject. Article 13 might also be included in this discussion.

Another delegate suggested jurisdiction and arbitration. Some wondered

if this would be fruitful in the absence of a new draft. Others thought that the CMI should provide an opportunity to address this subject because many European countries might be constrained not to participate as government representatives in a discussion at UNCITRAL.

Other subjects that were mentioned included transport documents, rights of suit, rights of transfer and control, delivery, and “any issue on which the draft differs from the Hague and Hague-Visby Rules.”

Other Topics

Mr. Beare invited delegates to raise whatever other issues they were particularly anxious to discuss.

During a short discussion of hazardous cargo and shippers’ liability, Prof. van der Ziel explained that the shipper would be strictly liable under its obligation to furnish information. There would be fault-based liability (with a reversed burden of proof) for damage caused by shipper’s cargo. He concluded that the practical effect would not be that different from the Hague-Visby Rules.

There was no agreement on how to define the word “dangerous” in this context. Some argued that even milk could be dangerous if the carrier spilled enough of it. Others felt that an open-ended definition would simply lead to expensive litigation. They argued that the special treatment for “dangerous cargo” should be limited to those cargoes that have specifically been identified as “dangerous cargo” by inclusion on a recognized list.

Some delegates objected to the treatment of shippers’ misstatement under the final proposal in WP.34. They described the proposal as punitive, and argued that there must be a causation requirement to justify the harsh treatment.

Mr. Kragic suggested that the clause in article 15(4) making a performing party responsible for the acts and omissions of any person to whom it has delegated performance of the contract should be deleted because it was inconsistent with the narrowed definition of “performing party.” He also argued that the word “negotiable” should be deleted in article 2(4).

Concluding Issues

The International Sub-Committee decided that it would probably be unnecessary to meet again as an International Sub-Committee prior to the Vancouver conference.

In conclusion, Mr. Beare thanked Clyde & Co. for their hospitality and logistical support during the International Sub-Committee’s deliberations.

Annex I

Attendance List

S.N. Beare	Chairman of the International Sub-Committee snb@richardsbutler.com
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THE UNCITRAL DRAFT INSTRUMENT ON THE CARRIAGE OF GOODS BY SEA

PHILIPPE DELEBECQUE*

Introduction

1. From the Convention of Aug. 25th 1924 to the Hamburg Rules: From unity to diversity of the maritime international legislation. “[C]ontribute by all appropriate means and activities to the unification of maritime law in all its aspects” (Article 1 of the Constitution of the CMI). These aims of the international maritime community, which were achieved for a time, at least in the most important areas ? is it necessary to evoke the great conventions of the early 20th century, the 1910 Conventions on salvage at sea and assistance, the 1924 Conventions on carriage and liability of owners of sea-going ships, the 1926 Convention on maritime liens and mortgages? ? seem, at the present time, to be distant. It must be said that political, economical and social data have significantly changed. What is commonly called “containerization”, as well as constant concerns about profitability, have altered a certain number of habits and have modified as many behaviors. Moreover, some novel maritime countries, sometimes called “Dragons”, have emerged, seeking to gain “market shares” too, embarking on hard competition with more traditional states. Finally, international organizations no longer play the same part, for they do not hesitate to go beyond their purely technical role and to intervene in strictly legal issues. All in all, it is the unification of maritime law that is at stake: it is shattered. The phenomenon hits, in particular, the field of transports. The Convention of Aug. 25th, 1924, for the unification of certain rules relating to bills of lading is still in force, but many countries keep ignoring it. The text was amended ? protocol of Feb. 23rd, 1968, concerning chiefly the scope and limitation of liability, protocol of Dec. 21st, 1979, on the currency unit, the SDR replacing the gold currencies ? that were however not ratified by all the signatory States to the original convention. Furthermore, following the initiative of many developing countries, the 1924-1968 “package”, *i.e.* the “Hague-Visby Rules”, was put back in hand and soon transformed into the Hamburg Rules by the adoption of the well-known convention of March 28th, 1978, currently ratified by 28 states. Without relying upon the rivalry of the Nordic countries and their recent Maritime Code, without even daring to think of the Maritime Code of People’s Republic of China (2000), the influence of which will sooner or later inundate us, without being willing to take national case laws into account, the explosion of the sources of maritime transport law is a reality.

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2. The UNCITRAL draft: a new instrument on the international carriage of goods by sea. During its 29th session, the United Nations Commission on International Trade Law (UNCITRAL) examined a proposal aiming to put on its work agenda the analysis of current practices and laws in the field of international carriage of goods by sea, in order to rethink this subject. Having observed the scattering of positive law, as well as its gaps on many issues, the Commission mandated the CMI to develop, with assistance from expert organizations ? International Union of Maritime Insurance; International Federation of Freight Forwarders Associations; International Chamber of Shipping? a draft “*instrument on the carriage of goods by sea*”, that is to say a draft document of international magnitude on maritime carriage of goods.

After consulting maritime law national Associations and organizing two major meetings, one in New York City, the other one in Singapore, the CMI submitted a first document to the UNCITRAL, which the Commission read carefully. So carefully that this institution decided, after thinking about it and making further observations, to set up a working group to examine these provisions, in order to propose a new international convention on maritime carriage of goods.

3. The UNCITRAL Working Group on Transport Law. Rapidly set up, this Working Group met for the first time in April 2002 at the United Nations Headquarters in New York City and began to examine the project. Most of the member States of the UNCITRAL, represented by their experts, participated in the work (Austria, Benin, Brazil, Burkina, Cameroon, Canada, China, Colombia, the Ex-Republic of Yugoslavia, Germany, Macedonia, the Federation of Russia, Fiji, France, Honduras, Hungary, India, Italy, Japan, Kenya, Lithuania, Morocco, Mexico, Uganda, Paraguay, Rumania, Rwanda, Spain, Sierra-Leone, Singapore, Sudan, Sweden, Thailand, the United Kingdom and the United States of America). Some other countries, which are active in the maritime world, also attended the session as observers (Algeria, Angola, Argentina, Australia, Bolivia, Chile, Cuba, Denmark, Ecuador, Finland, Greece, Ivory Coast, Kuwait, the Netherlands, New Zealand, Norway, Peru, Republic of Korea, Senegal, Switzerland, Tunisia, Turkey and Venezuela), and so did several international organizations: Economic Commission for Europe, UNCTAD, Andean Community, Iberoamerican Institute of Maritime Law, BIMCO, ICS, CMI, IFFFA, IMMTA, IUMI, International Group of P and I, that is to say, around fifty people altogether, who elected Professor Rafael Ilescas (University Juan Carlos, in Madrid) president of the group.

The Working Group met again in September 2002, in Vienna, in an almost identical configuration. It recently reassembled in New York City in March 2003, and one more time last October in Vienna. A few more sessions will most likely be necessary in order to achieve the project. However, quite a few results have already been obtained: the text received wide support and all the delegates showed their willingness to move forward in the discussion and to strive for the re-unification of maritime transport law within the framework of a genuine international convention and not mere non-enforceable standard

rules (see G.J. Van der Ziel, *The UNCITRAL CMI Draft for a New Convention Relating to the Contract of Carriage of Goods by Sea*, 25 *Transportrecht* 265, 66 (2002); M. Sturley, *The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress*, 39 *Tex. Int'l L.J.* 65 (2003)).

4. The philosophy and contents of the draft instrument. The UNCITRAL project is rightly ambitious. It intends to cover all the aspects of the contract of carriage by sea: its conclusion, whether it involves the issuance of a bill of lading or not; its contents, that is to say the determination of the parties' rights and obligations; and its performance, or, more precisely, its non-performance, through the questions of liability for loss, damage or delay. The provisions dealing with these various issues are motivated by the same inspiration. One can detect therein the willingness to ensure the security of maritime operations: hence a strengthening of the parties' obligations and an increase of the degree of care required for the performance of the carriage of goods by sea. The willingness also to achieve, as far as possible, a balance between the interests of the shippers and those of the carriers: the proposed text is thus stricter towards the carrier than the Hague-Visby Rules, without nevertheless taking ? rightly or wrongly ? the shippers' side, as the Hamburg Rules do. Finally, the project aims to modernize maritime transport law: by naturally taking into account requirements of electronic commerce and progress of computing science; by integrating new concepts ? e.g. "performing party", "controlling party" ? and by endeavouring to keep up with the evolutions of practice, in particular, on deck cargo and delay.

The drafters of the project addressed the key themes of the contract of carriage by sea, through which the major developments of the contractual phenomenon may be outlined.

- First, the theme of the contract's borders, through the key question of whether the carriage in question is "port-to-port" or "door-to-door". This issue is so important that it deserves to be dealt with as such, being granted that the latter option should ultimately get more votes than the former.
- Second, that of its label, for one can wonder whether the project should be limited only to contracts of carriage, either with a bill of lading or not, and exclude affreightments, while hesitating over volume contracts, tonnage contracts and "service" contracts. It is a strict conception that should be agreed to, under a few qualifications, the project intending to apply above all to carriage operations on scheduled services.
- By extension, the theme of contractual freedom has been opened. As soon as the Harter Act was passed, acts dealing with transport have been considered mandatory, in the concern to protect freight's interests. Nowadays, this viewpoint is no longer routine, considering the position of strength that the shippers regained, as well as the reassertion of the value of contract as a technique for organizing social relationships. In other words, if maritime carriage is to remain widely regulated, and if it is out of the question for the draft instrument to be another non-

mandatory document, as the Vienna Convention on the international sale of goods is, then it is essential for the parties involved in the carriage to have room to manoeuvre: hence the acceptance of some exemption clauses; hence also the derogatory convention options, which are very often reserved in the project.

- For the first time, a document of international magnitude focuses on the contents of the contract of carriage and endeavours to detail the parties' rights and obligations. In this respect, the right of control is broadly defined, with, however, slight differences ? difficult to understand ? between what is a matter of contract alteration and what relates to mere instructions. As to obligations, those of the shipper are ? rightly ? greatly detailed concerning the delivery of goods and the payment of freight, which is undoubtedly the reason why the rights of the carrier are detailed.
- It must be observed that the text also addresses the much discussed topic, at least among legal scholars, of mixed contracts: performing parties are, to a large extent, classed as contracting parties. Surrogates are not the only ones to be concerned, as it is the case in the Hamburg Rules, but also the people who participate in the operation at the carrier's request: *de facto* carriers, handlers, bailees... These agents will theoretically be subject to the same rules. The idea is not novel, for it is veiled in some statutes, including the French statute of June 18th 1966 and the great international conventions: on transport by rail: RU-CIM (Article 27), transport by inland waterway: CMNI (Article 4), transport by air: Montreal Convention (Article 38 and following); it is only a reflection of the way things are.
- The theme of liability is obviously at the heart of the project: the rule that has been set is not to surprise, since the carrier is fully liable for loss resulting of loss, damage or delay in the delivery, unless the carrier, in order to be relieved from liability, proves that the damage is due to one of the exceptions. As a result of discussions, nautical fault is no longer one of these exceptions, and as a result of a fascinating debate on the necessity to make, as the Harter Act provided, the access to the exceptions subject to the proof by the carrier of its diligence in the vessel's seaworthiness. Civil law jurists wanted a more direct system that would clearly stand up for liability structured on a system of presumptions.
- Finally, the project addresses some procedural questions: rights of suit, time for suit, formalities to fulfil, etc... and, since the amendments of July 2003, rules concerning jurisdiction and arbitration.

These great themes are contained in 19 chapters (after the modifications of July 2003 and work of October) dedicated to definitions, electronic communication, period of responsibility, obligations of the carrier, liability of the carrier, liability of the carrier by sea, obligations of the shipper, transport documents and electronic records, freight, delivery to the consignee, right of control, transfer of rights, rights of suit, time for suit, jurisdiction, arbitration, general average, other conventions and limits of contractual freedom. If one

compares these rules with the 10 articles of the Hague-Visby rules, one could assess the distance travelled. One can also assess the project drafters' willingness to reform. Incidentally, this ambition is very clearly expressed in the provisions concerning the scope of application.

5. The scope of the draft instrument. First, the project is "*multimodal*". More specifically, it is, as Pierre Bonassies said, about "transmaritime multimodal" transport (some also said "maritime plus"), because the carriage includes necessarily a maritime part, which should be, according to some, international and not national. The question is obviously crucial and calls for further developments. Second, the project is international, in the sense that it is to apply as soon as the contract of carriage contains any international element, and this element is broadly interpreted, since it is strictly legal, depending on the place of receipt, the place of delivery or the will of the parties.

Visibly, the draft instrument is comprehensive, and at least denser than the previous texts, and, for this reason, is not likely to go unnoticed. Therefore, in order to let ourselves be persuaded, we will first present the contents of the project (I) before examining its scope of application (II), knowing that some provisions are to be modified (the numbering used complies with the changes adopted after the first reading) and pointing out the unavoidable difficulties attached to any translation.

I. The contents of the draft instrument

6. The project defines the contract of carriage, which is the very object of the document, as the "*contract under which a carrier, against payment of freight, undertakes to carry goods wholly or partly by sea from one place to another*". During the discussion, some delegations suggested adding a paragraph to this definition that would make contracts that contain "an option" concerning the carriage of goods by sea, which refers in continental legislation to the contract of forwarding, classed as contracts of carriage. Needless to say, this addition gave rise to a certain number of reservations.

The contents of the future convention will be presented according to the chronology of the contract of carriage and by examining what comes within the conclusion of the contract, its contents i.e. the parties' rights and obligations, its performance, or rather its non-fulfilment, which is connected to the crucial theme of the liability of the carrier.

A. The conclusion of the contract of international carriage of goods by sea

7. The contract of carriage that the draft convention is to govern presents much specificity. If one confines oneself to the manner in which it is concluded, it must be noticed that the contract is necessarily accompanied by the issuance of a set of documents, and that, most of the times, it involves more than two persons.

1. Documents

8. Delivery. The consignor is entitled to obtain from the carrier a transport

document or an electronic record evidencing the receipt of the goods (Article 33). It has to be immediately noticed that all the ? essential ? questions related to electronic documents, which are duly dealt with in the draft instrument, had only been lightly touched upon: the UNCITRAL is indeed also working on electronic commerce in general and unofficial instructions were given in order for what will eventually be decided in the maritime field to be structured on what is to become the common UN electronic commerce law. That is a point of view.

The shipper is entitled to obtain from the carrier a negotiable document, unless they have agreed not to use such a document, or it is the usage not to use one (Article 33b).

9. Contract particulars, date and signature. The transport document must include some particulars related to a description of the goods, their marks, their number, their quantity, their weight, the carrier, the date the document was issued, the date the goods were received and the loading date. However, the absence or the inaccuracy of one or more of these particulars does not affect the legal character or validity of the document (Article 36). It is the traditional solution in transport law.

The document must be signed by the carrier or a person having authority from the carrier, the electronic signature being as valid as a handwritten one, provided the former fulfils the requirements.

10. Functions. Even though the project does not make it clear, the transport document has several functions.

First, it carries out a contractual function, for it specifies, and even determines, parties' rights and obligations: the use of forms, with general requirements printed on the back, should be maintained.

Second, it has an evidentiary function, because the document makes it possible to prove the quantity and quality of the goods that are handed over to the carrier. In this respect, even though the statements of the carrier or shipper are deemed authentic (until there is evidence to the contrary), nothing prevents the carrier from neutralizing them, thanks to qualifications. In order to be effective, these qualifications must fulfil some requirements, which the project endeavours to detail in its Article 37, by making a distinction between "*containerised*" and "*non-containerized*" goods. This question is, in practice, crucial, for it leads one to question whether the carrier has good reasons to question the accuracy of the information furnished by the shipper. More specifically, qualifications are approved if the carrier can show that it had no reasonable means of checking the information; this "*reasonable means of checking*" must be not only materially practicable, but also commercially reasonable. Surprisingly, if the text details qualifications at length, it does not mention the practice of letters of warranty. This was noticed.

Finally, the transport document can carry out a commercial function: it is the case of the bill of lading, which represents the goods to the extent that it is an order or a bearer document. Although this function remains, it does not give rise to any specific provision (see 1.k), except Chapter 12, which is dedicated to the transfer of rights.

11. Transfer. Chapter 12 of the project deals with the transfer of rights and makes a distinction according to whether the document is negotiable or not. In the former case, circulation of rights is carried out according to the regular methods of endorsement (order document) or tradition (bearer document). If the document is non-negotiable, the transfer of rights is subject to the provisions of the applicable law that is said to be that which governs the transfer agreement. It is not definite that this sole reference is sufficient in order to ensure the effectiveness of the transfer of rights (compare with the Rome Convention on the Law Applicable to Contractual Obligations, Article 12, that, as to the conditions under which the assignment can be invoked against the debtor, refers to the law governing the right to which the assignment relates, without prejudice to the law of the debtor's domicile that governs the conditions under which the assignment can be invoked against third parties).

2. Parties

12. Parties to the contract. The contract of carriage is concluded between at least two persons, namely the consignor and the carrier in French land law, and the shipper and the carrier in maritime law. In the project, the consignor is defined as the person who delivers the goods to the carrier for carriage (1.c), whereas the shipper is identified as the person who enters into the contract with the carrier (Article 1.d).

The carrier is the person who enters into a contract of carriage with a shipper (Article 1.b). It is, in this situation, a *de jure* carrier, or contractual carrier, as opposed to the actual carrier considered by the project as a performing party (see 16 below). In addition, it can be said that identifying the contractual carrier is not always an easy task, because the transport document, and in particular, the bill of lading, may have no heading. In such a situation, which occurs rather frequently, the registered owner of the vessel is presumed to be the carrier (Article 36-3), which is consistent with case law.

13. The consignee. The project does not deal specifically with the consignee. It only indicates (Article 1.i) that it is the person entitled to take delivery of the goods under a contract of carriage, a transport document, or an electronic record. This definition is welcoming: it regards the consignee as a contractual party (like in French law) who joined the contract concluded between the shipper and the carrier at the time of the delivery, as well as a person who takes over the rights of the shipper because of the transfer of the document (like in other laws). This distinction is not unimportant, especially when one has to determine which law governs the consignee's situation.

14. The other participants. The draft convention intended to consider the situation of all those who participate in the carriage operation, and thus take into account the economic reality, which is a good thing, even though, generally, texts remain ponderous, complex and sometimes redundant.

15. Controlling party. That is the case of the party that is said to be controlling (Article 1.h), that is described as the "interlocutor" of the carrier

during the voyage. According to the text, this party is the person “*entitled to exercise*” the right of control, which is defined as “*the right to agree with the carrier to a variation of the contract of carriage and the right, under the contract of carriage, to give the carrier instructions in respect of the goods during the period of its responsibility*” (Article 53), and is, ultimately, nothing more than the right of disposition that is the possibility, recognized in French law, for the owner of a building to be built to unilaterally modify the terms of the contract that it entered with the contractor. The letter of the text is not excellent, because it does not make it possible to assert that the right of control is a prerogative that may be unilaterally exercised.

16. Performing party. That is also the case of the performing party, or more specifically, parties (Article 1.e). The idea ? relatively novel (it is mentioned in no international maritime convention, except in the Hamburg Rules, and emerged only recently in the other conventions on transport, except the Guadalajara convention, which incidentally is more about carriage of passengers than that of goods) ? is to subject the persons, who are not directly connected to the shipper, to the same rules as the contractual carrier. Otherwise, these operators are subject to delictual liability, which is, at least in some legislations, including French and American legislations, not in their favor (ordinary statute of limitations, no limitation of liability, ordinary courts...). The purpose would be to protect these participants, these underlings ? who legally are not parties to the contract ?, but who are involved in the operation, who are, in other words, engaged in the same contractual circle.

The term of performing party, which was accepted by the drafters of the project, applies, positively, to “*a person other than the carrier that physically 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*”, which applies to a contractor, in the non-technical meaning of the term, assigned to carry out a task of carriage, or a secondary task of handling or bailment. Although the definition is not among the best, it at least excludes the sub-contractors hired by the shipper or the consignee.

During the discussion, a proposal was made, in order to respect some statutes, to distinguish maritime performing parties and land or, more accurately, non-maritime, performing parties, the former being classed as the carrier, or subject to the same legal rules, the other underlings being governed by the applicable national law. Although this standpoint seems to be wise, the definition of the maritime performing party is unclear: the term stands for a performing party that performs any of the carrier’s responsibilities during the period of time comprised between the moment the goods arrive at the port of loading and the moment they leave the port of unloading; the performing parties that perform on land any of the carrier’s responsibilities during the period of time comprised between the departure of the goods from one port and their arrival at another port of loading being not considered as maritime performing parties.

The Working Group wondered whether the performing party had the

possibility not to perform the considered operation itself and hire sub-contractors. An affirmative answer was eventually given.

17. The “agent”. Finally, it is to be noted that the proposed text clearly implies that the carrier, provided the parties agree, and in respect of a specified part or parts of the transport, may “act as agent” (Article 9.1), that is to say, act as an intermediary between “the goods” and any carrier. For all that, the carrier does not become a forwarder, as it would in French law, because its liability is then strictly defined and is only based on its fault. Besides, Article 9.2 specifies what the obligations of this somewhat unnatural carrier are: it has to 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 to perform duly under its contract”. In other words, it is expected to act as “a good professional”.

Other important provisions determine the parties’ rights and obligations.

B. The parties’ rights and obligations

18. Under the contract of carriage, the rights of each party generally correspond to the other’s obligations. Therefore, we shall merely examine first the obligations of the shipper, before studying those of the carrier.

1. The obligations of the shipper

19. Delivery of the goods. Conformity. The shipper’s first obligation is to deliver the goods to the carrier in accordance with the provisions of the contract (Article 25). The delivery must take place at the time and location agreed. Moreover, the goods delivered must be in such condition that they will withstand the intended carriage. In other words, the shipper, or more specifically any person who accepts such a role (Article 31) has, as to the delivery, an obligation of conformity.

As what is henceforth accepted in the matter of sale, this obligation of conformity extends to an obligation to provide information. Article 27 of the project indeed holds that the shipper has to provide to the carrier the information, instructions, and documents that are reasonably necessary for the handling, carriage, and compliance with the rules. These information and instructions must be accurate, complete and given in a timely manner.

20. Sanctions. The text does not only set the terms of the obligation of delivery. It also specifies the sanctions thereof. It is to be noted first that the carrier itself may decline to load or may unload, destroy or render the goods harmless if the latter are a danger to persons or property, or even to environment (Article 12). This is the most efficient ? because preventive ? way to ensure the safety of the carriage. Second, it is the question of liability that is being addressed. In case of any damage caused by the failure to provide information, the shipper is liable: this liability is considered strict liability, which seems to be excessive.

The failure to comply with the obligation of conformity, whether it

results for the carrier in a damage to goods or to person, is less severely punished, for the text acknowledges that the shipper is not liable if it “*proves that such loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or the consequence of which a diligent shipper was unable to prevent*”. Although this is an increased obligation of means [whereby a person must employ all necessary means to reach a given result], it is unclear what kind of liability is in question (no clear answer was put forward during the debates, because the distinction between obligation of means and obligation of result [whereby a person must reach a given result whatever means it takes] is more explicit to Latin jurists than to others).

It must be added that the shipper's liability extends to the acts and omissions of those to which it applied, *i.e.* forwarders, handlers or consignees, provided these persons acted within the scope of their functions.

21. Safety issues. One question ? which is unfortunately topical ? has however not been addressed, namely that of the safety of the freight. The severe, and even disturbing, solutions provided by (French) air law (Article L. 321-7 of the *Code de l'aviation civile*) that impose on (known) shippers and (authorized) forwarders heavy liability, are probably not to be reproduced, unless profound adjustments are made. In any case, the question is to be addressed sooner or later. So far, it has only given rise to a few statements or mechanical remarks, although some delegations did not hesitate to ask the proper questions, as far as liability is concerned.

22. Freight. Freight claim. The project dedicates an entire Chapter (Chapter 9) to freight, which is novel, but provisions are too detailed and not rigorous enough. The text is not concerned with its fixing, as the carriage price, which implies that the value of the freight may be left to either party's unilateral will, and in particular, the shipper's. It is more concerned with the freight claim, which is incidentally a claim that the carrier has against the shipper (unless otherwise agreed, for it is possible to imagine that the debtor is the consignee, either with joint and several liability or not). This claim is generally considered earned upon delivery. Therefore, no freight becomes due if the goods are lost before delivery. However, this rule is not mandatory, and “*freight earned whatever event occurs*” clauses will, in practice, be encountered.

23. Payment of freight. As to payment of freight, it theoretically takes place upon delivery, which is logical; in more legal words, Article 41-1 provides that “*freight is payable when it is earned*”, which apparently shows a confusion between the rise of the claim ? the occurrence that is at its origin ? and its payability, a definite or well-founded claim not being necessarily payable. Moreover, 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. This is likely to eradicate the well-known practice, whereby, in case of loss or damage, “*the goods*” take the law into their own hands. Here again, the solution partakes of a common law of transport.

24. Guarantees of freight. The instrument (Article 45) expressly acknowledges the carrier's right to retain the goods until payment of freight and of its other claims (apparently payable). However, it is difficult to understand why this right can only be invoked when it is the consignee who is liable for the payment of freight, and in addition, according to "*the national law applicable to the contract of carriage*". Moreover, one may wonder if it would not be more appropriate to specify that the right of retention could not only be invoked to the extent that the "*lex rei sitae*" accepts it, and be excluded, in any case, when the goods are aboard. But these private international law issues have only been outlined during the discussions of the Working Group.

Besides, in case payment is not effected, the carrier is entitled to sell the goods and to satisfy the amounts payable to it from the proceeds of such sale. The text, however, evokes "satisfaction", which seems to grant to the carrier an exclusive right on the price. Here again, this provision is unclear and disrespectful of the other preferential creditors.

2. *The obligations of the carrier*

a) *Main obligations*

25. As to the ship. Article 10 of the project provides that the carrier "*shall, (...) in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee*". The text sets out the "major obligations" of the carrier, in a rather allusive manner, for the carriage and the delivery cannot be performed without a transport vehicle, which is, in this case, chiefly a ship. This is why Article 13.1 specifies that the carrier is bound to provide a ship that is seaworthy and fit for the carriage. Although the issue is still debated, it can be considered, as the majority of the Working Group does, that this obligation is to be exercised not only at the beginning of the voyage, but must be continuous. This is easily justified by the safety requirements related to navigation, and the great majority of the Working Group perfectly understood it. This due diligence ? because it is not, strictly speaking, an obligation ? concerns not only the ship and its equipment, but also on the parts of the ship in which the goods are carried, and possible containers supplied by the carrier.

26. As to the goods. The main obligations of the carrier also naturally concern the goods. Under these conditions, it is the carrier's responsibility to load, stow, carry, keep, take care of and discharge the goods (Article 11). However, it is specified that the parties may agree that some of these functions will be performed by the shipper, the controlling party or the consignee.

One may then wonder if this contractual mitigation of the carrier's obligations could induce not only a reduction of the costs of the operation of carriage, but also a discharge of liability. It would undoubtedly be excessive to accept such a discharge, at least as far as the obligations related to safety of the carriage, including stowage, are concerned. The combination with the provisions of Article 14 listing among the exceptions loading, handling and unloading when these operations were performed by a person who is not the

carrier, as well as with the provisions of Article 88 that prohibit any kind of clauses that exclude liability, is not obvious either. However, it may be thought that the Working Group is willing to introduce here some flexibility and to have some clauses concerning obligations and liability accepted, unlike current law. The issue is crucial considering the interpretation that the courts give to the board-to-board clause, or to the “FIO” or “FIOS” clause.

27. Delivery. The last major obligation of the carrier concerns the delivery of the goods. An entire Chapter (10, Articles 46 and following) is rightly dedicated to it. The drafting is odd because the text focuses more on what the consignee has to do than on what is incumbent on the carrier. This certainly shows an implementation of the idea of cooperation in the good course of the contract (see below, # 28). The drafters of the project, beyond the question of proof of delivery (Article 47, providing that, on request of the carrier or the performing party, the consignee must “confirm” the delivery) and the questions concerning the justification of the rights on the goods (Article 48 and following), wanted to settle the practical problem related to the failure to act or the absence of the consignee. In case of breach by the consignee of its obligation, the carrier is entitled to act, regarding the goods, as an “agent” of the consignee, but without any liability, except in the case of an inexcusable fault (Article 46)

In case of the absence of the consignee, the “held up” goods are given a status (storage, custody or, if the case arises, sale; see Article 50) that is rather close to that provided by the bills of lading themselves.

b) Other obligations

28. Good faith – cooperation. The carrier must (Article 26) 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 concerning the delivery of the goods (see above # 15). This provision shows that the contract of carriage is not viewed as being in the sole interest of either of the parties; although it is not a contract of common interest, which does not make much sense, it promotes, however, a certain cooperation on either side. One can identify here the idea of good faith, that could already be found in the Vienna Convention on the Sale of Goods, as well as currently in the Principles of European Law of Contracts (Article 1.106), which idea should appear more clearly, as the Working Group agreed. It is not about requiring from either of the parties to renounce any of their prerogatives or to show abnegation. “Contractual solidarism” is certainly out of place. It is simply a matter of encouraging the fulfilment of the contract in the interest of both parties.

Another provision establishes this idea of good faith-cooperation: Article 20.4 indeed provides that in the case of any actual or apprehended loss or damage, the parties involved in the dispute must give all “reasonable facilities” to each other for inspecting and tallying the goods and access to records and documents relevant to the carriage of the goods. However, the latter provision is still in square brackets, that is to say, reserved. A further discussion of the text should make it possible to lift hesitations and forge ahead.

29. Carriage by sea. Deviation. Carriage on deck. Two other more specific obligations that only concern the carrier by sea need to be considered. On the one hand (Article 23), the carrier must, as any carrier, take the usual route; but it may deviate from it to give assistance or for any other legitimate or “reasonable” cause (generally stipulated in the bill of lading via “freedom” clauses, which courts consider perfectly valid). On the other hand (Article 24, largely confirming the solutions nowadays accepted), the carrier must, with the reservations and under the specific circumstances that we know (administrative regulations; specially equipped ships: container-holders), carry the goods to the cargo: the carriage on deck must ? duly ? be in accordance with the contract, or comply with the “customs, usages and practices of the trade”. If such is not the case, the liability of the carrier could not be reduced. Specifically, liability is the last issue addressed.

C. The liability to which the carrier is exposed

30. The most frequent legal problems, but not necessarily the most difficult, are encountered when the goods are damaged or lost, or delayed. In other words, those are the questions of the non-performance of the contract, rather than those of its perfect performance, which need to be developed, and are, incidentally, considered by the UNCITRAL draft instrument.

1. Grounds of liability

31. Presumption of liability or strict liability. As to the carrier’s liability, rules are fairly complicated, and would certainly need to be clarified. The discussions were, obviously, very long and often very animated, some reasoning in terms of *ipso jure* liability, others pleading for a system of presumptions. For the moment, even though no final decision has been made, the Working Group has, nevertheless, agreed on a scheme largely inspired from the Hague-Visby Rules, composed of several stages, the American delegation having proposed a four step progress, our delegation having resorted to a sportier terminology.

32. “Four steps” or “tennis game”. Article 14 of the project is currently composed of four paragraphs, several successive versions having been examined. The latest proposed text begins with stating a principle: the carrier is liable in the case of loss, damage, or delay, knowing that it is incumbent on the claimant to prove either the loss or the fact that the occurrence that caused or contributed to the loss took place during the period of the carrier’s liability. One can recognize here the theme of the obligation of result, which was primarily created to solve evidence problems.

The second line of the first paragraph adds that the carrier is relieved from liability if it proves that neither itself nor a performing party committed a fault that caused the loss. The obligation of result is, therefore, a lightened one.

Article 14, Paragraph 2, indicates that the carrier is presumed having committed no fault if it is established that the loss has been caused by one of the following occurrences:

- act of God; war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions;

- quarantine restrictions, interference by or impediments created by governments, public authorities, rulers or people, including interference by or pursuant to legal process;
- act or omission of the shipper, the controlling party or the consignee;
- strikes, lock-outs, stoppages or restraints of labour;
- wastage in bulk or weight or any other loss or damage arising from inherent quality, defect or vice of the goods;
- insufficiency or defective condition of packing or marking;
- latent defects not discoverable by due diligence;
- handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee;
- acts of the carrier or a performing party in pursuance of the powers conferred by Article 12 and 13-2, when the goods have become a danger to persons, property or the environment or have been sacrificed.

However, even though the carrier may prove that any of these events occurred, its liability may be asserted if the victim proves that it committed a fault that contributed to cause the loss, or if it is established that the loss was caused by an occurrence that is not included in the exception list, or by an occurrence not relied on by the carrier.

Thus, it is an authentic tennis game that the parties are led to play, without knowing if, ultimately, the carrier will be partially relieved from liability or held totally liable.

Concerning the latter issue, it was precisely proposed to stop the game and refer to applicable national law, as *lex fori* (it is not absurd to consider that compensation questions must refer to a specific law that is not that of the liability claim, and thus, to propose the application of *lex fori*) or *lex contractus* (that is to say, as far as French law is concerned, the doctrine, which is partially accepted by the courts – see the decisions published in *DMF* 1998, special issue, 72, #111, with an approving comment by P. Bonassies – on fault combination or cause combination, knowing that in the case of a conflict between the carrier’s fault and the shipper’s fault – “fault against fault” –, liability is shared according to the seriousness of the faults, whereas in the case of a juxtaposition of the carrier’s fault and the shipper’s absence of fault – “fault against absence of fault” –, the carrier’s liability is total.

Some others, more numerous, pleading for resorting to the competent judge, on condition that it determines the share of liability that is incumbent on the carrier according to what may be imputed to it (the allocation criterion would depend on the respective causal power of the faults, or of the occurrences that are at the origin of liability, and not on the seriousness of the faults, which is more usual, at least in French law).

33. Exceptions. List. The system is, to a large extent, structured on the technique of exceptions. This reference to common law methods has been fairly well accepted: an agreement has been reached on the necessity to rely upon the existing case law and, ultimately, on a foreseeable law. The Working Group considered it appropriate, if not rational, to take the Hague-Visby rules and their case law developments as a sound model.

However, the Working Group questioned the content of the list of exceptions, and, in particular, on the use of maintaining the reference to the “act of God”, which refers to “force majeure”, *i.e.* the irresistible occurrence, on the interpretation of the word strike, on the difficulty to delimit wastage if customs are not taken into account...

Then, and foremost, the Working Group was brought to consider the relevance of providing exceptions specific to the maritime world. Hence long discussions about the two most controversial issues that were, *a priori*, accepted by the project: nautical fault and fire. The former case, the existence of which is henceforth only justified by history, seemed to belong to another world; all the delegations of the UNCITRAL Member States agreed that it was time to “abandon” (the expression is from the United States delegation) the nautical fault. The latter case – “fire aboard the ship” – has so far been maintained, but under certain conditions: fire would be an exception “unless it was caused by the act or fault of the carrier”.

Two more exceptions specific to the maritime world appear in the project, without giving rise to particular reservations, namely those that relate to assistance to persons and property, as well as to “*perils, dangers and accidents of the sea or other navigable waters*”.

34. Non-seaworthiness. In the debate over the contents of the exception list, the place of the excuse associated with the sea-unworthiness of the ship was discussed at length. It has – provisionally – been accepted that the carrier should remain liable for the loss resulting from the ship’s non-seaworthiness, or its unfitness for carriage, which must be duly proved by the victim, unless the carrier is able to prove that it complied with its obligations relating to seaworthiness (and provided by Article 13.1, see above, # 25). The proposed text is, in reality, much more complex and makes successive references that are difficult to follow. It is its light version, proposed by our delegation, which is dealt with in this article.

35. Liability of the performing parties. The Working Group has rapidly accepted the idea that the performing parties should be ranked as the carrier by sea itself. All of these parties are, therefore, subject to the same legal rules, which does not mean that problems will no longer occur. The first question that surfaces concerns the calculation of the limits of the performing parties’ liability, to the extent that they do not issue a bill of lading and that the latter generally contains the data necessary for the calculation of the limitation (number of packages, etc...). The second problem relates to severalty between the carrier and the performing parties. Texts seem to accept it, since they mention “*joint and several*” liability, but it has no theoretical ground: reference to an explanation, maybe to the idea of representation, might not be superfluous to assess the range of the severalty. The next step is to convince the audience, which is more familiar with common law methods than imbued with civil law concepts.

2. *The liability system*

a) *Substantive rules*

36. Statutory and mandatory liability. The carrier's liability is mandatory: derogatory clauses are deemed null and void, to the extent that they are intended or have as their effect, directly or indirectly, to exclude or limit its liability (Article 88); the text repeats the exceptions regarding the carriage of live animals (Article 89) and exceptional carriages (Article 90). It goes way beyond the traditional prohibition, however. It indeed condemns any clause adjusting the carrier's liability, whatever this liability may be, based on the loss, damage or delay, but also on another contractual non-performance. In addition, the text concerns the liability of all the parties ? carrier, performing party, shipper, controlling party, consignee ? in the case of a breach of any of their obligations. Furthermore, some wondered (see in particular the American delegation) about the character of the provisions considered: do they have to be "one way mandatory" or "two way mandatory"? It is clear that unilateralism needs no longer to be maintained: if one sets out the principle of nullity of liability clauses, this principle should apply to all clauses, whether they are intended to reduce the carrier's liability or to increase it, whether the aim to add to the shipper's liability or to decrease it.

Moreover, liability is more statutory than contractual, so far as the carrier is in a largely statutory situation: this is why (Article 21) liability exemptions and limitations mentioned in the text, as well as the obligations it imposes, are applicable to any action against the carrier or performing party for loss or damage suffered by the goods or in connection with the goods that are covered by a contract of carriage. Under these conditions, whether or not the action is based on a contract does not matter: whatever it is, it is subject to this instrument.

37. Broadened liability. The carrier's liability is broadly understood, since it should apply to any damage caused to the goods between the time of their receipt and that of their delivery under the conditions defined in Chapter 3, which refers again to the scope of application of the project. However, one question surfaces, because the carrier's obligations are nowadays defined, which is likely to increase the number of liability cases subject to the draft instrument. This question is incidentally central in transport law, because courts no longer connect the carrier's liability to the moving. It reveals other bases of liability: As far as carriage of passengers is concerned, the phenomenon is notable (see Cass. 1ère civ. 12 dec. 2000, *Bull. Civ. I*, n° 323, ruling that the SNCF is liable for the attack of a passenger; see also Cass. 1ère civ. 15 juil. 1999, *D.* 2000, 283, deciding that British Airways is liable for the damage suffered by some passengers while they were in transit at the Kuwait City airport terminal at the very moment the Gulf war started); it is the same as far as carriage of goods is concerned (see Cass. com. 24 sept. 2003, navire Victor Dubrowski, *DMF* 2004, p. 10). Hence the necessity to outline with great care the carrier's liability.

It is to be observed that the carrier is liable for its own act, but also for another person's act (Article 15.3). The carrier is indeed responsible for the

acts and omissions of the performing parties ? maritime or not ? that it applied to, and more generally of all the persons that it introduced into the contractual circle. This liability for another person's act is classed as liability for one's own act, but it can be asserted only to the extent that the performing parties, sub-contractors, employees or agents acted within the scope of their duties. Although these persons' liability is directly sought, they will be entitled to invoke the exemptions and limitations that the carrier enjoys: this is the legal expression of the "Himalaya" clause.

It may be added that the carrier's liability is all the more broad that it covers not only cases of loss and damage, but also those of delay. The rules concerning delay (Article 16) are very similar to those contained in the Hamburg Rules: delay occurs when the deadline agreed upon in the contract or by custom is not abided by. If delay causes a commercial loss, independently from any damage, compensation is accepted, but limited. Are these provisions persuasive? Isn't the delay issue above all a "commercial" issue? In the prospect of the competition in which airlines and sea-lines will soon engage for servicing the North Atlantic, the question should remain open.

38. Limited liability. Finally, the carrier's liability is limited (Article 18). Here again, the rule is traditional and undoubtedly part of the common law of transport. No figure has been put forward yet: it must be said that the compensation ceilings issue is not really a legal matter. Beyond political considerations, the answer can only be given after a study of the traffic itself is done: in this respect, the American delegation handed over the analyses made by their own professionals (US Containerized Shipments) that show that 75.4 % of the containerized shipments that reached the United States ports in 2002 were less than 2 SDR in value. The EU equivalent studies are expected.

In any case, whatever the figure retained and the calculation parameter adopted (the reference to the kilogram should be sufficient) are, the Working Group favored a reappraisal mechanism based on the evolution of some indicators.

Finally, it must be noted that the ceilings will not be "unbreakable": it is provided that the carrier will not be able to hide behind the limitation of liability if its intentional or inexcusable fault is proven. The usual definition of the inexcusable fault is used again (reckless act or omission done with knowledge that a loss or damage will probably result). The text (Article 19) talks about "personal" act or omission, which refers to the theme of "personal fault", well known by maritimists and the common law; however, the term has been put in square brackets to leave room for discussion.

b) Procedural rules

39. Notice. The draft, very classically, provides (Article 20) that the carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the transport document, unless notice of loss or damage to the goods or in connection with the goods has been given by the victim. This is the system of reservations upon delivery, which, except in the

case of a common inspection by the parties, must be made upon delivery if the damage is apparent and within three days if the damage is not apparent. The rule is not sanctioned by any extinguishment of rights, except concerning the damage caused by delay (Article 20.2). It is, therefore, sanctioned on the ground of proof, which is less brutal and complies with solutions generally accepted in the maritime world. It can be regretted that the text is not explicit enough about the proof requirements relating to the reality and importance of the damage.

40. Liability action. Articles 63, 64 and 65 deal with rights of suit. Their wording is very much inspired by common law concepts. No general rule is set up: it is said in a restrictive manner that the rights under the contract of carriage may be asserted against the carrier or a performing party only by the shipper, the consignee, any third party to which the former or the latter transferred its rights, and any third party that has acquired such rights by subrogation. One does not reason in terms of interest or cause of action: the right of suit is vested in certain persons. The method is, therefore, not that of civil law. It may be rigid, but it is more secure.

41. Time for suit: statute of limitations or extinguishment of rights. The project provides in Chapter 14 that the carrier is discharged from all liability in respect of the goods, if judicial or arbitral proceedings have not been instituted within a period of one year (the same solution applies if the action is instituted against the shipper). This period of time commences on the day that the goods have been or should have been delivered (Article 67). It may also be subject to an “extension” by a declaration to the claimant. However, the text is silent regarding interruption or suspension. Hence the question of the legal nature of that period of time: is it a period of extinguishment of rights? Is it a statute of limitations? Considering the profound differences of opinion that emerged during the early discussions, the answer will undoubtedly be left to national courts. More rigor would have been appreciated here.

42. Court jurisdiction and resort to arbitration. The initial draft contained no provision on these litigation issues, which are yet essential in practice. This concerned the Working Group, who wished to include in the instrument a determination of jurisdiction rules and, in particular, a regulation of jurisdiction clauses, warmly accepted by some legislations, including the European Community legislation (see Regulation 44/2001, Article 23), more cautiously by others, including French courts (which require the clause to be subject to a special acceptance by the consignee), as well as arbitration clauses and agreements. It is done, since, in its latest version, the project (Chapter 15, Article 72) completely integrated the Hamburg Rules articles on arbitration and was inspired thereby as to court jurisdiction. That does not mean that discussions on the latter Chapter are closed, for as of now, only heads of jurisdiction considered as relevant are, without prejudice to the place of the habitual residence of the defendant or the place where the vessel was arrested, the places of effective or agreed receipt or delivery. As to jurisdiction

clauses, they are accepted, but only to the extent that their acceptance took place after the dispute resulting from the contract of carriage began.

One could have expected more flexibility, knowing that in the United States this type of clauses is nowadays acknowledged under the same conditions as in common law. It is certain that intense debates on this aspect of the project, as well as on almost all of the others, may be expected. Meanwhile, it is the issue of the scope of application of the future convention that is subject to the most vigorous discussions.

II. The scope of application of the draft instrument

43. Contracts of carriage. The draft instrument applies, provided, a certain number of requirements are fulfilled. The first one is of a material nature, the nationality of the parties or vessel naturally not being taken into account. The contracts that the text applies to are contracts of carriage. This implies, in the spirit of continental law, in which conceptualization is crucial, that the involved operator takes care of the goods, their carrying from one location to another in total independence, and delivery at destination to the proper authority. Under these conditions, contracts that are not labelled carriage are left outside of the scope of application of the project, which is the case of contracts of container rental (see Article 13.c, which is a provision through which the Working Group went too hastily), contracts of forwarding and contracts of affreightment, knowing that, as far as affreightment is concerned, the instrument still governs, in the relations between the shipper and the third party holder, the negotiable documents and records issued pursuant to a charter-party. However, the question is not a simple one, for the borderline between carriage and voyage affreightment is often subtle. Besides, some contracts, including those labelled volume contracts, are real carriages, but no regulation seems to be necessary. Hence the following solutions, or more precisely at this point, the following suggestions: the text would not leave outside of its scope of application freely negotiated or detailed negotiated contracts, which concerns charter-parties, tonnage contracts, or volume contracts, supposing a succession of shipments. What a nice tribute to the adhesion contract theory! Nevertheless, parties to these contracts would still have the possibility to depart, wholly or partly, from the provisions of the convention. Therefore, in this field, the latter would only be non-mandatory.

44. International contracts. A second requirement for the application of the project relates to the international nature of the contracts concerned. In this respect, it is planned to say that the project applies if the operation is international, and more specifically:

- if the place of receipt or the port of loading (specified either in the contract or in the contract particulars) is located in a Contracting State, or
- if the place of delivery or the port of discharge (specified either in the contract or in the contract particulars, or actual) is located in a Contracting State, or
- if the parties to the contract of carriage state that the instrument, or the

law of any State giving effect to it, is to govern the contract (see Paramount clause). This requirement of internationality remains, however, poorly expressed, for it is, for the moment, expressed twice, within the definition of the contract, as well as within the scope of application of the project.

45. “Transmaritime” contracts. It is nowadays established that the project does not concern multimodal transport as such. It only relates to “Transmaritime multimodal” operations, what some call “multimodal plus”, in the sense that the carriage must be completed, wholly or partly, by sea. The presence of a maritime segment is, consequently, a criterion for the application of the instrument. Some delegations have even proposed that this segment be international. This is likely to reduce the scope of application of the project and leads to let, for instance, transports between continental France and Corsica be governed by the CMR or national law. This amendment is still being discussed.

46. Conflicts of conventions. In any case, the carriage may contain a pre-carriage or a post-carriage that is not by sea. But, these carriages ? mainly by road or by rail ? may be governed by international conventions (RU-CIM / CMR), which may give rise to conflicts. Hence the rule contained in Article 8.1.a and b, which provides that, when loss or delay occurs before the goods are loaded or after they are unloaded from the ship, mandatory provisions of other applicable conventions prevail over those of the project, but only to the extent that they contain precise specifications as to the carrier’s liability, limitation to liability, and time for suit.

This text, therefore, provides a minimum network system in order to take into consideration the fact that the great majority of contracts of carriage by sea include a carriage by land, road, inland waterway or rail, and that it is necessary to take that into account. The project is superseded only when a mandatory convention applicable to domestic carriage applies to the domestic phase of a contract of carriage by sea and when it is ascertained that the loss or damage in question occurred during the domestic carriage. This leads to a series of combinations (see the excellent summary by M. Sturley, *op. cit.*, # 7, p. 88).

The Working Group wondered if the application of only international mandatory provisions (CMR type) was to be reserved, or if also the application of national mandatory provisions was to be reserved. The first branch of the alternative is more relevant and consistent: it seems, by the way, to be unanimously approved.

More generally, the draft instrument made a point of stipulating (Article 83), in order to favor the implementation of the network system, that no provision of the instrument prevented another Contracting State from applying any other international instrument that mandatorily applies to contracts of carriage primarily by a mode of transport other than carriage by sea, which refers to, as far as European States are concerned, the CMR, the RU-CIM and the CMNI.

47. Operations within the scope of application. As to operations that are within the scope of application of the project, it must be noted that Article 7.2 provides a contractual system. It is no longer a “tackle to tackle” system, like in the Hague Rules, nor a “port to port” system, like in the Hamburg Rules. The text clearly states that its scope of application covers the period from the time when the goods are received to the time when they are delivered, but that receipt and delivery are comprehended in accordance with the contractual provisions or, in the absence thereof, in accordance with the usages. In the absence of usages, one will have to refer to the time when and location where the carrier or a performing party actually takes custody of the goods. Finally, when the place of delivery is imposed by local legislation, it is, of course, this place that will be taken into consideration as the place of delivery and end of the contract.

In any case, the reference to the will of the parties in the determination of the starting point and ending point of the operation subject to the project is undoubtedly one of the most innovative aspects of the reform. This character perfectly fits the spirit of the new text and the willingness to give back to the contract the place that falls to it.

As M. Sturley remarks (*op. cit.*, p. 76), “the coverage is contractual”. The coverage of the text is defined by the contract itself. If the contract covers the “pre” and the “post” carriage, then so does the project. But if the contract only covers the maritime part of a multimodal operation, this sole part is subject to the project. The text is, thus, not the same for everybody and depends on what the parties contemplated: it is “port-to-port” for an operation that is viewed as such; it is “door-to-door” when the contract implies a shipment from the shipper’s plants to the consignee’s warehouses.

Conclusion (provisional)

48. *Variae causarum figurae*. We said it: the draft instrument on the carriage of goods by sea is ambitious. It covers the whole contract of carriage and, once again, in a fairly appropriate manner. One can perceive through the lines of the new instrument a theory of the contract of carriage that one would wish to set up and that one will have to propose someday, in order to harmonize the various international conventions and rules. For the moment, the project did not fail to consider its connections with the theory of general average, which is said (Chapter 17) to remain applicable, as well as with the other maritime conventions and, in particular, the 1976 London Convention on limitation of the shipowner’s liability. It must be noted, in passing, that there is no question of abrogating these conventions. It has simply, but very accurately, been stated that in the relations between Contracting States the provisions of the new instrument will prevail over those of an earlier treaty. *Lex posterior derogat*.

49. International trade law and private international law. The project is also ambitious, because it comes within the prospect of a formation, if not of a first drafting, of international trade law that was initiated in the Vienna Convention on the International Sale of Goods. By referring several times to the usages of international trade, and also by relying on the contract and by not

automatically setting aside resort to the conflicts of laws method, the text usefully takes the Vienna precedent as a model. When one is aware of how successful the latter convention begins to be, it is quite encouraging for the current project.

50. However, the instrument is far from being adopted, even though its outline is defined and its foundations are established. It is, in any case, perfectible at the expense of some requirements. The first one is to retain a spirit: as Jean Latron recently told me, we should make sure that our future conventions “still smell like wrack”? rather than fuel?, I would like to add. The second one is to keep on trusting specialists: in this respect, the role of the CMI and the other professional organizations represented in the Working Group is crucial, because a project of such a magnitude as the one currently discussed, cannot be left to sole bureaucrats. Such is not the case, but let’s make sure that such will never be the case. The third and last requirement would be not to go into all details, and, thus, leave a certain part to state or arbitral courts, at least on non-fundamental issues. Only courts are able to polish up and supplement the texts. It is undoubtedly too often national, as Francesco Berlingieri said very accurately, but it is one more reason to contemplate elevating it and taking up with a real unification, if not harmonization of the law, and in particular, of maritime law.

Vienna, October 15, 2003

THE TREATMENT OF PERFORMING PARTIES

MICHAEL F. STURLEY*

I. Introduction

Two of the most controversial aspect of the Draft Instrument¹ have been its scope of coverage and its treatment of performing parties. In sharp contrast with previous comparable conventions,² the Draft Instrument's coverage is *contractual*: Its scope is effectively defined by the contract of carriage itself.³ If the contract covers land carriage preceding the loading of the vessel or land carriage subsequent to the unloading of the vessel, then the Draft Instrument does, too. But if the contract covers only a maritime leg, then that is all that the Draft Instrument will cover. In other words, if a contract of carriage provides for a shipment from one port to another port, then the Draft Instrument's coverage is simply "port-to-port." But if a contract of carriage provides for a shipment from the shipper's manufacturing plant to the consignee's warehouse, then the Draft Instrument's coverage is "door-to-door."

The Draft Instrument is also more direct than previous comparable conventions in its treatment of performing parties – those entities that are not immediate parties to the contract of carriage but that perform the carrier's obligations under the contract of carriage.⁴ The Hague Rules deal only with the relationships among the carrier, the shipper, and third-party cargo interests. They do not address the problem of performing parties at all. The Hague-Visby Rules begin to deal with the problem in their attempt to address the well-known Himalaya issue,⁵ but they just begin to scratch the surface. The Hamburg Rules introduce the concept of the so-called "actual carrier,"⁶ and thus make the first real effort to begin to address the problem. The Draft

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¹ U.N. doc. A/CN.9/WG.III/WP.21 (Jan. 8, 2002).

² The Hamburg Rules are port-to-port, *see* art. 4(1), while the Hague and Hague-Visby Rules are "tackle-to-tackle," *see* art. 1(e).

³ *See* arts. 3.1, 4.1. *See also, e.g.*, Netherlands' Position Paper on Multimodality of the Draft Instrument, U.N. doc. A/CN.9/WG.III/WP.____, §§ 2(1)-2(2) (Mar. __, 2003) (paper circulated at the Eleventh Session of the Working Group on Transport Law; U.N. document number to be assigned) [hereinafter Netherlands' Position Paper].

⁴ *See* arts. 1.17, 6.3.

⁵ *See* art. 4 *bis*.

⁶ *See* arts. 1(2), 10.

Instrument makes a much more ambitious attempt to resolve the principal issues that arise in modern commerce when carriers almost inevitably sub-contract for the performance of some or all of their obligations under the contract of carriage.⁷

At this stage of the UNCITRAL negotiations, it has become clear that these two issues are intertwined. After taking a closer look at each of the two by way of background, this paper will examine the various proposals now under discussion to consider them together – addressing the scope problem through the proposed treatment of performing parties.

II. Scope of Coverage

The Draft Instrument provides for door-to-door coverage, which is somewhat narrower than full multimodal coverage. In a true multimodal regime, the contract of carriage could provide for *any* two (or more) modes of carriage.⁸ Thus a multimodal regime would govern a shipment involving road and rail transport. The Draft Instrument, in contrast, requires a maritime leg.⁹ Thus it could be described as a “maritime-plus” convention.¹⁰ Because the existing liability regimes are port-to-port or narrower,¹¹ “maritime-plus” was initially controversial. Many feared that the new regime would conflict with existing unimodal regimes, particularly CMR¹² and CIM-COTIF.¹³ Thus during the UNCITRAL Working Group’s opening discussion of the Draft Instrument, several delegates spoke in general terms against the concept of door-to-door coverage and instead favored restricting the application of the Instrument to a port-to-port basis.¹⁴

The Draft Instrument attempts to deal with these concerns by establishing a “network” system of liability. Under article 4.2.1, liability is based on the relevant unimodal regime when it can be shown that the damage

⁷ See art. 6.3.

⁸ See, e.g., United Nations Convention on International Multimodal Transport of Goods, May 24, 1980, art. 1(1) (defining “multimodal transport” as “the carriage of goods by at least two different modes of transport”).

⁹ See Draft Instrument art. 1.5 (defining “contract of carriage” to require the goods to be carried “wholly or partly by sea”).

¹⁰ See, e.g., Netherlands’ Position Paper, *supra* note 3, §§ 1(c), 2(2).

¹¹ See *supra* note 2.

¹² Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 [hereinafter CMR].

¹³ The Convention Concerning International Carriage by Rail (COTIF), May 9, 1980, 1987 Gr. Brit. T.S. No. 1 (Cm. 41), provides that “international through traffic” is subject to the “Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM),” which forms Appendix B to COTIF. See COTIF art. 3(1). These rules will be cited as CIM-COTIF. A new version of CIM-COTIF was promulgated in 1999, but is not yet in force.

¹⁴ See UNCITRAL, Report of the Working Group on Transport Law on the Work of Its Ninth Session (New York, 15-26 April 2002) (U.N. doc. A/CN.9/510), §§ 27-29. Working Group III had met in the 1970s to discuss international legislation on shipping. The current Working Group III’s first meeting on the new proposal was accordingly the “ninth session” of Working Group III.

occurred during land transport that would otherwise have been subject to a mandatorily applicable international convention.¹⁵ In practical terms, this means that European¹⁶ road carriage, which is subject to the regional convention known as CMR,¹⁷ and European¹⁸ rail carriage, which is subject to the regional convention known as CIM-COTIF,¹⁹ will be subject to article 4.2.1's special network rules.²⁰ Although non-European countries receive no significant benefit from the Draft Instrument's network system, they have generally acquiesced on the assumption that the adoption of a network system is a political necessity to achieve a compromise that can be ratified in Europe.

III. *Performing Parties*

The Hague and Hague-Visby Rules on their face regulate the relationship between the "shipper" and the "carrier." In modern commercial shipping practice, however, the "carrier"²¹ never performs all of its duties

¹⁵ The Draft Instrument covers only mandatorily applicable international conventions because it creates its network exception only for the 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

Article 4.2.1 (emphasis added). The bracketed language in clause (i) is designed to address a particular problem under the 1980 version of CIM-COTIF, *supra* note 13. The language is bracketed because the problem does not arise under the 1999 version. Thus the bracketed language will be unnecessary if the new convention takes effect after the 1999 version of CIM-COTIF is in force.

¹⁶ Morocco and some of the successor states to the former Soviet Union are the only parties to CMR that are not at least partially within Europe. The Inter-American Convention on Contracts for the International Carriage of Goods by Road, July 15, 1989, OAS T.S. No. 72, 29 I.L.M. 81, is of no practical significance. According to the OAS web site, no nation has yet ratified it. The signatories are Bolivia, Colombia, Ecuador, Guatemala, Haiti, Paraguay, Peru, Uruguay, and Venezuela. See <<http://www.oas.org/juridico/english/sigs/b-55.html>>.

¹⁷ CMR, *supra* note 12.

¹⁸ COTIF applies primarily in Europe and the Middle East.

¹⁹ CIM-COTIF, *supra* note 13.

²⁰ The Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 137 L.N.T.S. 11, would also come within the network exception established by article 4.2.1. The combination of sea and air carriage, however, is sufficiently unusual that this is not a major practical concern.

The Convention on the Contract for the Carriage of Goods by Inland Waterways ("CMNI"), Feb. 6, 1959, 1961 Unidroit 399, 1 Int'l Transport Treaties at II-1, was never ratified by any nation. If CMNI, the 2000 Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, enters into force, then European river and canal carriage would also be within the network exception established by article 4.2.1.

²¹ "Carrier" is defined in Article 1.1 of the Draft Instrument as the "person that enters into a contract of carriage with a shipper." The "carrier" is thus the party that *promises* to perform the carriage, not necessarily the party that does perform the carriage.

under the contract of carriage itself. Quite apart from the fact that most carriers are corporations, which can act only through their agents, virtually every carrier today subcontracts with separate companies to perform specialized aspects of the carriage. For decades, shipowners have contracted with independent stevedores to load and unload their vessels,²² and with independent terminal operators to store cargo prior to loading or after discharge. With the explosion of door-to-door shipments, few (if any) carriers would even have the physical capacity to perform all of their duties under a typical contract of carriage. Indeed, some carriers perform *none* of their duties under the contract of carriage themselves. Non-vessel-operating carriers, or NVOs, contract with the shipper to carry the cargo, but often sub-contract every aspect of the actual transportation.²³ Although the carrier is ordinarily liable for the loss or damage caused by its subcontractors, the early liability regimes made no effort to address the responsibility of those parties that in fact perform the contract.

The Hamburg Rules made some effort to deal with this problem by introducing the concept of an “actual carrier,” which article 1(2) defines as any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.

This broad definition²⁴ thus starts with the carrier’s employees, agents, and subcontractors to whom the carrier itself has delegated the performance of the contract of carriage. The final clause, covering “any other person . . .,” then covers sub-subcontractors, and so on down the line.

²² See GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* § 6-4, at 278 (“Under the customary employment pattern the harbor worker is hired by a master stevedore or other independent contractor and not by the shipowner.”); see, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 263-64 (1979) (contrasting “recurring situation” in which longshoreman is “employed by a stevedoring concern” with the “less familiar arrangement where the . . . longshoreman loading or unloading the ship is employed by the vessel itself”).

²³ See, e.g., *James N. Kirby, Pty Ltd. v. Norfolk Southern Ry. Co.*, 300 F.3d 1300 (11th Cir. 2002), *cert. pending*, No. 02-1028 (U.S., filed Jan. 6, 2003).

²⁴ It is unclear just how broadly the “actual carrier” definition should be read. At the very least, it contemplates vessel owners or operators in the transshipment context. (The definition would undoubtedly cover land carriers in a door-to-door shipment, too, except that the Hamburg Rules apply on a port-to-port basis.) The language is broad enough to cover “any person” that performs any aspect “of the carriage of the goods.” The key question is whether “the carriage of the goods, or . . . part of the carriage” includes every necessary aspect of moving the cargo from the place of receipt to the place of delivery (such as loading and unloading the vessel), or whether it includes only those aspects of the overall carriage of the goods that could themselves be described as a carriage of the goods (such as the carriage on a feeder vessel from the place of receipt to a transshipment port). A logical interpretation of the language suggests the broad reading. The phrase “the carriage of the goods” must refer to the carrier’s obligation to carry the cargo from the place of receipt to the place of delivery, and it would be utterly nonsensical to say that the loading and unloading the vessel, for example, were not a “part” of that overall obligation (assuming that the place of receipt is prior to loading and the place of delivery is subsequent to unloading). It is less certain whether the Hamburg Conference intended such a broad definition.

Early drafts of the CMI Instrument introduced a very broad concept of “performing carrier.”²⁵ This proved to be one of the most controversial aspects of the project. Even the term “performing carrier” was criticized, on the ground that many independent parties performing the carrier’s obligations under the contract of carriage do not literally “carry” the goods. Thus the new term “performing party” was introduced.²⁶

More fundamentally, the performing party definition (which is now found in article 1.17) proved highly controversial.²⁷ Some delegations to the CMI’s International Sub-Committee supported a broad definition in order to ensure that all litigation for cargo damage would be subject to a uniform liability regime, regardless of a defendant’s role in the transaction. If all of the potential defendants were subject to the same rules, there would also be less of an incentive to pursue multiple lawsuits against different defendants. The International Federation of Freight Forwarders Associations (FIATA), in contrast, was particularly anxious to ensure that its own members would not be covered by the definition when they undertook to carry goods but had no intention of performing that obligation themselves. During the International Sub-Committee’s last meeting before submitting its final draft, held in Madrid in November 2001, the performing party definition was significantly narrowed (on FIATA’s motion),²⁸ with the result that far fewer parties are governed by the substantive liability provisions of article 6.3.²⁹

Article 6.3’s substantive liability provisions also generated some controversy. During the International Sub-Committee’s deliberations, FIATA argued that the Draft Instrument should not impose any liability on performing parties, and some other delegations supported this view. Within

²⁵ See, e.g., Draft Outline Instrument art. 1.4 (draft discussed at the Singapore Conference, February 2001) [hereinafter Singapore Draft], *reprinted in* 2000 CMI YEARBOOK 123; Draft Outline Instrument art. 1.3 (May 31, 2001) (draft discussed at the Fifth Meeting of the International Sub-Committee on Issues of Transport Law (London, July 16-18, 2001)) [hereinafter May 2001 Draft], *reprinted in* 2001 CMI YEARBOOK 357.

²⁶ Despite the differences in terminology (and some significant differences in detail), the Hamburg Rules’ “actual carrier,” the early “performing carrier,” and the Draft Instrument’s current “performing party” all express essentially the same concept. The change from “carrier” to “party” was made because the word “carrier” is often counter-intuitive, particularly in the Draft Instrument’s door-to-door context. Many of the carrier’s duties under the contract of carriage are performed by entities (such as stevedores or terminal operators) that would not ordinarily be called “carriers,” even though their work is an indispensable part of the carriage of goods. The CMI draftsmen also found the word “actual” to be confusing because it suggested that the “carrier,” meaning the contracting carrier, was not “actually” a carrier after all (despite being called the “carrier” throughout the convention).

²⁷ The controversy is discussed in paragraphs 14-18 of the UNCITRAL Report.

²⁸ See Draft Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law (Madrid, Nov. 12-13, 2001) [hereinafter Sixth Meeting Report], *reprinted in* 2001 CMI YEARBOOK 305, 341-42. The draft report of the sixth meeting was formally approved at the International Sub-Committee’s seventh meeting in February 2003.

²⁹ See *id.* at 342. The last minute narrowing of the definition is also likely to have unintended consequences on other parts of the Draft Instrument. Other provisions that mention “performing party” (e.g., articles 1.9, 1.11, 1.20, 6.1.3, 6.9.1, 6.9.3, 6.10, 7.3, 8.1, 8.2, 8.3.1, 10.1, 10.4.1, 10.4.3, 11.3, 13.1, 17.2) were all drafted with a broader definition in mind.

the United States, the World Shipping Council (WSC), an organization representing the major liner carriers serving the U.S. market, and the National Industrial Transportation League (NITL), an organization representing U.S. shippers, entered into an agreement that established their joint negotiating position on the CMI-UNCITRAL project.³⁰ As part of this compromise package, the WSC and NITL took the position that the contracting carrier alone should be liable for any cargo loss or damage.³¹ Not only would the new convention refrain from imposing any new liability on performing parties, it would affirmatively preempt any liability that performing parties might have under current law. For example, the WSC/NITL Agreement would call for the preemption of existing bailment and tort law.³² The practical effect of this proposal would be to leave the cargo interests without an effective remedy whenever the contracting carrier (which might well be an overseas NVOC) was insolvent or otherwise not amenable to suit.³³

Balanced against the Draft Instrument's imposition of liability on performing parties is its extension of "automatic" Himalaya protection to performing parties.³⁴ During the CMI discussions, there was widespread support for the proposition that every potential defendant should automatically be entitled to the benefit of the same defenses and limitations on liability as the carrier itself enjoys under the Draft Instrument. Although this approach would not provide completely predictable treatment on uniform terms to all actions for cargo loss or damage, it would at least ensure that some of the Instrument's core provisions (those governing the carrier's defenses and limits of liability) would apply to all actions. It would also reduce the incentive to sue sub-contractors that might otherwise be subject to higher liability under current non-uniform laws.

One significant caveat was expressed to the suggestion in favor of universal Himalaya clause protection. Some of those favoring a broad definition of "performing party" felt that all performing parties should be entitled to the benefit of the carrier's defenses and limits of liability because they would assume the carrier's responsibilities and liabilities under the Instrument. Performing parties would take the bitter with the sweet. If the narrow definition is adopted, however, or if performing parties do not assume any liability under the Instrument, then this rationale no longer applies. Many

³⁰ See Joint Statement of Common Objectives on the Development of a New International Cargo Liability Instrument (available on-line at <http://www.worldshipping.org/jointstatement.pdf>) [hereinafter WSC/NITL Agreement].

³¹ *Id.* at 4 (§ B(6)).

³² In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), for example, the U.S. Supreme Court recognized that a negligent stevedore was liable for the damage that it caused when loading cargo. Moreover, in the absence of a Himalaya clause, the negligent stevedore was fully liable — without the benefit of the carrier's limitations on liability. The WSC/NITL Agreement would overrule this result.

³³ There appears to be no support for this extreme position in the WSC/NITL Agreement. The existence of the position has nevertheless made the entire issue more controversial.

³⁴ See art. 6.3.3.

feel that it would be unfair to give sub-contractors all of the benefits of the Draft Instrument if they assume no responsibility under it.

IV. Proposals Discussed at the Spring 2003 New York Meeting

The UNCITRAL Working Group's most recent session was held in New York from March 24th to April 4th, 2003.³⁵ During this two-week session, the second week of the session was devoted to a discussion of the Draft Instrument's scope of application.³⁶ The Working Group recognized that the choice between a door-to-door convention and a port-to-port convention would have implications throughout the Instrument, and it was therefore important to address the issue in a detailed and systematic fashion. Moreover, the preliminary discussion of the issue at the spring 2002 meeting in New York had suggested that this would be a highly controversial debate with strongly-held views on both sides.³⁷ To assist the discussion, the UNCITRAL Secretariat (with help from the CMI) prepared a 42-page background paper titled "General Remarks on the Sphere of Application of the Draft Instrument."³⁸

In view of this background, it is remarkable how non-contentious the scope discussion turned out to be. There seemed to be widespread agreement – perhaps even a consensus among the national delegations speaking on the issue – that the world had little need for another port-to-port convention,³⁹ and that some sort of door-to-door (or even multimodal) convention was therefore appropriate.⁴⁰

Furthermore, there seemed to be broad agreement that the Draft Instrument needed to address the potential problems created by its door-to-door application, and that the appropriate treatment of performing parties was the primary way to do this. Although many views were expressed on how to treat performing parties, the divergence of opinion on the fundamental issues was less than many had anticipated.

At this point, it is far too early to predict with any confidence which view (or, more likely, which compromise among various views) will emerge in the final Instrument. I will therefore simply summarize the various proposals that were advanced at the meeting.

³⁵ See UNCITRAL, Report of the Working Group on Transport Law on the Work of Its Eleventh Session (New York, 24 March to 4 April 2003) (U.N. doc. A/CN.9/526), § 17 [hereinafter Eleventh Session Report].

³⁶ See *id.* §§ 219-67; *cf.* UNCITRAL, Provisional Agenda, Working Group III (Transport Law), Eleventh Session (New York, 24 March-4 April 2003) (U.N. doc. A/CN.9/WG.III/WP.24), § 24.

³⁷ A somewhat tangential discussion of the issue at the beginning of the fall 2002 meeting in Vienna reinforced this suggestion.

³⁸ U.N. doc. A/CN.9/WG.III/WP.29 (Jan. 31, 2003).

³⁹ See, e.g., Netherlands' Position Paper, *supra* note 3, § 1(a) ("[T]he creation of a new maritime convention covering port-to-port carriage only would not make much sense."). The FIATA observer spoke in favor of a port-to-port convention, but even he described his own position as a "lonely" one.

⁴⁰ See Eleventh Session Report, *supra* note 35, § 239.

For each proposal, it will be helpful to consider how it would work in actual transactions. I therefore ask readers to keep two hypothetical shipments in mind.⁴¹ In the first shipment, a German manufacturer wishes to send a container of goods from Berlin to Chicago. It therefore enters into a contract of carriage with a German freight forwarder – a non-vessel-operating carrier (NVO) – that undertakes to deliver the goods in Chicago. The NVO, which is thus the “carrier” for the door-to-door shipment from Berlin to Chicago, then subcontracts with the three performing parties that will in fact move the goods: a European trucker that will carry the goods by road from Berlin to Antwerp, an ocean carrier that will carry the goods by sea from Antwerp to New York, and a U.S. railroad that will carry the goods by rail from New York to Chicago. The second hypothetical shipment is essentially the same, except that in this alternative the goods are carried from Berlin to Calgary, via Antwerp and Montreal, with a European railroad and a Canadian trucker.

A. A uniform liability regime

Although support was expressed for a uniform liability regime (at least in theory), it was generally recognized that it would probably be impossible to achieve a truly uniform regime in practice.⁴² It is nevertheless helpful to recognize how a uniform liability regime would operate. If nothing else, it serves as a useful point of reference. Moreover, many delegates agreed that the ultimate convention should provide a liability regime that is “as uniform as possible.”

Under a uniform liability regime, the same rules would apply for *any* cargo loss or damage, regardless of where the loss or damage occurred and regardless of the role played by the particular defendant. Thus, if the European trucker damaged the goods in the first hypothetical, the cargo claimant could sue either the trucker (as the party that damaged the goods) or the German NVO (as the contracting carrier) under the Draft Instrument, which would displace CMR (the regional convention that might otherwise apply at least to the trucker’s liability). Similarly, if the ocean carrier damaged the goods, the cargo claimant could sue either the ocean carrier or the German NVO under the Draft Instrument. Finally, if the U.S. railroad damaged the goods, the cargo claimant could sue either the railroad or the German NVO under the Draft Instrument, which would displace the U.S. law that might otherwise apply. The results would be similar under the second hypothetical, with the German NVO, the European railroad, the ocean carrier, and the Canadian trucker all being liable under the Draft Instrument.

A uniform liability regime would have obvious benefits of uniformity and predictability, at least from the perspective of those that regularly deal in international multimodal shipments. Complicated questions as to when and how the damage occurred would be minimized, with the result that disputes

⁴¹ The first of these hypothetical shipments is based on an example that was discussed during the recent New York meeting.

⁴² See Eleventh Session Report, *supra* note 35, § 239.

could be settled more easily. Because every defendant would be liable on the same basis, there would be no artificial effort to sue defendants who were subject to higher limits on liability.

Of course, from the perspective of an inland carrier that deals regularly in unimodal shipments and is rarely involved in an international multimodal shipment, the uniform liability regime would decrease uniformity and predictability. Some inland carriers might even be unaware whether a particular container was moving under a unimodal or multimodal contract.

More significantly, from a political perspective it is widely recognized that at least some important countries will be unwilling to preempt their existing rules governing unimodal transport to apply a new international “maritime plus” convention. In particular, the European countries are unwilling to abandon CMR and CIM-COTIF, and some nations appear unwilling to abandon their domestic law regimes. Thus, no serious support was expressed for adopting a fully uniform liability regime, even by those delegations that would have preferred this solution if it were attainable.

B. The current UNCITRAL Draft Instrument

The UNCITRAL Draft Instrument seeks to establish a system that is as uniform as possible by creating a “network exception” that is as narrow as possible. Under a full network system, the liability rules for each leg would be determined by the rules that would otherwise be applicable to that leg, and the same rules would apply for both the performing party (the unimodal carrier that is generally subject to the relevant rules) and the contracting carrier. Under a full network system, therefore, both the German NVOC and the European inland carrier in our two hypotheticals would be liable for damage between Berlin and Antwerp on the terms of the relevant inland convention (CMR or CIM-COTIF). The NVOC and the ocean carrier would be liable for damage on the ocean voyage under the Draft Instrument. Finally, the NVOC and the U.S. or Canadian inland carrier would be liable for damage on the inland journey under the U.S. law governing railroads or the Canadian law governing truckers.

The Draft Instrument does not adopt a full network system. To maximize uniformity, article 4.2.1 adopts a network system that is as narrow as possible. Only mandatory laws are respected on the theory that an international convention should have the power to override any regime that the parties themselves could contractually avoid. Thus, the U.S. Carmack Amendment is preempted, and the U.S. railroad would be subject to the terms of the Draft Instrument. Moreover, article 4.2.1 respects only international conventions on the theory that a nation ratifying a new international convention must be prepared to give up some of its preexisting domestic law, even if that domestic law had been mandatory. Thus the mandatory Canadian law governing the liability of truckers is preempted, and the Canadian trucker would also be subject to the terms of the Draft Instrument.

The bottom line is that for damage between Berlin and Antwerp the Draft Instrument would subject both the German NVOC and the European inland carrier to liability on CMR or CIM-COTIF terms, but for any subsequent

damage the Draft Instrument itself would apply. Only CMR and CIM-COTIF would be mandatory international conventions as required by article 4.2.1. The Canadian law, although mandatory, is merely domestic, and would thus be preempted. Not only is the Carmack Amendment domestic, it is not even mandatory, and thus it would be even more readily preempted.

*C. Canada's "option 2"*⁴³

As one of the options in its proposal, Canada advocated a simple modification of the Draft Instrument's current network system to give effect not only to other mandatory international conventions but also to mandatory national law.⁴⁴ This change would have no impact on our first hypothetical. The European inland leg would be subject to CMR, a mandatory international convention, and thus it would already be within the Draft Instrument's narrow network exception. The U.S. rail leg would not be subject to any mandatory national law, and thus it would not be within the somewhat broader Canadian network exception. As a result, the analysis of our first hypothetical would be the same under this Canadian proposal as under the current Draft Instrument.

For our second hypothetical, this Canadian proposal would change the analysis. Because a mandatory national law⁴⁵ applies to the road journey from Montreal to Calgary, the broader network exception would mean that the cargo claimant could recover from either the NVOC or the Canadian trucker only to the extent permitted by the mandatory Canadian law.⁴⁶

⁴³ Canada made a formal proposal that was circulated in U.N. doc. A/CN.9/WG.III/WP.23 (Aug. 21, 2002). The Canadian proposal raises three options. Paragraph 9 of the proposal discusses option 2.

⁴⁴ A subsequent proposal by Sweden agreed with Canadian option 2 (and made additional suggestions). See Proposal by Sweden, U.N. doc. A/CN.9/WG.III/WP.26 (Dec. 13, 2002).

An earlier draft of the CMI Instrument had included precisely the language that the Canadian delegation proposes to add in option 2. See May 2001 Draft, *supra* note 25, art. 4.4(a), reprinted in 2001 CMI YEARBOOK 361. This language had been deleted from the draft in preparation for the November 2001 meeting of the CMI's International Sub-Committee, see Sixth Meeting Report, *supra* note 28, reprinted in 2001 CMI YEARBOOK at 318, on the basis of a full discussion of the issue at the July 2001 meeting, see Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law (London, July 16-18, 2001), reprinted in 2001 CMI YEARBOOK 265, 291-93. The Canadian delegation at the CMI meeting spoke in favor of deleting the language that the Canadian delegation to the UNCITRAL Working Group now wishes to restore. See *id.* at 291 (comments of Prof. Tetley).

⁴⁵ The relevant mandatory national law in Canada is not federal legislation, but uniform provincial legislation. See, e.g., Valmet Paper Mach., Inc. v. Hapag-Lloyd AG, [2002] B.C.S.C. 868 (citing three uniform provincial statutes).

⁴⁶ As it happens, the liability limit under the mandatory Canadian law governing truckers is roughly the same as the Hague-Visby weight limit, but it is entirely possible that a mandatory national law would provide for much lower limits. The Canadian delegation informed us that until fairly recently it had mandatory law limiting a railroad's liability to 20,000 Canadian dollars for a forty-foot container, or 10,000 Canadian dollars for a twenty-foot container. For a heavy container, or a container with a large number of individual packages, this would represent a small fraction of the liability limit under the Hague-Visby or Hamburg Rules.

*D. The Italian proposal*⁴⁷

Italy argued that the Draft Instrument's network system is both too broad and too narrow. It is too broad in demanding the application of the underlying unimodal regime to the door-to-door carrier. In Italy's view, there is no need to apply CMR or CIM-COTIF to the German NVOC in our hypothetical cases, even if the damage occurs on the inland carriage between Berlin and Antwerp. The NVOC is not a road carrier that would expect to be governed by CMR or a rail carrier that would expect to be governed by CIM-COTIF. It did not contract to carry the goods by road or rail from one European state to another European state; it contracted to carry the goods by three different modes of transportation from Berlin to a country in North America that is not a party to CMR or CIM-COTIF. The NVOC is a CMR or CIM-COTIF shipper (under its contract with the European trucker), not a CMR or CIM-COTIF carrier. Thus, there should be no conflict between either CMR or CIM-COTIF and the Draft Instrument with respect to the NVOC, even if the Draft Instrument were to apply for damages on an inland European leg.⁴⁸

Italy also argues that the Draft Instrument is too narrow in failing to respect the interests of non-European inland carriers. A Canadian trucker has just as strong an expectation that the mandatory Canadian law will apply to it as the European trucker's expectation to be governed by CMR.

The Italian solution is to apply the Instrument to all suits against the contracting carrier regardless of where the loss or damage occurs. Moreover, the Instrument would apply to all suits against maritime performing parties. The new convention will be not only a multimodal instrument in the "maritime plus" context but also the unimodal instrument for the maritime mode. Thus, maritime performing parties should expect it to apply. Non-maritime performing parties, on the other hand, would expect to be liable on the terms applicable to their own contracts with the contracting carrier. To protect this expectation, the Italian proposal would permit cargo interests to sue inland performing parties only on a subrogation-like basis.⁴⁹ In essence,

When the Swedish delegate realized the implications of the similar Swedish proposal (*see supra* note 44) to include mandatory national law within the network system (a proposal that had been drafted with a focus on the much higher limits of the mandatory Swedish law governing domestic road carriage), he suggested giving the cargo claimant the option of recovering *either* the limits established by the Draft Instrument *or* the mandatory national law, *whichever is higher*.

⁴⁷ Italy made a formal proposal that was circulated in U.N. doc. A/CN.9/WG.III/WP.25 (Dec. 13, 2002).

⁴⁸ The Italian proposal's view of the relationship between CMR and the UNCITRAL Draft Instrument is not universally shared. For an argument rejecting the Italian view, *see* Malcolm Clarke, *A Conflict of Conventions: The UNCITRAL/CMI Draft Instrument on Your Doorstep*, 9 J. INT'L MAR. L. 28 (2003).

⁴⁹ At this preliminary stage, Italy has not yet fully developed the proposal. Thus there are no details now as to how the subrogation-like action would work in practice. But at the very least, the same legal regime would govern the shipper's action against the subcontracting performing party as would have governed in an action by the door-to-door carrier against its subcontractor, the performing party.

a cargo claimant could recover from an inland performing party on the same basis as the door-to-door contractual carrier could have recovered.

In the context of our two hypotheticals, therefore, the cargo claimant can recover from the German NVOC for any damage, regardless of the leg on which it occurs, on the Draft Instrument's terms. It can recover from the European trucker for damages on the European road leg on CMR terms because that is the basis on which the NVOC could have recovered from the trucker. It can recover from the European railroad for damages on the European rail leg on CIM-COTIF terms, under the same analysis. It can recover from the ocean carrier for damages on the ocean leg on the Draft Instrument's terms both because the Instrument would apply to maritime performing parties and because the Instrument would be the maritime convention regulating the NVOC's action against the ocean carrier. Finally, the cargo claimant could recover from the relevant North American railroad or trucker under U.S. or Canadian law. If the NVOC had negotiated a very low limit with the U.S. railroad under the Carmack Amendment, the cargo claimant presumably would be bound by that agreement (because that is what the Carmack Amendment allows). For the Canadian trucker, it would be bound by mandatory Canadian law—just as the NVOC would have been.

E. The U.S. suggestion

The United States did not submit a formal proposal, but it did circulate a discussion paper that made a suggestion for further consideration.⁵⁰ Under the U.S. suggestion, the contractual carrier's liability would be determined by the narrow network principle now found in article 4.2.1 of the Draft Instrument. This is a compromise suggestion, based on the desire to achieve as uniform a system as possible and the belief that it will be necessary to extend at least this much deference to CMR to achieve a convention that will be widely ratified.

For inland performing parties, the U.S. suggestion would neither create a new cause of action nor preempt an existing cause of action. Cargo claimants would be free to sue inland performing parties on exactly the same terms as they do today under existing law. For maritime performing parties, the Draft Instrument would recognize a direct cause of action on its own terms.

For damage between Berlin and Antwerp in our two hypotheticals, the cargo claimant could recover from the German NVOC or the European inland carrier on CMR or CIM-COTIF terms as appropriate.⁵¹ For any damage on the ocean voyage, the Draft Instrument would apply in an action against either the NVOC or the ocean carrier. For any damage on the North American inland journey, the cargo claimant could recover from the NVOC under the

⁵⁰ It remains to be seen whether the United States will ultimately support its own suggestion. The tentative U.S. positions have already gone through several variations, *cf. infra* note 57, and no final position has yet been reached.

⁵¹ This assumes that a cargo owner has a direct cause of action against a subcontracting trucker under the CMR or against a subcontracting railroad under CIM-COTIF. If no cause of action exists under current law, the U.S. suggestion would not create one.

Instrument, and its rights against the relevant inland carrier would be whatever they are today. For the New York to Chicago leg, this would mean a tort action in which the railroad would be free to claim whatever benefits it could under the NVOC's Himalaya clause.⁵² For the Montreal to Calgary leg, this would presumably mean an action under the mandatory Canadian law.

F WP.29 paragraph 166

The UNCITRAL Secretariat's background paper addressing the sphere of application of the Draft Instrument⁵³ describes a number of possible approaches, including the proposals of Canada,⁵⁴ Sweden,⁵⁵ and Italy.⁵⁶ It also discusses three "options based on the treatment of performing parties."⁵⁷ I discuss the first of these options here.⁵⁸

This proposal – like the Italian proposal – would hold the contractual carrier liable on the Draft Instrument's terms for any loss or damage, regardless of where it occurred or what other law might otherwise govern in that context. The Draft Instrument would also govern actions against maritime performing parties. For nonmaritime performing parties, the Draft Instrument would be the default rule, but each contracting state would have the option of deciding whether the new convention would apply to inland carriage within its territory. We can assume that the European states would opt out of the Draft Instrument to the extent necessary to preserve the application of CMR and CIM-COTIF. Presumably Canada and Sweden would similarly opt out to the extent their mandatory national laws apply. The United States would decide whether to opt out for domestic road and rail carriage at the time it ratified the convention. As things now stand, there is reason to believe that the U.S. government would opt out because that is what the truckers and railroads currently prefer, but if these industry groups see a benefit to joining the new regime when the time comes that would be possible instead.

If these assumptions are correct, then the German NVOC in our hypotheticals would be liable on the Draft Instrument's terms throughout, the European inland carriers would be liable on CMR or CIM-COTIF terms, the ocean carrier would be liable on the Draft Instrument's terms, the U.S. railroad

⁵² See, e.g., *James N. Kirby, Pty Ltd. v. Norfolk Southern Ry. Co.*, 300 F.3d 1300 (11th Cir. 2002), *cert. pending*, No. 02-1028 (U.S., filed Jan. 6, 2003).

⁵³ U.N. doc. A/CN.9/WG.III/WP.29 (Jan. 31, 2003). See *supra* note 38 and accompanying text.

⁵⁴ See *id.* at §§ 138-49.

⁵⁵ See *id.* at §§ 150-53. See also *supra* note 44.

⁵⁶ See *id.* at §§ 154-58.

⁵⁷ See *id.* at §§ 159-85. Although WP.29 was circulated as a Secretariat paper, it was openly admitted that the Secretariat had included these three options in its paper at the request of the U.S. delegation, which was then (January 2003) considering the possible adoption of one of the three options as the U.S. position. In late February, however, the U.S. delegation moved away from these three options and began thinking along the lines summarized in section IV-E, *supra* notes 50-52 and accompanying text. The three options are still on the table, though, and may yet be considered by the Working Group.

⁵⁸ See *id.* at § 166.

would be liable under U.S. tort law, and the Canadian trucker would be liable under the mandatory Canadian law.

G. Summary of proposals

For ease of reference, the governing rules under the six proposals discussed in this part can be conveniently summarized on the following two tables. Table 1 shows the outcomes under the first hypothetical, with the final leg from New York to Chicago. Table 2 shows the outcomes under the second hypothetical, with the final leg from Montreal to Calgary.

Table 1

location of the loss:	during road carriage (Berlin - Antwerp)		during sea carriage (Antwerp - New York)		during rail carriage (New York - Chicago)	
defendant being sued:	German NVOC	European trucker	German NVOC	ocean carrier	German NVOC	U.S. railroad
Uniform liability regime	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Current Draft Instrument	CMR	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Canada's "option 2"	CMR	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Italian proposal	the Draft Instrument	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	Carmack/contract
U.S. suggestion	CMR	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	tort law
WP.29¶166	the Draft Instrument	CMR	the Draft Instrument	the Draft Instrument	the Draft Instrument	tort law (?)

Table 2

location of the loss:	during rail carriage (Berlin - Antwerp)		during sea carriage (Antwerp - Montreal)		during road carriage (Montreal - Calgary)	
defendant being sued:	German NVOC	European railroad	German NVOC	ocean carrier	German NVOC	Canadian trucker
Uniform liability regime	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Current Draft Instrument	CMI-COTIF	CMI-COTIF	the Draft Instrument	the Draft Instrument	the Draft Instrument	the Draft Instrument
Canada's "option 2"	CMI-COTIF	CMI-COTIF	the Draft Instrument	the Draft Instrument	mandatory local law	mandatory local law
Italian proposal	the Draft Instrument	CMI-COTIF	the Draft Instrument	the Draft Instrument	the Draft Instrument	mandatory local law
U.S. suggestion	CMI-COTIF	CMI-COTIF	the Draft Instrument	the Draft Instrument	the Draft Instrument	mandatory local law
WP.29§166	the Draft Instrument	CMI-COTIF	the Draft Instrument	the Draft Instrument	the Draft Instrument	mandatory local law

V. Conclusion

It is still far too early to predict with confidence the shape of the final Instrument that will emerge from the UNCITRAL process. Many of the contentious issues are still unresolved, and there are many possible solutions. In additions to the proposals that have already been circulated, new proposals will be made at the coming sessions. At the moment, however, it does appear (1) that the new Instrument will provide for door-to-door coverage, and (2) that the problems created by this new overlap with land-based regimes will be resolved at least in part by the Instrument's treatment of performing parties.

JURISDICTION AND ARBITRATION

STUART HETHERINGTON*

UNCITRAL's Draft Report of Working Group III (Transport Law) on the work of its eleventh session (UNCITRAL, New York 24 March – 4 April 2003) records that discussion concerning Article 13 (Rights of Suit) resulted in the Secretariat being requested "to prepare draft provisions on issues of jurisdiction and arbitration."

The Hague Rules of 1924 contained no provisions dealing with jurisdiction or arbitration, in the sense of seeking to identify where or how claims might be brought. Article 10 did of course provide that the Convention "*shall apply to all bills of lading issued in any of the contracting States*". That provision was enlarged upon by Article 5 of the Visby Amendments in 1968 to provide that the Convention "*shall apply to every bill of lading relating to the carriage of goods between ports in two different States if:*

- (a) *the bill of lading is issued in a Contracting State, or*
- (b) *the carriage is from a port in a Contracting State, or*
- (c) *the contract contained in or evidenced by the bill of lading provides that the Rules of this Convention or legislation of any State giving effect to them are to govern the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person."*

Furthermore, Article 5 of the Visby Amendments provided that: "*each Contracting State shall apply the provisions of this Convention to the bills of lading mentioned above.*"

It was not until the Hamburg Rules of 1978 that provisions dealing with jurisdiction and arbitration were included in a Convention dealing with sea carriage.

Jurisdiction

Article 21 in the Hamburg Rules provided a plaintiff with the option of instituting an action in one of the following places:-

Article 21(1)

- "(a) the principal place of business or, in the absence thereof, the habitual residence of the defendant; or*
- (b) the place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or*

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- (c) *the port of loading or the port of discharge; or*
- (d) *any additional place designated for that purpose in the contract of carriage by sea."*

By Article 21(2) it was also provided that an action may be instituted in the Courts of any port or place in a Contracting State at which the carrying vessel or any other vessel of the same ownership may have been arrested in accordance with applicable rules of the law of that State and of international law. The same rule did, however, provide that if the defendant applied to the Court for its removal to one of the jurisdictions referred to in Rule 1 of Article 21, the claimant must comply with that application, but only if the defendant furnished security to ensure payment of any judgment that might be awarded in the action.

Rule 3 of Article 21 barred the institution of proceedings at any places other than those specified in Rules 1 and 2 of Article 21.

Rule 5 of Article 21 enabled parties to reach agreement "after a claim under the contract of carriage by sea has arisen", which designates the place where the claimant may institute an action.

Arbitration

By Article 22 of the Hamburg Rules, it was provided in Rule 1 that the parties could, by agreement in writing, agree to refer disputes under the Convention to arbitration. Pursuant to Rule 2 of Article 22 it was, however, provided that where a charterparty contains a referral of disputes to arbitration and a bill of lading pursuant to that charterparty does not contain a special annotation providing that such provisions shall be binding upon the holder of a bill of lading, the carrier cannot invoke that provision as against the holder who acquires the bill of lading in good faith.

Rule 3 of Article 22 replicates Rule 1 of Article 21 and provides the claimant with the option to institute arbitration proceedings either where the defendant has its principal place of business (or the habitual residence of the defendant); or at the place where the contract was made, or at the port of loading or the port of discharge; or at any place designated for that purpose in the arbitration clause or agreement. There is an equivalent provision to Rule 5 of Article 21 in Rule 6 of Article 22 which provides that nothing in the article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

Australia

In Australia, the modified Hague-Visby Rules contain provisions dealing with jurisdiction, law and arbitration.

Jurisdiction and Law

Insofar as jurisdiction and law are concerned, they are contained in Sections 10 and 11 of the *Carriage of Goods by Sea Act 1991 (as amended)*. Section 10 (Application of the amended Hague Rules) provides as follows:

"(1) the amended Hague Rules only apply to a contract of carriage of goods by sea that:

(b) is a contract:

(i) to which, under Article 10 of the amended Hague Rules, those Rules apply; or

(iii) contained in or evidenced by a non-negotiable document (other than a bill of lading or similar document of title), being a contract that contains express provisions to the effect that the amended Hague Rules are to govern the contract as if the document were a bill of lading.

Article 10 of the Amended Hague Rules provides as follows:

- “1. Subject to paragraph 6, these Rules apply to sea carriage documents relating to the carriage of goods from ports in Australia to ports outside Australia, regardless of the form in which the sea carriage document is issued.
2. Subject to paragraph 6, these Rules apply to the carriage of goods by sea from ports outside Australia to ports in Australia, unless one of the Conventions mentioned in paragraph 3 (or a modification of such a Convention by the law of a contracting State) applies, by agreement or by law, to the carriage, or otherwise has effect in relation to the carriage.
3. The Conventions are:
 - (a) The Brussels Convention;
 - (b) The Brussels Convention as amended by either the Visby Protocol or the SDR Protocol or both;
 - (c) The Hamburg Convention.
6. These Rules do not apply to the carriage of goods by sea under a charterparty unless a sea carriage document is issued for the carriage.
7. These Rules apply to a sea carriage document issued under a charterparty only if the sea carriage document is a negotiable sea carriage document, and only while the document regulates the relationship between the holder of it and the carrier of the relevant goods.”

Section 11 of the Act (Construction and jurisdiction) provides:

“(1) All parties to:

(a) a sea carriage document relating to the carriage of goods from any place in Australia to any place outside Australia; or
 (b) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii), relating to such a carriage of goods;
 are taken to have intended to contract according to the laws in force at the place of shipment.

(2) An agreement (whether made in Australia or elsewhere) has no effect so far as it purports to:

(a) preclude or limit the effect of subsection (1) in respect of a bill of lading or a document mentioned in that subsection; or
 (b) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of a bill of lading or a document mentioned in subsection (1); or
 (c) preclude or limit the jurisdiction of a court of the Commonwealth or of a State or Territory in respect of:

- (i) a sea carriage document relating to the carriage of goods from any place outside Australia to any place in Australia; or
- (ii) a non-negotiable document of a kind mentioned in subparagraph 10(1)(b)(iii) relating to such a carriage of goods.”

In *Hi-Fert Pty Limited and Cargill Fertilizer Inc. v Kiukiang Maritime Carriers Inc and Western Bulk Carriers (Australia) Ltd* (1999) 2 Lloyds Rep 782 the Full Federal Court of Australia held that an arbitration clause in a contract of affreightment, which was also incorporated into the bill of lading, was rendered of no effect. The arbitration clause was in a standard form:

“Any dispute arising from this charter or any Bill of Lading issued hereunder shall be settled in accordance with the provisions of the Arbitration Act 1950, and any subsequent Acts, in London”

The leading judgment in that case was given by Emmett J who a short time later gave another judgment in: *Hi-Fert Pty Limited v United Shipping Adriatic Inc., Marine Cargo Care Pty Limited and Hyundai Merchant Marine Co. Ltd*, unreported 3.12.98 Emmett J.

His Honour held, consistently with the Full Federal Court decision that the arbitration clause in the charterparty which had been incorporated into the bill of lading was of no effect, but did so in the face of two new arguments that were put relating to Section 11 that it did not apply to shipments covered by bills of lading issued in a foreign jurisdiction and only applied to bills of lading issued in Australia.

Firstly, it was said that Section 11 only applied where the governing law of the agreement was Australia. Emmett J had no difficulty rejecting that argument in reliance on the decision of the Australian High Court in *Compagnie des Messageries Maritime v Wilson* (1954) 94 CLR 577 on the predecessor Section in Section 9 of the Sea Carriage of Goods Act 1924, which it had been held applied to a bill of lading which was subject to French law. (That decision was always regarded by practitioners in Australia as establishing that arbitration clauses in voyage charterparties, as well as bills of lading, were null and void, as the Section spoke of “documents relating to the carriage of goods” and not simply bills of lading).

Secondly, His Honour was faced with much more complex arguments by reason of the terminology used in the Australian legislation and Regulations introduced to give effect to the changes in that legislation. I do not propose to burden you with the complexities of the legal arguments which were advanced which are unique to the Australian legislation.

Suffice it to say that Emmett J rejected those arguments on the basis that the effect of them, if correct, would be that Section 11(2)(c)(i) “would not apply to Sea Carriage documents relating to the Carriage of Goods from any place outside of Australia to any place in Australia if one of the Conventions mentioned in paragraph 3 of Article 10 of the modified Hague-Visby Rules applies, by agreement or by law, to the carriage or otherwise has effect in relation to that carriage” and, as His Honour pointed out prior to the commencement of the regulations which gave effect to the changes in Australian law, applied to any bill of lading or similar document of title relating to the carriage of goods from any place outside Australia to any place

in Australia, irrespective of whether any of the Conventions referred to in paragraph 3 applied to the carriage or not.

Accordingly, there is authority at the present time that jurisdiction clauses which purport to exclude Australian jurisdiction in bills of lading, wherever issued, will be ineffective.

Arbitration

In relation to arbitration, it is also provided in Section 11(3) that:

“An agreement, or a provision of an agreement that provides for the resolution of a dispute by arbitration is not made ineffective by subsection (2) (in spite the fact that it may preclude or limit the jurisdiction of a Court) if, under the agreement or provision, the arbitration must be conducted in Australia.”

Accordingly, whilst Australian jurisprudence would hold that a referral to arbitration, whether in a foreign or domestic jurisdiction would come within Section 11 and be ineffective, this provision does permit the referral of disputes to domestic arbitration and expressly overrules the jurisprudence which would hold that such a referral would come within the description in Section 11(2)(b) *“preclude or limit the jurisdiction of a Court”*.

It would seem that parties who agree to refer a dispute to arbitration out of the jurisdiction, after the dispute has arisen, and not by reason of any bill of lading provision compulsion could be at risk of coming within the ambit of Section 11(2)(b) which does not appear to be limited to contractual arbitration clauses. Thus, a provision equivalent to article 22 rule 6 of the Hamburg Rules might be beneficial in our jurisdiction.

**A GUIDE TO THE E-COMMERCE FEATURES IN
THE DRAFT INSTRUMENT ON THE CARRIAGE OF
GOODS [WHOLLY OR PARTLY] [BY SEA]**

This guide has been created to assist understanding of the eCommerce features in the draft instrument and to focus on the main issues.

Articles 16. & 17. of the UNCITRAL Model Law on Electronic Commerce, 1996 (A/51/17) provide the foundation for Transport Documents using eCommerce. These Articles are also the reason that the draft instrument came into being. During the discussions leading to these Articles, it became clear that the lack of uniformity for Transport Documents remained a serious impediment to eCommerce (A/CN.9/526; paragraph 129). This led the Commission to issuing a call to interested organizations for proposals to provide for uniformity of Transport Documents (A/51/17; paragraph 215).

The Comité Maritime International accepted that invitation, and tasked a committee to draft necessary articles. Because of the great disparity in the use and meaning of the term “bill of lading”, Transport Document was adopted from the Model Law to cover all forms of bills of lading including waybills, straight bills, etc. Further, because there is an aversion in some quarters to the use of the term “document” in eCommerce (under the rationale that “documents” can only be paper-based), another term was sought for electronic Transport Documents. A number of international trade groups and laws have adopted Electronic Record to avoid this problem, and it was adopted for the draft instrument (although there is no technical or legal reason that Electronic Transport Document, or even Electronic Transport Record, could not ultimately be adopted).

Issue: Should some term other than “electronic record” be adopted?

At the 38th session of the UNCITRAL Electronic Commerce Working Group (March 2001) it was urged that any procedures for electronic Transport Documents go beyond the functional equivalent declarations (that is merely declaring that electronic documents are to be accorded the same legal and commercial status as paper-based documents) of the Model Laws, and be drafted as stand-alone procedures, as if paper Transport Documents had ceased to exist (A/CN.9/484; paragraph 92.). The CMI eCommerce drafters undertook this considerable challenge. This meant that the draft would need two distinct procedures to replace bills of lading, rather than rely only on the simple statement that electronic Transport Documents are the functional equivalent of paper Transport Documents (some commentators urge such an approach, insisting that functional equivalency alone can not support true negotiability). This problem was eased by separating the elements that paper Transport Documents and electronic Transport Documents have in common, from the features unique to each (A/CN.9/510; paragraph 36 and A/CN.9/526;

paragraph 128). In effect, the instrument could easily be converted to a paper only or an electronic only document without affecting the substance. This approach allows us to concentrate on the specific features of an electronic Transport Document, rather than reexamining all aspects that would comprise an electronic Transport Document.

Issue: Should the stand-alone approach be pursued, or should it be abandoned and the “functional equivalent” approach be adopted exclusively?

The best example of a common element is “Contract Particulars” in Article 34. This was created to describe the information that is used to complete a Transport Document. It will also be particularly helpful for Electronic Records to avoid the typical terminology associated with paper bills of lading when information is added to the paper – for example “stamped on the bill of lading” (It is not possible to “stamp” or endorse an Electronic Record without altering it – thereby affecting its “paper trail” for security purposes – but information can be attached or linked to it). Contract Particulars are neutral as to paper or electronic documents, and eliminate the need to find alternate terminology when drafting for Electronic Records.

If it is kept in mind that the following common elements (all of which the Working Group has previously taken up) are the basic building blocks for Transport Documents and/or Electronic Records, then it will simplify our review of the electronic features which follow these common elements.

I. The Common Elements

Art.1(f) “Holder” means a person that 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 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 6. able to demonstrate that it has [access to] [control of] such record.*

The traditional term “holder” is retained, but defined in terms of both paper and electronic. The alternatives contained in the square brackets are the only unresolved difference among the CMI’s eCommerce drafters – to use “access to” or “control of” an electronic record – there was some opposition to the use of “control” because of the possible confusion with “Controlling Party”, and some opposition to “access” because it was felt to be too loose. It has been suggested that terms such as “command”, “authority”, “dominion”, “direction”, “power”, or “mastery” might work better than “control” or “access”.

Issues: Either “access to” or “control of” (or some other term) must be selected. Another possible solution would be to restructure the definition of

holder. The issue has been raised in the previous reading that the identity of the originator of a negotiable electronic record should be provided (A/CN.9/510; paragraph 37). It has also been suggested that the phrase “for the time being” is unnecessary (A/CN.9/510; paragraph 91).

Art. 1(h) Controlling party means the person that pursuant to article 50, is entitled to exercise the right of control.

Controlling Party is a term that is useful to insure that the transfer of rights do not mean different things between paper and electronic Transport Documents. (The term also expresses implicit rights that previously were not uniformly applied or recognized).

Art. 1(r) “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.

Contract Particulars are information related to the goods or the contract such as terms, notations, signatures and endorsements. By categorizing these various steps as information, the use of terminology that only works well with paper Transport Documents is avoided.

Other Common Elements

Chapter 8 - Transport Documents and Electronic Records

Art. 33 - Issuance - indicates when a Transport Document or Electronic Record should be issued.

Art. 34 - Contract Particulars - details as to what information must be included

Art. 35 - Qualifying the description - the use of exceptions or qualifications as to the condition of the goods

Art. 36 - Deficiencies - how to treat information that was not provided.

Chapter 12 - Transfer of Rights

Art. 60.2 - Holders exercising rights under the contract of carriage assumes any liability attached to it.

Art. 60.3 - Agreements to switch from Negotiable Transport Documents to Negotiable Electronic Records (or *vice versa*) are not considered to be exercising rights under Para. 60(2).

II. Electronic Features

Art. 1(n) “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.

Electronic Communication is a term that is meant to be compatible with the concepts of “Data Message” (Art. 2(a)) and “Information System” (Art. 2(f)) of the Model Law [see also A/CN.9/WG.IV/WP.103; Art. 5(a) and (e) – Legal Aspects of Electronic Commerce; Electronic Contracting: Provisions for a Draft Convention] to give the greatest scope possible to non - paper based

systems; and to support Art. 1(o) and Chapter 2. “Digital image” has been added to provide comfort to users, who have expressed doubt in this area, that systems such as “.pdf” images, (which are now in use) are clearly covered, even though it was intended to be covered in the definition of “Data Message”.

Issues: Are the eCommerce articles, and this paragraph in particular, consistent with the Model Law as previously noted in A/CN.9/510; paragraphs 35 & 88? Is there sufficient justification for using “Electronic Communication” instead of “Data Message”?

Art.1(o) “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

- (i) evidences a carrier’s or a performing party’s receipt of goods under a contract of carriage, or*
 - (ii) 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.

Electronic Record, as previously discussed, is a new term for an electronic bill of lading (or waybill, straight bill, etc.) The leading sentence might be revised to read: ...information collected from one or more data messages and sent by electronic communication... to clarify what was intended by the phrase “one or more messages”. The definition of Electronic Record provides substance to the actions related to contracts of carriage as described in Art. 16 of the Model Law. In particular, it provides for information to be linked or attached. Examples would include the added notation that the goods have been loaded aboard a vessel, exceptions taken to the condition of the goods at delivery, endorsements, digital signatures, digital certificates, etc. It has been suggested that the phrase “logically associated with” might be used for clarification. Thus the end of the definition might be revised to read: It includes information logically associated with the electronic record by attachments or otherwise linked so as to become part of the electronic record.

Issues: The definition itself requires modification, as does the definition for Transport Document, since it is for contracts of carriage, which could include charter parties. Clarification is needed to narrow the use of these terms to the sphere of bills of lading, seawaybills, etc.. Concerns have been raised regarding the phrases “one or more messages” (how can they be identified?) and “information attached or otherwise linked” (Too broad? Does it conform to the rules for incorporation by reference?) in this article as to their consistency with the Model Law (A/CN.9/510; paragraph 88).

Art.1(p) “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 6, 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.

Negotiable Electronic Record defines what makes such a record negotiable. As with Negotiable Transport Documents, the attributes of negotiability are that a record is consigned “to order” or states that is negotiable. (The only significant difference between Negotiable Transport Documents and Negotiable Electronic Record is that it is not possible to create a “bearer” Electronic Record unless a “token” is used). While nominative bills of lading would not qualify for negotiability (thereby eliminating the confusion that arises in their use), they still can be used under the UCP 500, which permits credit transactions using non-negotiable transport documents. It also requires that rules of procedure be agreed to between the parties. In any system where rights would be documented or transferred, a set of procedures is essential to provide security, avoid misunderstandings, and the preserve the uniqueness of the document or record (the guarantee of singularity) as required by Art. 17(3) of the Model Law. But the law does not set security requirements or procedures for paper-based bills of lading, and it would be a mistake to do this to Electronic Records. For one thing, technology changes too often, as it must to keep up with fraudsters, so it is dangerous to be locked into yesterday’s state of the art. The commercial imperatives (to the carrier for the risk of misdelivery, and to the holders for the loss and disruption to their business) to avoid fraud enable the commercial parties to make corrections faster than the law can. The situation would be no different for electronic records, except that, as ocean carriers do now, their rules of procedure are in writing, and must be agreed to in order to do eCommerce. This is necessary because eCommerce is relatively new, and lacks the customs associated with paper-based bills of lading. The term “adequate provisions” is intended to induce the parties to an electronic record to use the discipline necessary for secure transactions.

Issues: Concerns have previously been raised regarding what “adequate provisions” are necessary, and whether they should be left to the rules of procedure agreed between the parties or set forth in the instrument (A/CN.9/510; paragraph 37). Further, it should be settled as to whether or not nominative bills of lading are to be permitted to be used as negotiable electronic records (A/CN.9/566; paragraph 132).

CHAPTER 2. ELECTRONIC COMMUNICATION

Article 3.

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 provides for the functional equivalence of Electronic Records with Transport Documents in order to insure that there can be no mistake that they are on an equal footing. Further, it requires that the parties consent expressly or impliedly to the use of Electronic Records (it is often said that there can be no accidental eCommerce), so that they can not be forced upon a party that is ill-equipped to do eCommerce or unable to abide by specified procedures (see paragraphs 79. and 82. of the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce, 1996) (A/CN.9/426). It has been suggested that “could be” might work better than “is to be” at the start of this article so that it is clear that no Transport Document must be created first.

Issue: Are requirements for storage/archiving needed to insure how long and how well data would need to be kept (A/CN.9/510; paragraph 37)? What is the threshold for the level of consent needed in this instrument?

Article 4.

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 ceases to have any effect or validity.*

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 ceases to have any effect or validity.*

These sections provide procedures for the replacement (or “drop-down”) of a Negotiable Transport Document with a Negotiable Electronic Record in 4(1), and vice versa in 4(2). While Art. 17.(5) of the Model Law provided for replacement of data messages by paper documents, the Guide for Enactment noted that Art. 17.(5) did not exclude replacement of paper documents with data messages (paragraph 120.), such that there would be no incompatibility with the Model Law in this approach. Both articles are written to protect the “guarantee of singularity” of Art. 17.(3) of the Model Law by requiring that the old document or record be terminated before a new one can have effect (As is the present practice for “switched” bills of lading in which a bill of lading is reissued to reflect necessary changes or a split into several bills of lading).

Issue: Is there a need to identify and correct possible conflicts arising from the use of paper and electronics within the same contract of carriage (A/CN.9/510; paragraph 37)?

Article 5.

The notices and confirmation referred to in articles 20(1), 20(2) 20(3), 34(1)(b) and (c), 47, 51, the declaration in article 68 and the agreement as to weight in article 37(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 provides for notices and confirmations required in various articles to be given by means of electronic communication if there is express or implied consent to use such means. This insures that a notice or confirmation cannot be effective if the receiving party lacks the means to receive such communication. This would be true of e-mail or even telefax if the receiving party had no equipment for such means of communication. Inasmuch as Art. 76. of Chapter 16. (Arbitration) specifies that arbitration agreements must be “evidenced in writing”, Art. 76. should be added to the above list or otherwise modified.

Issues: Should this Article be limited to situations where Electronic Records are used exclusively, or is it applicable at all times under the instrument even when Transport Documents are used (A/CN.9/525; paragraph 94)?

Article 6.

The use of a negotiable electronic record is subject to rules of procedure agreed between the carrier and the shipper or the holder mentioned in article 1(p). 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*
 - (ii) pursuant to articles 4(2) or 49(a)(ii), the negotiable electronic record has ceased to have any effect or validity.*

This requires rules of procedure as referred to in the contract particulars, that as a minimum, would provide for transfer to further holders, security to prove that party is the holder (once again, “the guarantee of singularity”), and the means to confirm that delivery has been effected and the Negotiable Electronic Record can no longer be transferred. To avoid any question as to what the rules of procedure are, they must be referenced in the contract particulars, and, as a practical matter, an operator of the system is going to require each holder to agree to the use of such rules or accept a transport document. As was noted in Art. 1(p), no attempt is made to lock in today’s

state-of-the-art, lest the provision become quickly outdated, given the parties commercial imperatives to avoid fraud (and the working group's expertise in legal matters rather than technical details). By listing the essential components necessary for a negotiable electronic record which must be included in the rules of procedure, the minimum requirements are set, and any other procedures can but improve the likelihood of a successful transaction. "The guarantee of singularity" might be improved by revising the article to read: ...and shall include adequate provisions providing, at a minimum,

- (a) the exclusive transfer of that record to further holder,
- (b) the manner in which the holder of that record, and no other, is able to demonstrate...

Issue: As previously raised under Art. 1(p), the term "adequate provisions" is to be examined (A/CN.9/510; paragraph 37). Consideration will have to be given to the possibility of a conflict as to Chapter 15: Jurisdiction relating to the carriage of goods under this Instrument and any jurisdiction specified under the rules of procedure for the Electronic Record

Article 33. Issuance of the transport document or the electronic record

Upon delivery of the goods to a carrier or performing party

(a) 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;

(b) the shipper or, if the shipper so indicates to the carrier, the person referred to in article 31, 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 3 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.

Art. 33(b) entitles the shipper to demand a Negotiable Electronic Record if the parties have agreed to the use of Electronic Records.

Art. 35 Signature

(a) A transport document shall be signed by 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 authorization of the

electronic record.

Art. 35(b) provides for authentication of Electronic Records by electronic signatures using the definition of electronic signatures as provided by the UNCITRAL Model Law on Electronic Signatures, 2001.

Issue: To verify the consistency of this Article with the Model Law on Electronic Signatures (A/CN.9/526; paragraph 32).

CHAPTER 12. TRANSFER OF RIGHTS

Article 59.

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 6.*

This article provides legal support for transferring rights under an Electronic record.

Issue: As with articles 1(p) and 6, the “adequate provisions” of Article 6 need to be examined.

CHAPTER 16. ARBITRATION

Variant A

Article 76.

Subject to this chapter, the parties may provide by agreement evidenced in writing that any dispute that may arise relating to the contract of carriage to which this Instrument applies shall be referred to arbitration.

Article 77.

If a negotiable transport document or a negotiable electronic record has been issued the arbitration clause or agreement must be contained in the documents or record or expressly incorporated therein by reference. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a negotiable transport document or a negotiable electronic record issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder, the carrier may not invoke such provision as against a holder having acquired the negotiable transport document or the negotiable electronic record in good faith.

This Chapter provides for arbitration provisions to be incorporated in Transport Documents and Electronic Records. As noted previously, Art. 76. (both Var. A and B) should provide for electronic communications in addition to written communications, and be mentioned in Art. 5. as well.

Issue: Should this instrument provide rules for the incorporation by reference into Electronic Records of things such as arbitration agreements.

III. In Conclusion

There are many other parts of the present draft instrument that refer to Electronic Records, but those articles or paragraphs simply use Transport Document and Electronic Record (negotiable and non-negotiable) interchangeably, and no particular issues affecting eCommerce have arisen (or are likely to arise) concerning those articles or paragraphs.

January, 2004

**THE LEGAL UNDERPINNING OF E-COMMERCE
IN MARITIME TRANSPORT BY THE UNCITRAL DRAFT
INSTRUMENT ON THE CARRIAGE OF GOODS BY SEA¹**

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This paper sets out how the new UNCITRAL draft instrument copes with e-commerce in maritime transport. Because the UNCITRAL draft aims to provide a full legal basis for it, one of the purposes of this paper is to indicate whether the draft has achieved this goal. By providing appropriate provisions on the right of control of the goods during their carriage, the draft enables the uncoupling of the law relating to the maritime contract of carriage and the use of documents. This is of the essence for the development of e-commerce in maritime transport and may lead to a gradual disappearance of transport documents like bills of lading, even in electronic form.

1. History

In December 2001 CMI submitted to UNCITRAL a draft for a new international instrument (“the UNCITRAL draft”)². CMI prepared this draft at the request of UNCITRAL. The origin of this request was the discussion in UNCITRAL’s Electronic Commerce Working Group on the subject of documents of title. There, it was concluded that, generally, the “virtualisation” of documents of title is not feasible because of the formal function of the paper document. Instead, the material functions of documents of title can be incorporated in a structure of electronic messages. In various UNCITRAL publications this approach is referred to as “functional equivalent approach”. It is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic commerce techniques.³

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¹ This paper is an updated version of the presentation held by the author at the Bordeaux CMI Colloquium, 10 to 13 June 2003.

² This draft is, slightly amended by the UNCITRAL secretariat, included in UNCITRAL paper A/CN.9/WG.III/WP.21. On the basis of the discussions held by the governmental delegates in three subsequent meetings, the UNCITRAL secretariat made a revised draft in A/CN.9/WG.III/WP.32. These papers are published at UNCITRAL’s website www.uncitral.org. Because in both papers the provisions of the draft have different numbers, this article refers to the new numbering of WP 32 and adds the old numbering of WP 21 in brackets.

³ See, for example, paras 15 to 18 of the ‘Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996)’, also available on UNCITRAL’s website.

2. Functional equivalence requires proper law⁴

This “functional equivalent approach” raised many questions in respect of the negotiable bill of lading. Although the functions of a bill of lading are well known in trade practice, the underlying law, however, is far from uniform. What exactly are the rights and obligations of the shipper, consignee and intermediate bill of lading holder? Here, much law is non-statutory and based on trade practices and case law. In addition, due to the symbol-function of the paper itself, much bill of lading law is typically paper related. As a result, the use of an “electronic bill of lading” cannot be based on a simple reference to the law applicable to paper bills of lading. And, if such use were legally based on a transfer of rights and possibly obligations (through assignment, novation, accession, succession or otherwise) it must be clear which rights and obligations are involved. This is all the more important in the event that (under national law) property law consequences (should) flow from such transfer.

3. Functions of negotiable maritime transport document

For the purpose of assessing whether the UNCITRAL draft provides for its intended role, the various functions that a negotiable transport document⁵ may have are listed below.

3.1 Data carrier

The document carries information that is of importance to many people other than the parties to the contract of carriage: insurers, banks, many authorities, and so on.

3.2 Receipt**3.3 Evidence of a contract of carriage****3.4 Functions relating to holdership****3.4.1 Legitimation**

The document identifies a person, referred to as the “holder”, as the party that is entitled to the rights incorporated in the document.

3.4.2 Conclusive evidence

In respect of receipt of the goods proof to the contrary is not allowed as against a holder, not being the shipper, acting in good faith.

3.4.3 Requirements for validity of security rights relating to the goods

One such requirement may be that the security provider (for example, the pledgee) must have a sufficient degree of control over the goods. Usually by holding the document the security provider complies with such requirement.

Further, in those jurisdictions where security rights relating to goods, which are not directly under control of the security provider, have to be registered, such requirement of registration is usually waived when the goods

⁴ This article focuses on those legal aspects that are specifically transport-related. It has to be borne in mind, however, that also general legal issues may determine the legal effect of electronic messages, such as attribution and authentication of e-messages, evidentiary value of e-messages, incorporation by reference, and the like.

⁵ In this paper, as in the UNCITRAL draft, a bill of lading made out to a named person is regarded as a non-negotiable transport document.

are covered by a negotiable transport document and the security provider is the holder of such document.

3.5 Property law functions

3.5.1 *Transfer of title*

Transfer of the negotiable transport document during carriage includes transfer of title to the goods (possession or pledge) or indicates the intention to transfer such title. Even after the carriage has terminated, a transfer of the document may indicate such intention.

3.5.2 *Enhanced protection against rights of third parties*

If in respect of goods in transit a negotiable transport document is issued, the possessor or pledgee of such goods is in many jurisdictions in a better position than he would have been without such issue, because the holder of a document of title may enjoy further and better protection against the rights of third parties in respect of the goods than the ordinary possessor or pledgee does.

3.6 Others

Because the document may “symbolise” the goods, seeking recourse against the document (liens, rights of retention, attachment, etc.) may replace recourse against the goods.

With regard to applicable law matters the document usually facilitates the application of the *lex rei sitae* rule: the place where the document is kept at the relevant moment may be substituted for the place where the goods are located at that moment.

4. **Future e-commerce patterns in maritime transport**

The functional equivalence of the paper document may be achieved by two different legal approaches. Each of these has its specific features and, therefore, may be preferred in different commercial and/or operational situations. The UNCITRAL draft would have seriously failed if it had not tried to accommodate both methods.

One approach is the full equalisation of an electronic document to its paper equivalent. An e-document may, for instance, be an electronic record in pdf format that can be seen and read on a computer screen, thereby imitating its paper equivalent as much as possible. An electronic endorsement may (later) be attached to such e-document.

This approach may be the most suitable for those trades that traditionally rely on the negotiability of the bill of lading.

The other approach is based on a transfer of rights that may take place in principle independent of any paper or electronic document. Here, the material functions of a transport document, to the extent needed for the particular transport, are included in (a system of) electronic messages. If a third party, for instance a consignee, needs to acquire rights (and possibly obligations) under the contract of carriage, such rights may be transferred electronically to such third party.⁶

⁶ The CMI Rules for Electronic Bills of Lading, 1990 (see www.comitemaritime.org), follow the transfer of rights approach. So does the Bolero system, see www.bolero.net.

In the ferry and short-sea trades, at least in Europe, much cargo is transported with no transport document other than, in principle, a receipt and there is very little reason why this practice should not further extend to the deep-sea container liner trade.

The usual pattern is that such cargo is subject to an (electronically concluded) master contract that covers specified cargo to be carried during a certain period. This master contract usually includes (or refers to) the transport conditions applicable to individual shipments made thereunder. Bookings of these individual shipments are often made by e-mail and same may apply to the acceptance of the booking by the carrier. The physical delivery of the cargo usually is confirmed by the terminal (also on behalf of the carrier) by a (paper or electronic) receipt.⁷ As between the contractual parties under such pattern often no further transport document is required anymore.

Both approaches have a common denominator: the need for a codification of the structure of the maritime transport contract.

The e-document requires such codification because much current law is tied to paper documentation practices, while the e-document obviously must be able to function on stand-alone basis.

The transfer of rights approach needs codified uniform rights because, in view of the absence of a document embodying rights, it has to be spelled out, for instance, which rights a shipper has. Only this way can the required certainty be provided to the transferee of such rights, such as a consignee.

5. The equalisation approach

The principle of equalisation is laid down in Article 3 (2.1), at the beginning of the UNCITRAL draft, immediately after the definitions. All particulars, which are usually stated in or on a paper document may instead be recorded in an “electronic record”, provided its issuance and its subsequent use is agreed by the shipper and carrier. It should be noted that this provision includes two elements: equalisation as well as the requirement of a contractual basis for the use of electronic documents. Both elements are equally essential.

Subsequently, this equalisation is pursued throughout the whole UNCITRAL draft. In each provision where a reference is made to “document” or “bill of lading”, the equivalent electronic record is materially equalised. In most cases this equalisation is achieved by an express mention of the electronic record in the provision concerned. Sometimes, the provision had to be somewhat adjusted to the specific features of an electronic record, such as in the definitions of “contract particulars” (Article 1.r (1.6)) and of “holder” (Article 1.f (1.12)). Occasionally, a separate provision is inserted, which may mirror the corresponding provision applicable to the paper document.

⁷ Even the procedure of delivering of the goods to the carrier may be automated: the physical condition of the cargo, for example, a container or a trailer, can be checked by electronic cameras that are installed in a gate through which the container or trailer has to pass and subsequently the shipper may receive electronically the receipt referring to the electronic check.

Examples are the definitions of “electronic record” (Article 1.o (1.9)) and “negotiable electronic record” (Article 1.p (1.13)). These are mirror images of the definitions of “transport document” (Article 1.k (1.20)) and “negotiable transport document” (Article 1.l (1.14)). And finally, a specific provision was required for use of an electronic record, such as relating to the requirement of a signature, see Article 35 (8.2.3). An electronic signature is definitely something different from an ordinary signature.

On two issues this equalisation is difficult to pursue. The first is the equalisation between the transfer of the electronic record and the transfer of the paper negotiable transport document. And the second difficult issue is related to it: the legitimating function of the paper document. With a paper document, it is the paper itself that identifies the person who is entitled to the rights incorporated in the document; in case of an uninterrupted list of endorsements this person is the final endorsee and in case of a blank endorsed document it is its actual holder. But how could an electronic document identify such person?

In this author’s view, this goal may be achieved when, as a minimum, the e-messages, which are relevant for the attribution of rights, can only arrive at the person entitled to these rights. And subsequently, having acquired these rights, this person is electronically identifiable as such by the carrier. This would entail certain technical and systematical requirements, which the UNCITRAL draft does not specifically define.

The draft only provides in Article 6 (2.4) for the requirement that the agreement, on the basis of which the parties perform their e-business, should include “adequate” terms relating to (a) the transfer of the record to a subsequent holder, and (b) the manner in which the holder of the record is able to demonstrate that it is the holder. In other words, it is left to the parties to the contract of carriage that the “rulebook” includes certain provisions to achieve a certain result, without the UNCITRAL draft giving a direct indication as to the contents of such an “adequate provision”⁸. It might well be that the draftsmen of Article. 2.4 were of the opinion that a more specific description what “adequate” might mean, would result in too much precision given the current state of the technical possibilities (commercially) available.

It should be kept in mind, however, that a proper electronic equivalent of the transfer and legitimating function of the paper document is of the essence. This is illustrated by the fact that the same requirement of “adequate provisions” in the “rules of procedure” is included in the definition of “negotiable electronic record”. Without “adequate” contractual provisions in the “rulebook”, negotiability of the electronic record is lost!

⁸ Eventually, it is up to national law to determine whether parties have achieved the adequacy of their terms. As an example, see section 16 of the US Uniform Electronic Transactions Act (UETA), which provides for a list of requirements. About the practical difficulties to comply with these requirements, see ‘Emulating Documentary Tokens In An Electronic Environment: Practical Models For Control and Priority of Interests in Transferable Records and Electronic Chattel Paper’, 59 Bus.Law. 379 (2003), a paper prepared by the ABA Cyberspace Committee Working Group On Transferable Records.

6 The Transfer of rights approach

The Articles 61 (12.3) and 62 (12.4) deal with the transfer of rights in cases where no negotiable document, or for e-commerce purposes more importantly no proper document at all, is issued. Such transfer is governed by national law. Generally, transfer of rights is a complicated subject and may, as indicated earlier, take place under a variety of legal concepts. It would be going too far to try to elaborate on this matter in a transport Convention. Therefore, the UNCITRAL draft has hardly any other option but to include here simply referral to national law.

Further, Article 61 (12.3) sets out two requirements that must be complied with, regardless the applicable national law: first, it must be allowed that a transfer of rights can be effected by means of electronic communication and, secondly, the transfer must be notified to the carrier. For e-commerce purposes both requirements are of the essence.

At the CMI Colloquium in Bordeaux (Note 1 above) Article 61 (12.3) of the UNCITRAL draft gave rise to extensive discussion. The general feeling was that a redraft of the Articles 61 and 62 was desirable because the original draft was not clear enough and could create complex conflict of law issues. Based on this discussion the CMI produced in Bordeaux a revised draft taking into account the criticisms raised⁹. The UNCITRAL secretariat, having for the same reasons already placed brackets around the original draft of Article 61, put this revised draft as a suggestion in footnote 207 of A/CN.9/WG.III/WP.32. In this author's view, this revised draft is a substantial improvement and deserves proper attention. It would be regrettable if this opportunity for uniformity in a for e-commerce purposes key provision were missed.

7. Right of control

7.1 In Articles 53 to 58 (11) of the UNCITRAL draft, there are provisions which attempt to define a right that should give its holder during the transport period (as defined in Article 7 (4.1)) similar control over the goods as, under the current bill of lading practice, a holder of a negotiable bill of lading has. This applies, irrespective of whether a transport document of any kind (negotiable or non-negotiable, electronic or paper) is issued. The intended effect is that, just as a bill of lading represents the goods, holding this "right of

⁹ This draft, prepared by Allan Philip, reads:

1. "If no negotiable transport document and no negotiable electronic record is issued, the transfer of rights under a contract of carriage is subject to the law governing the contract for the transfer of such rights or, if the rights are transferred otherwise than by contract, to the law governing such transfer. [However, the transferability of rights purported to be transferred is governed by the law applicable to the contract of carriage.]

2. Regardless of the law applicable pursuant to paragraph 1, the transfer may be made by electronic means, and it must, in order to be valid, be notified to the carrier [either by the transferor or by the transferee].

3. If the transfer includes 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."

control” includes the power of disposition over the goods. Therefore, these Articles 53 to 58 (11) are of paramount importance for e-commerce purposes.

7.2 Article 53 (11.1) defines the “right of control” as the right to instruct the carrier during the period of its responsibility. Within the scope of this definition, a distinction is made between instructions which involve amending of the contract of carriage and instructions without such consequence. Examples of the latter instructions are those which are common in the ordinary course of the transport business, such as the instruction to carry the goods at a certain temperature or to deliver the goods at a specific hour of the day. But the description of the instruction right also includes the power to agree with the carrier to an amendment of the contract of carriage.

Two specific amendments to the contract of carriage are expressly mentioned in the description of the instruction right:

- (a) the right to demand delivery of the goods before their arrival at the place of destination, and
- (b) the right to replace the consignee by another person, which person may include the controlling party itself.

Both these rights are essential for an unpaid seller who wants to exercise his rights under his contract of sale, or for a bank which wants to enforce its rights of pledge on the goods. Delivery of the goods during the voyage may, amongst others, prevent the goods arriving in the jurisdiction of the buyer, while the other right (b) enables such seller or bank to appoint another person (itself or its agent, a new buyer, and so on) as a new consignee in place of the original consignee. These two rights (a) and (b) together may provide their holder with the control over the goods, which is why the UNCITRAL draft has opted for the term “right of control”.

In Article 55 (11.3) provision is made that a carrier, with certain qualifications, is obliged to execute the instructions given.

7.3 In addition, Article 54 (11.2) expressly provides that the “right of control” is transferable. How such transfer is effected is dealt with in Article 59 (12.1) for a transfer under a negotiable document, and in Article 61 (12.3), referred to in paragraph 6 above, for a transfer when no negotiable document is issued.

7.4 Article 54 (11.2) of the UNCITRAL draft also deals with the important matter of who possesses the “right of control”.

When a negotiable transport document is issued, such person is exclusively the holder of the document. If more than one original is in circulation, such person must have all the originals in its possession in order to be the “controlling party”. When exercising the “right of control”, the holder of this right must, on request of the carrier, demonstrate that it is the holder of all originals of the negotiable document.

When no negotiable document is issued - including when there is no document at all - the shipper is, in principle, the holder of the “right of control”. But the shipper and the consignee may agree otherwise, provided the carrier is advised about such “otherwise agreement”. For clarification purposes, the Article adds that such “otherwise agreement” may include that the consignee is appointed as the holder of the “right of control”.

Herewith, it may be assumed that the Incoterms variations under a contract of sale are covered, together with the transferability of the “right of control”.

7.5 A “controlling party”, however, not only has rights, it also has obligations. Its main obligation is to ensure that a carrier is able to deliver the goods. Another obligation is to provide the carrier with additional information or instructions at any time after receipt of the goods by the carrier where the carrier reasonably needs them.

Special rules apply when the “controlling party” is an “intermediate holder”.

It should be emphasised that the term “controlling party” denotes a function. Shippers, consignees, holders of a bill of lading, may all be a “controlling party”. For all practical purposes, the “controlling party” is the counterpart of the carrier during the carriage. It is, irrespective any document, the person in control of the goods during carriage¹⁰.

Previous paragraphs have dealt with “functional equivalence”, listed the functions of a negotiable transport document, and made reference to the two methods used in the UNCITRAL draft to achieve the “functional equivalence”. Now the question arises whether these two methods will succeed.

8. Does the equalisation method as provided for in the UNCITRAL draft achieve the functional equivalence of the negotiable paper transport document?

To answer this key question it is helpful return to the list of functions set out in paragraph 3 above.

- Data carrier
Data files are particularly well suited to electronic processing. Third parties may acquire electronic access to the information by agreement.
- Receipt
Article 33.a (8.1.i) provides for the issue of an electronic receipt. The UNCITRAL draft does not make specific reference to requirements that are of importance to the evidentiary weight of a document itself¹¹ (although it does with regard to its contents), with the exception of the requirement of a signature. Article 35 (8.2.3) provides for an electronic signature.
- Evidence of contract of carriage
Generally, contractual consensus may be effected through electronic communication. Article 33.b (8.1.ii) provides for the issue of a negotiable electronic record. For the evidentiary aspects refer above under “receipt”. Further, unlike the Hague-Visby Rules, the applicability of the

¹⁰ There is always a ‘controlling party’ with one exception: in the event of a paper negotiable document of which more than one original has been issued and not all the originals are in the hands of one person, during the carriage no ‘controlling party’ exists.

¹¹ See Article 9.2 of the UNCITRAL Model Law on Electronic Commerce.

UNCITRAL draft is not related to a specific document, but applies to certain contracts of carriage irrespective of any document.

- Legitimation

The legitimation function of negotiable electronic record is referred to in Article 49.a to d (10.3.2.a to d) and Article 54.3.b (11.2.c.ii). Article 1.p (1.13) and Article 6 (2.4) require that the parties agree to “adequate provisions” for this purpose.

- Conclusive evidence

This is explicitly provided for in Article 39.b.i (8.3.3.b.i).

- Validity of security rights

The holder of an electronic record is the sole controlling party (pursuant to Article 54.3.a (11.2.c.i)) and, consequently, must be regarded as having sufficient degree of control over the goods to satisfy any requirement for validity of pledge. Electronically, there can only be one original, so there can be no risk of originals being in different hands.

Whether a possible requirement to register the security right will be waived for the holder of a negotiable electronic record will depend on the applicable national law.

- Transfer of title

It must be noted that the UNCITRAL draft carefully restricts itself to provisions of transport law and does not extend to matters of sale or property law. However, it obviously takes into account the fact that its transport law provisions have to function in conjunction with the law of sale and the law of property. As a result, the right of control is defined in such a way that the controlling party has similar control over the goods as the holder of a negotiable transport document under the present negotiable transport document practice. And because, currently, under many national laws the transfer of a negotiable transport document and the transfer of title to the goods are “attached” to each other, it is not improbable that these national laws in future will do the same in respect of a transfer of a right of control, particularly when such transfer is effected by the transfer of an negotiable electronic transport document.

Therefore, in those jurisdictions where the transfer of a negotiable paper transport document is an act of delivery of the goods, the legislator may “attach” the same property law consequence to the transfer of negotiable electronic record, because the legal effect towards the goods (under transport law) is the same under both transfers.

And in the jurisdictions where the transfer of a negotiable transport document indicates the intention to transfer title, there seems to be no reason why the transfer of a negotiable electronic record should not provide the same indication.

Obviously, this is all on condition that parties have agreed to “adequate provisions” (referred to in the final part of paragraph 5) in respect of transferability.

- Protection against rights of third parties

If, due to the proper definition of the right of control, national law joins the transfer of a negotiable electronic record and the transfer of title to the

goods, such national law might go one step further and provide the new holder of the electronic record with similar protection against the right of third parties to that at present enjoyed by the holders of a negotiable paper transport document.

However, if applicable national law does not make such provision, the “adequate provisions” may include a contractual warranty by the transferor to the transferee that its predecessors were entitled to transfer (or whatever other protection the transferee might enjoy).

- Others

Even if national law acknowledges that a negotiable electronic record “symbolises” the goods in the same way as the paper document does, there will always remain the same practical and procedural difficulties that generally exist when a person seeks recourse against an intangible asset.

Also, determining the “place” of an electronic record seems to be not without its difficulties.

9. Does the “transfer of rights” method as provided for in the UNCITRAL draft achieve the functional equivalence of the negotiable paper transport document?

To answer this question it is helpful to refer to the same list of functions as before.

- Data carrier

Same remarks as under paragraph 8.

- Receipt

Same remarks as under paragraph 8.

- Evidence of contract of carriage

Same remarks as under paragraph 8, except that Article 33.b (8.1.ii) equally paves the way for the parties not to use any (paper or electronic) document.

- Legitimation

Article 54.1.a (11.2.a.i) spells out which person is the controlling party. And any transfer of the right of control to another party cannot be completed without notification to the carrier: see Article 61 (12.3). Further, under Article 48.a (10.3.1.i) the “controlling party” has the duty to advise the carrier of the name of the consignee. With these three provisions, a carrier always knows to whom it has to deliver the goods. Article 48.b (10.3.1.ii) obliges the consignee to produce “proper identification”, while the controlling party itself has the same obligation: Article 54.1.c (11.2.a.iii).

- Conclusive evidence

This may be a problem, because Article 39.a (8.3.3.a) provides for the prima facie evidence rule. This means that the parties who, with regard to description of the goods, wish to reinforce the evidentiary value of the receipt, must do so contractually. In this connection it may be noted that a precedent can be found in Article 5.ii.b of the CMI Uniform Rules for Sea Waybills, 1990. It should be realised, however, that certainly in

respect of the carriage of containers and trailers, due to the probability of the validity of qualifying clauses, the practical value of the conclusive evidence rule is rather limited.

- Validity of security rights

The right of control must be deemed to provide a sufficient level of control over the goods to satisfy any requirement for validity of pledge. However, whether national law will be inclined to waive a possible requirement of registration of the security right, is more questionable.

- Transfer of title

In those jurisdictions where, besides the agreement to pass title of the goods, an act of delivery is needed, it may be expected that national law will regard the transfer of the right of control, including the notification thereof to the carrier, as a *longa manu*¹² delivery of title.

And in those jurisdictions where a transfer of title is a consensual matter, there may be no reason why a transfer of the right of control would not indicate the intention to transfer (constructive) possession.

- Protection against the rights of third parties

In case of a *longa manu* delivery of title national law cannot be expected to attribute to the transferee protection against the rights of third parties similarly to that of the transferee of a negotiable paper transport document. Only a contractual warranty from the transferor may give the transferee some comfort.

- Others

Recourse against the right of control or the right to claim delivery of the goods may replace recourse against the document, but may in practice more difficult to pursue and less effective.

A facilitation of the *lex rei sitae* rule is hardly conceivable under the “transfer of rights” method.

10. Some conclusions

10.1 The UNCITRAL draft has generally achieved the functional equivalence between the paper transport document and its electronic substitute.

Such substitute does not necessarily need to be an “electronic document” in the strict sense; when the “transfer of rights” method is used, it may be a file of e-messages.

The involvement of national law may cause some uncertainty, while under the “transfer of rights” method it is fairly sure that some lesser important functions of the negotiable paper transport document cannot be fully replicated electronically. It may be observed, however, that, first, the full functional equivalence is often in actual practice commercially not needed and, secondly, e-commerce may have so many other advantages (security, speed, cost effectiveness, and so on) that the advantages normally far outweigh the possible disadvantages.

¹² This term is used here to indicate the transfer of goods when they are in the hands of a third party.

10.2 A weakness of the draft is that nowhere it refers to relevant general legal aspects of e-commerce, such as those dealt with in the UNCITRAL Model Law on Electronic Commerce 1996 and the US UETA, even not when the specific features of negotiable instruments are involved.

In this author's view, this is a matter of legislative policy, which is worth thoroughly discussing. I am inclined to view the disadvantages of incorporation of these general legal features of e-commerce in the UNCITRAL draft as greater than the advantages.

10.3 It may be expected that the proper description of the most important rights and obligations of the parties to the contract of carriage will conform to the current tendency to avoid the use of transport documents where possible.

To give an example, let us assume that, in a given case, the purpose of a bill of lading is to provide the seller with the certainty that it will receive payment for the goods before they are delivered by the carrier to the buyer. Under the UNCITRAL draft a simple e-mail to the carrier, "please instruct your agent that he should not deliver the goods without my prior authorisation" provides the seller with the required certainty. The provisions of the Articles 33.b (8.1.ii), 48.a (10.3.1.i), 53 (11.1), 54.1 (11.2.a) and 55 to 57 (11.3) together provide the required legal infrastructure that makes the bill of lading in this example superfluous.

Another example: a bank that wishes to control the goods as collateral security has under the UNCITRAL draft the choice of acquiring such control either by having a (paper or electronic) negotiable document transferred to it or by a simple transfer of the right of control (in writing or electronic form).

The fundamental uncoupling of the law of contract of maritime carriage and the use of documents is extremely important for the development of e-commerce. In the author's view, this separation may, eventually, turn out to be of much greater importance for practitioners than the provision of the legal infrastructure for the negotiable electronic document.

10.4 Electronic techniques may make a core function of (paper and electronic) negotiable documents - the transfer of (constructive) possession of the goods - obsolete. The fact that in the past a *longa manu* transfer of property could not be notified to the carrier holding the goods, caused the contract of carriage developed into a negotiable document. Today, however, secure and instant communication is possible between any trader and carrier at every corner of the globe. Why should anybody use the roundabout means of a transfer of an electronic transport document if, more directly, a simple electronic transfer of the right of control plus notification to the carrier could have the same effect?

REPORT BY THE CMI INTERNATIONAL SUB COMMITTEE ON GENERAL AVERAGE

TABLE OF CONTENTS

	<i>Page</i>
0. SUMMARY	276
1. INTRODUCTION	276
1.0 <i>IUMI report</i>	276
1.1 <i>Remé Working Group – papers – decisions</i>	276
1.2 <i>Remé questionnaire</i>	277
1.3 <i>The Singapore conference – papers – decisions</i>	278
2. THE WORKING GROUP'S BRIEF	278
2.1 <i>Wiswall steering committee – papers – decisions</i>	278
2.2 <i>Topics to be considered by the Working Group</i>	278
2.3 <i>Topics excluded</i>	278
2.4 <i>The Working group – composition – meetings – tasks</i>	279
2.5 <i>International Sub-Committee</i>	279
3. RADICAL CHANGE – COMMON SAFETY/COMMON BENEFIT	279
3.1 <i>IUMI's proposals</i>	279
3.2 <i>IUMI's proposal "Grip of peril"</i>	280
3.3 <i>Common Benefit – concept – summary – YAR Rule X, XI, XII</i>	280
3.4 <i>Substituted expenses – concept – Rule F. Rule XIV (2)</i>	281
4. ARGUMENTS FOR AND AGAINST EXCLUDING COMMON BENEFIT EXPENSES	281
4.1 <i>Introduction</i>	281
4.2 <i>Arguments for excluding Common Benefit</i>	281
4.3 <i>Arguments for retaining Common Benefit</i>	284
5. INCREMENTAL CHANGES CONSIDERATION OF SPECIFIC TYPES OF EXPENSE	286
5.1 <i>Cargo handling (including damage caused during handling)</i>	286
5.2 <i>Wages, fuel and port charges in port of refuge</i>	287
5.3 <i>Draft clauses</i>	288
5.4 <i>Temporary repairs</i>	288
5.5 <i>Substituted expenses</i>	289
6. REDISTRIBUTION OF SALVAGE CHARGES	290
6.1 <i>General comments</i>	290
6.2 <i>Arguments for and against excluding salvage</i>	291

Report by the CMI International Sub-Committee

7. TIME BAR (PRESCRIPTION)	292
7.1 <i>General comments</i>	292
7.2 <i>Summary of replies to Remé questionnaire</i>	293
7.3 <i>Draft clause</i>	293
8. INTEREST	293
8.1 <i>General comments</i>	293
8.2 <i>Currency</i>	293
8.3 <i>Draft Clause</i>	293
9. COMMISSION	293
9.1 <i>General comments</i>	294
9.2 <i>Arguments for and against allowing commission</i>	295
9.3 <i>Draft Wordings</i>	295
10. ABSORPTION CLAUSES	295
10.1 <i>General comments</i>	295
10.2 <i>Extent of use</i>	295
10.3 <i>BIMCO standard clause</i>	296
11. SEPARATE TREATMENT OF SACRIFICES OF PROPERTY	296
12. TIDYING UP THE TEXT OF THE YAR	296
13. ANNEXE A – GENERAL AVERAGE EXAMPLES	298
13.1 <i>Example 1</i>	298
13.2 <i>Example 2</i>	298
13.3 <i>Example 3</i>	299
14. ANNEXE B – DRAFT WORDINGS	300
14.1 <i>To exclude from GA allowance for crew wages and maintenance</i>	300
14.2 <i>To exclude from GA allowance for crew wages, maintenance, fuel and stores and port charges</i>	301
14.3 <i>To limit allowance for temporary repairs so as to avoid any undue advantages for the Ship owner; particularly in cases where a temporary repair makes it possible for the ship to make final repairs at a place where repairs can be made cheaper than close to the port of refuges (Baily method)</i>	301
14.4 <i>To exclude from GA allowance for salvage</i>	301
14.5 <i>New rule on time limit for GA Contributions</i>	302
14.6 <i>Interest</i>	302
14.7 <i>Administration costs</i>	303
15. ANNEXE C – PROPOSALS FOR TIDYING UP THE TEXT OF THE YAR	303

0. SUMMARY

This report sets out the results of the studies conducted in 2002-3 by the Working Group and the International Sub Committee under the Chairmanship of Mr Bent Nielsen (Denmark) on the proposals for revision of the York-Antwerp Rules (YAR) made by the International Union of Marine Insurers (IUMI), and in particular that the scope of General Average should be limited by excluding “common benefit”. The purpose of this report is to review the arguments on each side of the debate, so that in due course an informed decision can be made at the Vancouver Conference of the CMI in June 2004.

As is the traditional method of work of the CMI, this Report sets out from a neutral stance the matters which are considered to be important in making the relevant decisions, and a position has not been taken on any of the arguments.

1. INTRODUCTION

1.0 IUMI report

At the 1994 Conference of the CMI held in Sydney, Australia an International Subcommittee under the Chairmanship of Mr David Taylor conducted a review of the YAR in the light of developments since the previous review in 1974. Prior to the conference extensive consultations with all interested parties had as usual taken place. At the end of the Sydney Conference a new version of the YAR, to be known as the YAR 1994, was adopted by the plenary session.

In the course of the discussions in the International Subcommittee and at the Sydney Conference the representatives of certain insurers, including IUMI, put forward proposals for radical reform of General Average based on a change of principle to exclude from General Average allowances based on “common benefit”, so that only allowances based on “common safety” were retained. It was however evident that these proposals had not received sufficiently thorough development prior to the conference to enable them to be considered in detail.

However, at the IUMI Conference in Berlin in April 1998 a Working Group submitted a paper entitled “Report of IUMI Drafting Working Group. General Average - How should it be Changed?” This report is set out in full on page 298 of the CMI Yearbook 2000. The report was adopted by IUMI, and as a result in March 1999 a formal request was submitted by IUMI to CMI that a case for further revision of the YAR should be placed on the agenda of CMI.

1.1 Remé Working Group - papers – decisions

A Working Group was therefore set up under the Chairmanship of Mr Thomas Remé (Germany) and consisting of Mr Pierre Latron (France) and Mr Hans Levy (Denmark), which prepared a questionnaire submitted to all CMI member maritime law associations.

Meanwhile at the CMI Colloquium, which took place in Toledo, Spain in September 2000, the possible review of the YAR was one of the subjects selected for discussion. Papers were presented, inter alia, by Mr Eamonn Magee, an underwriter, and Mr Geoffrey Hudson, an average adjuster, whose main thrust was respectively for and against the amendment of the YAR along the lines proposed by IUMI. These papers are also printed in the CMI Yearbook 2000 on pages 294 and 314, respectively. A lively debate ensued, at the conclusion of which it was the common consensus that this was a subject which should be included on the work programme of the 2001 CMI Conference in Singapore. Mr Richard Shaw (UK) was appointed Rapporteur of that session and of the session at the Singapore Conference.

1.2 Remé questionnaire

The text of this questionnaire is set out on page 292 of the 2000 CMI Year Book. It was not possible to draft a synopsis of all the replies received from 21 Maritime Law Associations. One of the great strengths of the CMI is the diversity of membership of the national maritime law associations of which it is composed, and many such associations appointed a subcommittee with a broad mix of members to draft their association's reply. It is not surprising therefore that in many cases the responses have indicated a divergence of views between the members of their committee between those representing marine insurers (who have generally favoured the revisions proposed by IUMI) and those representing shipowning interests and average adjusters (who have not).

In summary, of the 21 national Maritime Law Associations, which replied to the questionnaire, 10 were in favour of retaining the "common benefit" principle of General Average while 7 associations were in favour of excluding "common benefit", and 4 associations were so divided as to be unable to formulate a common position.

In accordance with CMI practice no questionnaire was sent to IUMI or other industry groups.

1.3 The Singapore conference - papers – decisions

At the CMI Conference held in Singapore in February 2001 a lively debate took place on whether or not further work should be done by CMI on the IUMI proposals. A substantial body of opinion argued that the review conducted in preparation for the 1994 Sydney Conference had been thorough and wide ranging, and that a further review of the YAR at this stage was premature. However the majority view was that the concerns expressed by IUMI and its supporters were of sufficient importance to justify further work by the CMI, and this view was adopted by the Conference. The resolution of the Conference which is printed in the CMI Yearbook 2001, page 213, requests the Working Group to consider what, if any, revision of the YAR should be made in the light of the deliberations and conclusions at the Conference.

2. THE WORKING GROUP'S BRIEF

2.1 *Wiswall steering committee - papers – decisions*

However the CMI Executive Council was concerned that the implementation of this decision should not lead to a completely open-ended review of all aspects of General Average and appointed a steering committee under the Chairmanship of Dr Frank Wiswall (USA), Vice President of CMI, to analyse the list of topics included in the IUMI Report of April 1998 and to identify those which merited further study by this Working Group. Dr Wiswall's steering committee conducted extensive consultations and held two well-attended meetings in London in May and December 2001, and a detailed report was submitted to, and approved by, the CMI Executive Council at its meeting in London on 7th December 2001. A copy of this report is available on the CMI website at www.comitemaritime.org

2.2 *Topics to be considered by the Working Group*

The topics, which should be considered by this Working Group, are therefore the following:

- **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 so-called common benefit expenses,
- **Absorption clauses** - exclusion of sacrifices in General Average,
- **Salvage claims** - to consider whether salvage remuneration should be readjusted in General Average,
- **Interest** - to consider the question of interest, and in particular whether the rate of interest stated in the YAR should be governed by a formula rather than a set figure,
- **Commission**¹
- **Temporary repairs,**
- **To let liability lie where it falls in sacrifices of property,**
- **Time bar,** and
- **“Substituted expenses”** – as one part of the consideration of the “Common Safety” vs. “Common Benefit” approach.

2.3 *Topics excluded*

The topics, which are excluded from our consideration, are the following:

- **“Ballast General Average”,**
- **Deductible clauses,**
- **“Error in management” exclusions,**
- **Reversal of the 1994 Rule 11 (d) compromise,**

¹ Commission was included in the list of topics, which the Wiswall Steering Committee indicated should not be considered by this Working Group, but it has subsequently been agreed that this topic should be considered by the Working Group.

- **Exclusion of adjusters' fees, and**
- **Other miscellaneous matters raised by the IUMI Report.**

2.4 The Working Group - composition - meetings – tasks

The CMI Executive Council also reviewed the composition of the General Average Working Group in the light of developments since the Singapore Conference as a result of which the membership consists of:

Mr Bent Nielsen (Denmark) - Chairman
 Mr Richard Shaw (UK) - Rapporteur
 Mr Ben Browne (UK)
 Mr Richard Cornah (UK)
 Mr Gilles Heligon (France) - appointed in place of Mr Pierre Latron in April 2002

Mr Hans Levy (Denmark)
 Mr Jens Middelboe (Denmark)
 Mr Howard McCormack (USA)

Meetings of the Working Group have been held in London on 18th and 19th March 2002 and in Copenhagen on 3rd and 4th July 2002.

2.5 International Sub-Committee

The Executive Council of the CMI at its meeting in Antwerp on 6-7 December 2002 resolved to create an International Sub-Committee (ISC) to deal with the proposals for amendments of the YAR which are the subject of this report. The Chairman and Rapporteur of the ISC remained the same as in the working group.

The first meeting of the ISC took place at Bordeaux on 11th June 2003 at which a report dated 7th March 2003 prepared by the Working Group setting out the matters for discussion was considered. An Additional Paper dated 27th October 2003 was prepared setting out draft wordings for possible amendments and additions to the YAR. This was considered at the second meeting of the ISC held in London on 17th November 2003.

This Report is substantially based on the Report dated 7th March with amendments to reflect the conclusions of the subsequent meetings of the ISC.

3. RADICAL CHANGE – COMMON SAFETY/COMMON BENEFIT

3.1 IUMI's proposals

The initial thrust of IUMI's proposals was to rein back "the progressive extensions in the scope of General Average which have taken place over at least the last 100 years with a view to lessening the burden which General Average places on property underwriters worldwide." Now that insurance is so very much more universally held by ship owners IUMI believed losses should lie where they fall to a greater extent than at present. The current concept of General Average is now felt to be outdated for a number of reasons. Despite this, IUMI recognise that there is an argument for continuing General Average in certain limited situations and that it would be difficult to abolish

General Average altogether, for example because the maritime legislative community worldwide is not yet “ready” for such a novel step.

In view of the discussions in the ISC meetings, the representatives of IUMI have put less emphasis on the complete abolition of the common benefit principle, but have pressed for the adoption of a more pragmatic scheme which would retain the allowance of cargo handling etc expenses under YAR Rule X and XII while the abolition of the allowance of crews wages and maintenance, fuel and stores as well of port charges under YAR Rule XI remains an important objective.

3.2 IUMI's proposal “Grip of peril”

The principal philosophy of the initial IUMI proposal is that the emphasis of General Average should be common safety rather than common benefit.

Expenses and sacrifices would only be admissible if they are made or incurred while ship and cargo are “in the grip of a peril”. A workable definition of the word “peril” would therefore be required. IUMI suggest that a peril should only continue until ship and cargo are in a condition of reasonable safety. It should not therefore usually continue after the arrival of the vessel at a port of refuge.

The Working Group was of the view that it would be of assistance to provide illustrative examples showing some practical effect of IUMI's proposals. The adjuster members of the Working Group have therefore kindly prepared three such examples, which are annexed to this report.

3.3 Common Benefit - concept - summary - YAR Rule X, XI, XII

3.3.1 Even though the main principle as expressed in Rule A is that only expenditures made or incurred for the common safety shall be allowed in General Average, certain expenditures which are not incurred for common safety are admitted in General Average according to Rules X (b) and (c), XI (b) and XII. These latter rules under the “Rule of interpretation” as “numbered rules” have, of course, preference above Rule A as a “lettered rule”.

3.3.2 Such expenditures are admitted if they relate to repairs, which “were necessary for the safe prosecution of the voyage”. This is often expressed as expenditures incurred for “the common benefit” as opposed to expenditures incurred for “the common safety”.

3.3.3 Under Rule X (b) and (c), the cost of cargo handling (handling, discharging, storing, reloading and stowing cargo, fuel and stores) to enable accidental damage to the ship to be repaired shall be admitted as General Average if the repairs were necessary “for the safe prosecution of the voyage”. Rule XII provides that damage to or loss of cargo (and fuel or stores) sustained as a consequence of this handling is admitted as General Average.

3.3.4 Under the same circumstances, i.e. if repairs of accidental damage are necessary for the safe prosecution of the voyage, Rule XI (b) provides for the admittance as General Average of wages and maintenance of master, officers and crew (sub-paragraph 1), fuel and stores (sub-paragraph 2) and

port charges (sub-paragraph 3), all incurred during the period of repairs.

3.3.5 It should be noted that, if the repairs are of damage caused by a General Average sacrifice or incurred as a General Average sacrifice, such expenditures e.g. for cargo handling, wages, fuel and port charges are admitted in General Average under the common safety principle, not as common benefit.

3.4 Substituted expenses - concept - Rule F, Rule XIV (2)

3.4.1 Rule F provides that additional expense incurred in place of another expense, which would have been allowable as General Average (substituted expense), shall be admitted as General Average. Rule XIV (2) contains the specific rule that the costs of temporary repairs made for the common benefit shall, in effect, only be accepted in General Average as a substituted expense.

3.4.2 In practice, the main effect of the substituted expense principle is the allowance as General Average of expenses, which are incurred in place of expenses, which are allowable under the common benefit rules. Indeed, the view has been expressed, but is not supported by the Working Group, that there would be no need for a rule about substituted expenses if the common benefit principle were abolished.

3.4.3 The most frequent “substituted expenses” are the costs of temporary repairs, towage to destination and transhipment of cargo to destination.

3.4.4 The costs of temporary repairs and towage to enable the vessel to be removed to another port of refuge because repairs cannot be carried out in the first port of refuge are allowed in General Average under Rule X (a) 2. Although subject to some doubt, this may be classified as a hybrid allowance based on the principles of common safety/common benefit.

4. ARGUMENTS FOR AND AGAINST EXCLUDING COMMON BENEFIT EXPENSES

4.1 Introduction

We shall list below the arguments, which have been advanced on both sides. The ISC stresses that in this Report it takes no position as to the validity of any particular argument on either side.

4.2 Arguments for excluding Common Benefit

4.2.1A marked majority of hull and cargo insurers have unified and strong feelings that the common benefit principle should be abolished. IUMI's hull and cargo insurer members pay the vast majority of the sums shifted in General Average so their voice is an important one. If the YAR are not amended some insurers have said that there is a risk that the present cover for General Average contributions will be restricted. As the representative of IUMI, Nicholas Gooding, said at CMI in Singapore in February 2001:

“If we had to resort to an “insurance solution” to solve our General Average problem, I think it would be a disappointment to us all. Some

General Average

may say such a solution would not be deliverable but you should not ignore what is happening in the insurance markets. With the admirable exception of Japan, most marine hull and cargo insurers are losing money and have been for some time. In Lloyd's there are approximately 25 syndicates writing hull [business] and slightly less cargo. At the peak of the market there were probably 3 times as many. It is likely numbers will continue to contract with people falling by the wayside through poor results or mergers. In the London company market there are now only a handful of players. The marine market of the future will be fewer in number, but substantial in size. It will become easier to sell new solutions to old problems in such a market.

I myself would rather address the problem through auspices of the CMI and a revision of the YAR.”

4.2.2 General Average is seen to be an unnecessary, expensive and unjust way of dealing with marine casualties. According to a study of 1700 General Average adjustments conducted for insurers by M. Marshall in 1996 and last updated in 1999² the annual cost of General Average claims to insurers is about USD 300 million. 10% or USD 30 million is made up of adjustment costs and a further 10% is interest and commission. 80% of cases are acknowledged as or considered likely to have been caused by the fault of those on the ship and/or the ship owner. However, 60%-65% of the total cost of claims is borne by cargo interests. In short, the current system does not “work” in the eyes of many in the market (not just underwriters but also owners who increasingly resort to Absorption clauses to avoid declaring General Average).

4.2.3 The adjustment of claims is a time-consuming process. Again according to M. Marshall's study, in seven years we can expect 95% of adjustments to be completed. While two thirds of the adjustments are produced in the 2 years after General Average is declared, these account for only one third of the money moved in General Average. A reduction in the overall number of General Averages would go some way towards resolving this.

4.2.4 Ship owners will say that they cannot accept a big uninsured loss. This misunderstands the thrust of the changes proposed; Nearly all the “new” liabilities will be covered by insurance products currently available (such as loss of earnings insurance) and any which may not be so covered will no doubt be provided with cover by a market eager for new business.

4.2.5 In response to those who suggest that “due consideration should be had to the long history of common benefit” (see 4.3.5 below) it should be pointed out that the opposition amongst property underwriters to the YAR, based as they are on “common benefit”, goes back at least 140 years.

² A copy of Mr Marshall's Report is available on the CMI website www.comitemaritime.org

Note that the CMI and this ISC are not in a position to confirm or deny the figures set out in Mr. Marshall's report, nor the conclusions drawn therefrom.

4.2.6 In response to those who suggest that it is too soon after 1994 to revise the YAR it is pointed out that the first study produced by Matthew Marshall (see 4.2.2 and 4.2.3 above) was only presented to the IUMI Conference in Toronto one month before the CMI met in Sydney in 1994. Time did not allow for them even to be introduced there, let alone for IUMI to consider and formulate an alternative to the current rules. So the 1994 Rules were adopted in a climate in which property underwriters had very little to contribute. Many feel it would be unfortunate if the initiatives of IUMI and others were not to result in a reform of the Rules just because it is felt to be too soon to re-examine them following a review in 1994, which was based on incomplete input.

4.2.7 In cases where the ship is legally unseaworthy, cargo interests will decline to contribute in General Average. Declarations of General Average may be a waste of time and money in such cases, especially where amounts are below the hull and P & I insurers' deductible or only slightly above it. The abolition of the common benefit principle would reduce the sums redistributed in General Average and thereby reduce the cost of wasted Adjustments and the general inconvenience of General Average declarations (e.g. obtaining/giving cargo security etc.).

4.2.8 The YAR have in the past been misused by certain ship owners to obtain unfair pecuniary advantage. In particular

- allowing wages in General Average while bearing up to and in a port of refuge is seen as an encouragement to unscrupulous ship owners to declare General Average for simple repairs
- allowing some port of refuge expenses is seen as a reward to owners of substandard ships for failing to maintain their vessels
- many examples of cases have been given in which owners have used General Average (and especially temporary repair and port of refuge expenses) as an excuse to demand money on account to continue the voyage rather than waiting to deliver the cargo, obtain security and rely on an adjustment. This affords owners of unseaworthy vessels an opportunity to obtain funds from cargo interests to which legally they may not be entitled.

It is said that these abuses have over many years sullied the reputation of the institution of General Average so that for many years many underwriters have regarded it as little more than an engine of "fraud and speculation". A radical reform of the Rules will restore the reputation of General Average.

4.2.9 Unless the contract of carriage is legally terminated, the owners are legally bound to deliver the cargo to the port of destination. A ship owner is only legally entitled to abandon a voyage if the test under the applicable law is passed. If he fails to meet the criteria he must carry the cargo to destination. None of the IUMI proposals alters the test of abandonment under any particular law.

4.2.10 Putting into a port of refuge is just another contingency for which the owners should allow in their voyage calculations or against which they can insure.

4.2.11 In some circumstances a ship owner is obliged to pay charges for

General Average

handling cargo at a port of refuge (which currently are allowable in General Average). If these are disallowed the ship's value for the purposes of ascertaining whether the voyage may be abandoned may be reduced; consequently, in a few cases the voyage may be abandoned where at present it could not be. However, it is said that the effect mentioned in 4.3.11 will be minimal.

4.2.12 Many of the expenses, such as wages and fuel, will have to be paid by the owner anyway. Accordingly, there is no good reason why he should recover them unless perhaps ship and cargo are in the grip of a peril.

4.2.13 To include wages, fuel and port charges is inequitable and against the main principle in Rule C (3) because it is a loss or an expense incurred by reason of delay.

4.3 Arguments for retaining Common Benefit

4.3.1 The general philosophy of cooperation, which underlies General Average, encourages the parties to incur the expenditure necessary to ensure that the ship and cargo reach their ultimate destination. If this distribution of expenses were not regulated by the common benefit rules, the parties would, after the emergency has incurred, often have to resort to individual agreements about the distribution of outlays and expenses (particularly cargo handling) necessary to bring about an expeditious and cost-effective solution for all parties concerned. This would involve serious risks of delays and other losses, which would not occur under the present system. Such individual agreements may well be to the disadvantage of the cargo interests compared with the present system and it is possible that in many cases the delays and losses arising would hit the cargo interests harder than the ship owner.

4.3.2 The result of the YAR as presently drafted is that cases move seamlessly from common safety to common benefit, thus reflecting the reality of many casualty situations, which do not fall neatly into defined stages. By retaining common benefit one is thereby avoiding a significant area of dispute.

4.3.3 It is said that the present system is an equitable compromise of the division of the costs and risks between ship and cargo in an emergency. It clears up the difficulties smoothly and fairly, and in most cases the system permits the voyage to be completed.

4.3.4 Ship owning interests consider that they are not in a position to bear the additional costs involved in the IUMI proposals, and it is probable that they will strenuously resist any such changes.

4.3.5 Due consideration should be taken to the long history and role of the principle of common benefit. The introduction of any new rules will run the risk that they will lead to litigation regarding their interpretation and resulting costs.

4.3.6 If the common benefit principle were abolished or restricted, this would put the uniformity and the universal acceptance of the YAR in danger and may lead to a variety of new Bills of Lading and Charter Party clauses entitling the ship owner to charge all sorts of expenses to the cargo interests. Under the common benefit rule, many of these costs would be apportioned between the contributing interests.

4.3.7 Each time the YAR are amended this results in the need for them to be incorporated into Bills of Lading and charter parties. If this happens at frequent intervals (of less than 25 years) this leads to confusion with several forms of Bill of Lading and Charter Party in circulation. Adjusters estimate that 60% of the cases under adjustment in 2002 involve contracts of carriage, which incorporate the YAR 1974.

4.3.8 It is appreciated that the wish to do away with the “common benefit type” allowance has been triggered by problems experienced with such allowance in cases involving sub-standard ships. However, “hard cases make bad law” and such undesirable consequences should not be removed by abolishing the common benefit rule altogether, but rather by introducing supplementary rules by which misuse of the principle is reasonably prevented. The Rule Paramount introduced in the YAR 1994 is, in fact, such a rule. The express requirement of “reasonableness” in that rule may eliminate many cases of misuse.

4.3.9 The common benefit expenses are of great commercial importance when combined with Rule F regarding substituted expenses. The allowance for transshipment or towage to destination in substitution for cargo handling costs, or other common benefit expenses, enables cargo to be brought to destination much more quickly than might otherwise be the case. Existing cargo policies only cover forwarding expenses when the voyage is terminated at an intermediate port and not if the voyage is simply delayed by lengthy repairs.

4.3.10 If there is unseaworthiness or another basis of liability for loss or damage to cargo, there are ways of dealing with it under Rule D. The advantage of the structure provided by General Average is that legal arguments can take place after the voyage has been completed. The initial allocation of costs is done under the YAR and then issues of liability can be decided later, as a result of which expenditure is settled by contribution between the parties or the relevant liability insurer.

4.3.11 If common benefit expenses such as cargo handling are no longer dealt with as General Average many of them will fall on the ship owner and in some instances, on the Hull Insurers. Such costs falling on the Owner can be added to repair costs to justify frustration of the voyage on grounds of cost. Cargo handling necessary to effect repairs at an intermediate port is allowable as Particular Average the “MEDINA PRINCESS” ([1965] 1 Lloyds Rep. 361) and can therefore be used to help establish a Constructive Total Loss claim. Removal of common benefit expenses will therefore see an increase in cases of cargo being left at ports of refuge, and/or in legal disputes seeking to contest this outcome.

4.3.12 Many of the costs removed from General Average under the IUMI proposals will fall on other insurers. Others, such as transshipment expenses, crew’s wages, and port charges may require additional insurances beyond existing hull and cargo policies.

4.3.13 The figures relied upon by IUMI reflect past realities which may have justified radical action if they still prevailed. However ISM, Port State Control, consolidation of ship owning companies, and increased use of

absorption clauses have greatly reduced the number of General Average cases where contributions from cargo are sought. The abolition of the defences of nautical fault and fire, currently under discussion internationally, will further hasten this process.

4.3.14 In some cases it is difficult to distinguish between expenses or sacrifices for common safety and those for common benefit. For example in some cases a ship that has been on fire at sea may have cargo that continues to smoulder or pose a threat even after being brought into a port of refuge. Some part of the discharging may still be for the common safety whilst other elements of cargo are removed to effect repairs (common benefit). The present rules usually render it unnecessary to make these difficult distinctions between cargo that is taken off to recondition sacrifice or accidental damage, or a combination of both. The present inclusive nature of the Rule therefore works well.

5. INCREMENTAL CHANGES - CONSIDERATION OF SPECIFIC TYPES OF EXPENSE

5.1. Cargo handling (including damage caused during handling)

Cargo handling, including handling, discharging, storing, reloading and stowing cargo, fuel and stores, is allowed under Rule X (b) and (c). Under Rule XI (d)(iv) certain anti-pollution measures taken in connection with cargo handling are also allowed in General Average.

Damage to or loss of cargo, fuel or stores sustained in consequence of such handling etc. is allowed under Rule XII.

Cargo handling was allowed as General Average prior to 1860 and also under the 1864 YAR.

There are strong views that the system works well in practice and that, coupled with allowances under Rule F that encourage transhipment of cargo to destination, brings many practical and commercial benefits.

Very often, if the cargo has to be discharged in a port of refuge to enable repairs to be effected to the vessel, it is much more convenient and expeditious to tranship it to the port of destination rather than to store it and reload it in the port of refuge.

It was also noted that the arguments in favour of retaining this rule are stronger than those for the retention of the allowance for crew wages, fuel and stores and port charges in that the expenses (for cargo handling etc.) are an additional outlay that is not related to the mere fact that the voyage is delayed.

As mentioned above, recognising the strength of this argument, the representatives of IUMI have put less emphasis on the complete abolition of the common benefit principle, but have pressed for the adoption of a more pragmatic scheme, which would retain the allowance of cargo handling expenses under YAR. The draft clauses annexed to this Report do not therefore include wording for the abolition of allowance of cargo handling.

It should be noted that there are cases where cargo may need to be discharged for the common safety in the port of refuge and also cases where repairs of damage caused by sacrifice may require dry-docking and may thus

require discharging of the whole or part of the cargo. Such cargo handling is not allowed under the common benefit rule but is treated as being for the common safety.

Likewise, it should be noted that loss or damage to cargo may arise as a result of a General Average act and will be allowed on the basis of the common safety rule, e.g. jettison of cargo (Rule II) and damage to cargo caused by extinguishing of fire (Rule III). Also, sometimes cargo damage which arises as a consequence of cargo handling in a port of refuge may be allowed under the common safety rule, e.g. where repairs to ship damage caused by sacrifice require dry-docking and discharging of cargo, and this in turn causes cargo damage.

See also the comments in paragraph 4.3.14.

5.2. Wages, fuel and port charges in port of refuge

Wages and maintenance of crew, fuel and stores consumed and port charges incurred during extra period of detention are currently allowed under Rule XI (b).

The abolition of this allowance has been strongly argued by the representatives of IUMI. Annexed to this Report are alternative draft wordings firstly for the abolition of the allowance of crew's wages and maintenance only, and secondly for the abolition of wages and maintenance together with fuel, stores and port charges. These costs accrue during the whole period of permanent repairs and represent a compensation of the owners' loss by delay. The owner may, however, often have substantial additional losses, e.g. loss of earnings, not allowed in General Average. Equally, other interests may suffer serious financial losses due to late arrival of their cargo.

This allowance is often controversial, in particular where the repairs are prolonged and/or where it is disputable whether the damage is accidental.

It is seen by many underwriters as an incentive to ship owners to declare General Average unnecessarily when their ship needs repairing, thus imposing costs on them which they feel they should not bear.

It should be noted that the crew's normal wages will never be allowed in General Average by reason of Rule C unless they are allowed under Rule XI. The most notable instance of this is Rule XI (a), which provides that crew wages incurred during the prolongation of the voyage occasioned by the ship entering a port of refuge as a consequence of an accident or sacrifice should be allowed. The crew's overtime is treated differently from crew's wages and may be incurred as a direct consequence of the crew assisting in a General Average act and will be compensated in General Average without regard to common benefit rules.

Adjusters have pointed out to the ISC that with the spread of absorption clauses it is now less common that a General Average will involve contribution by cargo if it is based solely on wages and port costs.

It should be remembered that there are cases where crew wages, etc. are recoverable in General Average under the common safety principle, i.e. if the repair is to damage caused by a General Average sacrifice.

General Average

For the purpose of illustration, the following are examples of monthly wage costs for a variety of vessels:

1. Oil tanker 156,809 GRT (Iranian): USD 53,036.00
2. Bulk carrier 24,943 GRT (Greek): USD 51,676.46
3. Chemical tanker 4,954 GRT (US): USD 45,661.00
4. General cargo 6,440 GRT (Thai): USD 39,450.00
5. Bulk carrier 41,699 GRT (Indian): USD 29,274.00

5.3 *Draft clauses*

In Annexe B are set out two alternative wordings to give effect to the exclusion of wages and maintenance of crew but maintaining port charges, fuel and stores respectively excluding all together wages and maintenance of crew, port charges, fuel and stores.

5.4 *Temporary repairs*

5.4.1 The allowance of temporary repairs carried out to secure the immediate safety of ship and cargo appears always to have been universally accepted as General Average. The allowance of temporary repairs to damage caused by sacrifice was supported in some jurisdictions, but the widest divergence in practice existed over the question of whether temporary repairs to Particular Average damage could ever be allowed in General Average and, if so, in what circumstances.

A Rule was introduced at the 1924 revision in order to ensure greater consistency of practice. It confirmed in similar terms to later revisions that temporary repairs for the common safety, or of sacrifice damage, were allowable in General Average and that temporary repairs of accidental damage could also be allowed, up to the savings in General Average expenditure realised thereby.

The only remaining doubt left by the first version of the Rule was whether the cost of temporary repairs should be a first charge on the savings to General Average alone or should be apportioned over all savings, including for example savings in Particular Average that arose by deferring permanent repairs to a cheaper locality. This uncertainty was resolved in the 1950 Rules that inserted the words “without regard to the saving, if any, to other interests”.

While the allowance of temporary repairs in connection with common safety and sacrifice continued to enjoy general acceptance, a number of changes were suggested to the second paragraph of Rule XIV when considering the 1994 revision of the Rules. The Rule was also subject to intense scrutiny in the English courts in the case of the “BIJELA” ([1994], 2 Lloyd’s Rep. 1). In the event, the Rule was not changed, although it is now of course subject to the new Rule paramount of the 1994 Rules.

5.4.2 If the IUMI proposal to remove “common benefit” allowances were implemented, allowances for temporary repairs to accidental damage would also fall away since they depend upon being allowed in substitution for “common benefit” expenses such as cargo handling.

5.4.3 IUMI did not submit separate proposals dealing with Rule XIV in

isolation, but other commentators have criticised the existing Rule on the following grounds:

- Repairs to accidental damage should always be a matter for the property insurers concerned.
- Savings to ship interests in permanent repair costs may be very significant and the present Rule requires no contribution until General Average savings are exhausted.
- Given modern repair methods, temporary repairs may achieve a semi-permanent or permanent status, particularly on older vessels.

These and other points were considered at the time of the 1994 revision process and the ISC has not felt it appropriate to go over the same ground again in great detail. One of the practical difficulties that was noted was the divergence in practice between insurance markets as to how temporary repairs were treated in Particular Average, which would impact on the way in which ship owners would seek to recover such costs in General Average. In addition, the difference in approach between jurisdictions remains, so that removal of the second paragraph of Rule XIV would mean a return to the uncertainties that prevailed prior to its introduction.

5.4.4 Under Rule X (a) 2, the costs of temporary repairs in a port of refuge to enable the vessel to be removed to another port of refuge because repairs cannot be carried out in the first port of refuge are admitted as General Average. It is doubtful if this may be considered an allowance based on the common safety principle, see paragraph 3.4.4 above.

Temporary repairs as substituted expense for any of the expenses mentioned under 5.1 and 5.2 are allowed under Rule XIV (2).

Again, it should be remembered that there are also temporary repairs in the port of refuge which are necessary for the common safety as well as temporary repairs of damage caused by sacrifice which would be allowed under the common safety principles.

At the meetings of the ISC proposals were made to introduce a so-called “Baily Clause” for the purpose of avoiding any undue advantage to the ship owner in cases where a temporary repair makes it possible for the ship to effect permanent repairs at a place where repairs can be made more cheaply than at or near the port of refuge. John Macdonald, Richard Cornah and Jaap Gerritzen have kindly prepared a draft wording to give effect to this, which is included in Annexe B.

5.5 Substituted expenses

5.5.1 The IUMI proposal would, as described above, automatically remove the possibility of substituted expense allowances under Rule F in most practical situations.

5.5.2 Provided the voyage is not frustrated at the port of refuge, transshipment of cargo is often allowable in substitution for the costs of storing and reloading of cargo where this would be required to carry out repairs necessary for the safe prosecution of the voyage.

This arrangement is generally considered beneficial to all parties.

Transshipment can, like towage, be a part of a salvage operation in which

case it is allowed on the basis of the common safety principle.

5.5.3 A vessel may be towed to destination rather than entering or remaining at a port of refuge. The cost of such towage (after crediting such expenses -as fuel etc. that may have been saved by the ship owner) is often allowed in General Average in substitution for expenses that would have been incurred if the vessel had remained at the port of refuge to effect repairs.

Again, such allowances facilitate the early completion of a voyage. Contribution between the parties for voyage to destination also help to discourage the unnecessary prolongation of salvage services to achieve the same purpose.

The IUMI proposals would confine towage allowances to those incurred while the ship and cargo were in the grip of a peril. This could have the effect of dissuading ship owners from terminating salvage services at the first port of refuge to ensure that the cost of the tow to the second port of refuge is contributed to by cargo interests. This tactic may not be successful as was shown in the English case of the “PAMAR” [1999] 1 Ll. Rep. 338 in which a salvage award of a tow under LOF from the Red Sea to Singapore (the owners’ chosen port of repair) was substituted by an award against cargo by one in respect of a tow only as far as Aden. Because the ship owner can sometimes recover in General Average contribution to the cost of towage under the present system by virtue of YAR Rule X (a) 2, there is an argument for retaining Rule X (a) 2 so as to prevent the towage being performed at the more expensive salvage rates which might occur in some cases if the IUMI proposal is adopted.

6. REDISTRIBUTION OF SALVAGE CHARGES

6.1 General comments

As noted in Lowndes and Rudolf (*12 edition para. 6.11*) in all maritime countries other than the United Kingdom, salvage has generally been treated as General Average and has, together with other General Average losses, been apportioned over values at destination. The divergence of British practice occurred during the latter part of the 19th century when adjusters began to distinguish, on grounds of principle, between salvage and General Average, with salvage being apportioned over values pertaining at the place where the services ended.

In 1926 the British Association of Average Adjusters passed a Rule of Practice that permitted the allowance of commission and interest on salvage awards, but the divergence in practice regarding inclusion of salvage awards in General Average was not finally resolved until a further Rule of Practice in 1942.

During the 1974 revision of the YAR, the old Rule VI was removed and the first version of the current Rule VI was inserted in order to ensure that international practice was uniform on this point.

The rule that salvage remuneration shall be allowed in General Average is criticised on the following grounds:

- In most jurisdictions, salvage charges are only payable to the salvor by

each of the salvaged interests; i.e. ship owners are not responsible for the cargo's share, cargo owners not for other cargo's or the ship's share.³ Therefore, the salvage remuneration is already distributed between the parties and a (new) distribution via the General Average is not necessary.

- Redistribution by General Average adjustment disturbs separate settlements between the salvor and/or the owner of a salvaged interest, because the latter does not obtain a final solution, as his share of all the remuneration paid by all parties may eventually be fixed at a different amount.

After considerable debate during the preparatory work of the 1994 YAR and also during the conference in Sydney, proposals to exclude salvage settlements were not carried.

However, the criticism has continued and IUMI have strongly urged that this should be considered again (see IUMI paper dated 2 April 1998, section 15).

It should be noted that the majority of the MLAs responding to the Remé questionnaire favoured IUMI's proposal on this point.

6.2 *Arguments for and against excluding salvage*

6.2.1 Arguments **for exclusion** of salvage from General Average:

- Inclusion of salvage involves unnecessary duplication of the apportionment of the salvage remuneration between contributing interests.
- In most cases the proportions are not changed significantly but the cost of readjustment may be relatively high.
- It requires collection of two sets of security to cover basically the same moneys.
- It prolongs the whole operation, sometimes for years.
- It involves additional hassle for cargo underwriters.

6.2.2. Arguments for inclusion of salvage in General Average:

- It produces a fairer result at the end of the case.
- In some cases to leave salvage where it falls after salvage settlement or arbitration can cause serious injustice; e.g. sacrifices made good in General Average are added back in computing the values under Rule G.⁴

³ See Article 13.2 of the International Convention on Salvage, 1989.

⁴ Take, for example, a vessel with a sound value of \$1,500,000 and cargo of \$1,000,000. The vessel is intentionally run aground for the common safety and suffers damage of \$500,000. She is then salvaged. After deducting the cost of damage repairs for the purpose of arriving at the salvaged values at the termination of the salvage service, ship and cargo would each pay 50% of the salvage award, assuming that it was settled separately and not included in General Average. However, the ship owner will ultimately receive an allowance in General Average for the sacrificial damage. If salvage is included in General Average, as it is at present, and the amount made good is added to the arrived value of the vessel at the completion of the voyage, then the contributory value of the vessel would be \$1,500,000, and ship would pay 60% of the salvage, which is more equitable in the circumstances.

General Average

- A second casualty can also materially affect the values at the end of the adventure and thus the apportionment.⁵
- In some cases the salvage remuneration can be assessed on the basis of rough figures, leaving the fine tuning of the apportionment to be done later in General Average. This can expedite salvage settlements and save costs.
- Some jurisdictions e.g. Netherlands contain laws, which require the ship owner to pay salvage in full and collect from cargo in General Average – this is recognised by the IUMI proposals.
- In many serious casualties General Average security will still be collected because the ship owner's likely financial exposure may not be fully known and the possible extent of cargo sacrifices cannot be determined without delaying the release of cargo.
- It redresses the balance if one party to the adventure is able to use commercial or other pressures to reach a particularly favourable negotiated settlement with salvors leaving other parties to pay the full cost at arbitration.
- Even if salvage is not allowed in General Average, it will still be treated as a special charge (which will be deducted in calculating contributory values) therefore the adjustment cannot be completed until the final amount of the salvage charges paid by each interest is available.

6.2.3 Draft clause

A wording to give effect to the exclusion of salvage charges from General Average is in Annexe B.

7. TIME BAR (PRESCRIPTION)

7.1 *General comments*

The YAR contain no provision concerning time barring of General Average contributions. In national laws, there is a wide variety of time bars, and some national laws are unclear, in particular with respect to the possible effect of the signature of the Average Bond or Average Guarantee.

In practice, it is often difficult, time-consuming and costly to assess if contributions are time-barred. Contributions may be owed by parties of many different nationalities, and legal advice may be needed in many jurisdictions where a suit must be brought to avoid a time bar.

International unification would therefore seem to be an advantage.

However, it is said the YAR are not a good vehicle to bring about unification of time bar rules because in many jurisdictions time bar provisions

⁵ If, for example, a vessel carrying cargo under deck and other cargo on deck receives salvage services, the deck cargo contributes to the salvage award in proportion to its value at the termination of the salvage. If, after suitable repairs, the vessel proceeds towards destination, but encounters very heavy weather in which the deck cargo is carried away and lost, the value of the lost deck cargo at completion of the voyage is nil and that deck cargo will not contribute to the salvage remuneration if it is readjusted in General Average.

are treated as law of a “public order” character, which cannot be amended by agreement.

Despite these problems, many members of the ISC consider that there are some real benefits from the inclusion of such a provision in the YAR. In some jurisdictions it would provide a legally valid argument and in others it could serve as a guideline to legislators, judges and practitioners and would provide an incentive to progress the matter and implement a unified time bar provision. The decision of the English Court in the “ARMAR” case [1980] 2 Lloyd’s Rep 450 demonstrates the value of such a change.

At the Bordeaux meeting the representative of IUMI stressed the importance of a dual time limit so that it includes a time limit from the date of the adjustment but also a provision under which the time runs from the date of the incident. They pointed out that marine hull and cargo insurance is “short tail” business and late claims such as General Average can have an impact on the capital reserving requirements imposed by governments on insurers. Therefore substantial and late GA claims can create particular problems for underwriters.

The operation of such a time limit should not affect the 12-month time limits in Rule E.

7.2 Summary of replies to Remé questionnaire

Some national associations have expressed sympathy for the introduction in the YAR of a time bar for contributions pointing out that it could have effect in some jurisdictions; however, most replies indicate that this is a matter, which should be left to national law because it cannot validly be dealt with through contractual agreement.

7.3 Draft clause

A draft wording to incorporate a time limit in the YAR is included in Appendix B.

7.4 Legislation (Issues of Transport Law)

The ISC understands that the CMI Executive Council has taken steps to recommend to UNCITRAL that a rule time barring General Average contributions as proposed in this Report should be included in the draft International Convention on Issues of Transport Law now under consideration.

8. INTEREST

8.1 General comments

The rate of interest has hitherto been specified in the YAR (Rule XXI), but it has been widely recognised that this can give rise to injustice if the rate is only revised every 20-25 years when the YAR are revised. The Working Group considered whether this might be governed by a formula rather than a set figure and initially proposed a formula in which the rate was to be linked to the LIBOR (London Inter-Bank Offered Rate). However in the ISC this proposal did not get general support since it was said to be too complicated,

General Average

and an alternative proposal, made initially in Bordeaux, that the rate should be fixed annually by the Assembly of the CMI, received general support.

The Assembly of the CMI meets annually, and the ISC had been advised that the Executive Council sees no difficulty in the Assembly carrying out this function provided that a set of guidelines as to how it should do so are adopted.

8.2 Currency

Interest rates vary, of course, over time and from currency to currency.

Therefore, justice strongly favours a variable formula, which links the interest not only to the time but also to the currency of the adjustment.

It would greatly facilitate the introduction of an interest formula in the YAR if one could also provide that all adjustments should be made up in one currency.

However, the ISC considers there is no realistic prospect of such a proposal being adopted because, during the work resulting in the 1994 YAR, proposals providing that all adjustments are made in USD (or SDR) were thoroughly considered but failed to be adopted.

Under the present system, the adjuster chooses the currency of the adjustment on the basis of an estimate of what would generally be the most acceptable and convenient currency for the parties to the General Average.

It seems (perhaps surprisingly) that this system has not given rise to much controversy. This would indicate that there would not be much need to introduce rules about the currency of the adjustment except for the purpose of solving the interest problem.

It is important to notice that the adjuster members of the Working Group have estimated that 80% of all General Average adjustments are stated in USD and that it would be exceptional to see adjustments which are stated in other currencies than currencies closely linked to USD, JPY, GBP and EUR or the European currencies which are now substituted by or closely linked to the EUR.

The ISC has considered the possibility of the CMI Assembly fixing different rates for different currencies, but has concluded that this is not desirable since it might expose the adjuster to difficulties in choosing the currency of the adjustment, and thus endanger the smooth working of the present system. The ISC therefore considers that it is preferable that the guidelines should allow the Assembly to take into consideration the prevailing rates of interest for the main currencies mentioned above, and the draft guidelines in Annexe B reflect this.

8.3 Draft Clause

A possible draft wording to amend YAR Rule XXI and draft Guidelines for the CMI Assembly are included in Annexe B.

9. COMMISSION

9.1 General comments

The YAR Rule XX provides that a commission of 2% on disbursements, except crew wages and maintenance, fuel and stores not replaced during the voyage, shall be allowed in General Average.

In Sydney, proposals to extend the allowance to commission on all General Average were not adopted. The IUMI now propose that all General Average commission shall be abolished. They also propose that administrative costs such as telephones, telexes and other communication charges should be excluded from General Average completely.

However, the ISC was informed that the present general practice of adjusters is to allow such administrative costs on the basis of considered estimates rather than insisting on documentary proof, but it was suggested that an addition to the YAR Rule E to confirm this would be helpful.

9.2 Arguments for and against allowing commission

*9.2.1 Arguments **against** allowing commission:*

- Originally, commission served as a useful incentive to parties to fund General Average disbursements, but the introduction of interest by the 1924 YAR has created unwarranted duplication.
- Owners' communication, banking and office expenses are now allowed separately which equally has created unwarranted duplication.

*9.2.2 Arguments **for** allowing commission:*

- It provides an incentive to the parties to fund the General Average disbursements;
- In collision cases the UK Admiralty Court allows an "agency item" (usually of 1%) in addition to all vouched claim items to cover the time and trouble of dealing with the collision. According to Mr Marshall's figures only 22% of General Averages arise out of collisions. "Agency" is not allowed in respect of non-collision claims.
- To allow commission in General Average is a historic custom in a substantial number of countries.

9.3 Draft Wordings

An additional wording to give effect to the amendment of Rule E is included in Annexe B.

10. ABSORPTION CLAUSES

10.1 General comments

Absorption clauses are clauses in hull policies whereby the underwriters accept that the ship owner has the option not to declare General Average in which case the hull cover "absorbs" all General Average losses, usually up to an agreed figure.

Some absorption clauses have given rise to certain practical problems. Also, absorption clause limits are not always set at appropriate levels for the vessels and trade involved.

10.2 Extent of use

Absorption clauses are very widely used. Major container operators have absorption clauses with large limits but they are common also in many other trades and most insurance markets.

The adjuster members of the Working Group have indicated that such clauses appear in over 60% of hull policies, albeit with regional variations.

10.3 BIMCO standard clause

In May 2002, BIMCO has approved a standard absorption clause.⁶ The Working Group has examined a draft of this clause and supplied comments, which have been taken into account in the final version.

After the work done by BIMCO the ISC considers that there is no need for further work to be done on this topic.

11. SEPARATE TREATMENT OF SACRIFICES OF PROPERTY

One suggestion made in the Steering Group chaired by Dr Wiswall was that sacrifices (of physical property) should lie where they fall, while expenditures (of money) falling within the definition of General Average should continue to be apportioned.

The ISC does not consider that such an amendment to the principles of General Average is either practical or desirable. The equal treatment in General Average of sacrifices and expenditure has been codified not only by Rule A of the YAR 94 but also by Section 65 (1) of the British Marine Insurance Act 1906, which reads “A General Average loss is a loss caused by or directly consequential on a General Average act. It includes a General Average expenditure as well as a General Average sacrifice.”

This proposal was considered by the author of Lowndes and Rudolf, the textbook on General Average, (12th edition) at paragraph 90.14 of appendix 5. The ISC can do no better than quote the comments of the author in full:

“Such a scheme might simplify some adjustments but would hardly reduce the number prepared. It is extremely rare for any General Average to consist of sacrifice alone and, indeed, 90 per cent or more of all General Average adjustments consist only of General Average expenditure, plus bunkers and stores consumed. Further, the total value of cargo sacrifices almost certainly exceeds the value of ship sacrifices, so that there would be an increased burden on cargo interests with resultant increases in cargo rates of premium.”

For the reasons succinctly set out above the ISC does not consider that this proposal would meet with acceptance internationally.

12. TIDYING UP THE TEXT OF THE YAR

12.1 In the course of its work the ISC has noted a number of imperfections in the drafting of the YAR, which are no doubt the result of their evolution since 1877. These imperfections are not such as to justify a conference to amend the Rules, but they are mentioned here for the sake of completeness.

⁶ A copy of this clause with BIMCO's explanatory notes are available on the CMI website at www.comitemaritime.org

12.2 The terms “admitted in”, “allowed in”, “admitted as” and “allowed as” General Average appear to be used interchangeably with no detectable difference in meaning. The words “made good” in General Average which appear, for example, in Rules I, II, III, and IV have a meaning which is different from “allowed” or “admitted” in General Average.

12.3 The term “bearing up for” (a port of refuge) in the heading of Rule XI is archaic and should be replaced by “putting into”.

12.4 Many of the Rules consist of more than one paragraph, but those paragraphs are not separately numbered. We consider that any revision of the Rules should include the addition of paragraph numbers to each separate paragraph.

12.5 The ISC is of the opinion that the reference to temporary repairs in Rule X (a) 2 must mean temporary repairs necessary to enable the vessel to proceed from first port of refuge to second port of refuge (i.e. not to destination). We therefore suggest adding “of refuge” after “port or place” where it appears for the second and fourth time in Rule X (a) 2.

12.6 A set of specific amendments of this nature, which are put forward for the consideration of the Vancouver Conference, is included in Annexe C.

19th December 2003

Bent Nielsen, chairman

Richard Shaw, rapporteur

General Average

13. ANNEXE A – GENERAL AVERAGE EXAMPLES*13. Example 1***Narrative**

A vessel on a loaded passage involved in a collision. After separating from the other vessel, she puts into a Port of Refuge for the Common Safety and to effect repairs necessary for the safe prosecution of the voyage.

The following losses/costs ensue:

	YAR 1994	Common Safety only
Extinguishing damage to cargo ignited by collision.	Allowed (Rule III)	Allowed
Fuel & stores, crew wages, port charges entering port of refuge.	Allowed (Rules X & XI)	Allowed
Fuel & stores, crew wages, port charges during repairs.	Allowed (Rule XI b)	Not allowed
Discharging, storing and reloading part cargo to enable vessel to dry dock for repairs.	Allowed (Rule X b)	Not allowed
Cost of temporary repairs carried out to avoid discharge of full cargo.	Allowed up to GA savings (Rule XIV)	Not allowed
Port charges outwards and fuel & stores and wages and maintenance regaining position.	Allowed (Rules X & XI)	Allowed ?*

* Depending on whether English Law or other practice is followed.

*13.2 Example 2***Narrative**

A container vessel grounds while on a loaded passage. Salvors are engaged under Lloyds Open Form and the vessel is re-floated and taken to a nearby Port of Refuge. No.1 Hold is flooded and vessel down by the head. Divers inspection confirms dry docking required to effect repairs, estimated duration 25 days, full cargo discharge required.

	YAR 1994	“Common Safety” only
Damage to propeller sustained during efforts to re-float.	Allowed (Rule VII)	Allowed
Port charges entering port of refuge.	Allowed (Rule X a)	Allowed
Anti-pollution vessels standing by during re-floating operations and while entering port of refuge.	Allowed (Rule XI d)	Allowed

*Report by the CMI International Sub-Committee***Example 2** (continued)

LOF terminated on arrival alongside but tug remains on standby at harbour authority request until No.1 hold pumped out.	Allowed (Rule A or Rule XI b)	? *
Deck stowed containers over No.1 hold discharged to facilitate pumping and restore safe trim.	Allowed (Rule X b)	? *
Divers apply additional temporary repairs to assist pumping.	Allowed (Rule XIV)	? *
Cargo discharged to quayside.	Allowed (Rule X b)	Not allowed
Cargo transshipped to destination on two vessels.	Allowed (Rule F subject to savings)	Not allowed
Wages and maintenance, port charges etc up to completion of discharge.	Allowed (Rule XI b)	Not allowed
Wages and maintenance and port charges etc to completion of repairs.	Allowed (Rule G/XI b)	Not allowed

* Dependent on the facts, as determined.

13.3 Example 3**Narrative**

While a containership is discharging alongside at an intermediate port, a fire breaks out in the bottom stow of Hold No.5. Shore fire brigade attends, hold No.5 and engine room are partially flooded. Local salvors assist (on contract basis) in bringing fire under control and subsequently supervising discharge of No.3 hold, including containers of hazardous cargo. Permanent repairs are estimated to require 40 days and require part discharge of cargo.

	YAR 1994	Common Safety only
Attendance of fire brigade.	Allowed (Rule A)	Allowed
Attendance of salvors to discharge No.3 Hold.	Allowed (Rule A or X b)	? *
Extinguishing damage to adjacent containers.	Allowed (Rule III)	Allowed
Extinguishing damage to ship's electrical systems.	Allowed (Rule III)	Allowed
Towage to destination.	Allowed (Rule F, subject to savings)	Not allowed
Wages and maintenance, port charges while in port of refuge.	Allowed (Rule XI)	Not allowed

* Dependent on the facts, as determined

14. ANNEXE B – DRAFT WORDINGS

14.1 To exclude from GA allowance for crew wages and maintenance

To amend Rule XI as follows:

Rule XI Expenses Putting into a Port of Refuge, etc.

(a) Fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).

(b) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, fuel and stores consumed during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted in general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Port charges incurred during the extra period of detention shall likewise be admitted as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be admissible as general average, even if the repairs are necessary for the safe prosecution of the voyage.

When the ship is condemned or does not proceed on her original voyage, fuel and stores consumed and port charges shall be admitted as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

(c) For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the ship owners or be made under the terms or articles of employment. Under no circumstances shall wages and maintenance of Master, officers and crew be allowed as General Average.

To delete reference to wages and maintenance in Rule XVII (section 2) and Rule XX (section 1).

14.2 To exclude from GA allowance for crew wages, maintenance, fuel and stores and port charges

To delete section (a) and (b), of Rule XI. Para (c) will be relettered (a) and para (d) as (b). The wording of new para (a) will then read:

(a) For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the ship owners or be made under the terms or articles of employment. Under no circumstances shall wages and maintenance of Master, officers and crew be allowed as General Average.

To rename Rule XI to “Wages and maintenance of crew and measures undertaken to prevent or minimize damage to the environment”.

To delete reference to wages and maintenance as well as fuel and stores in Rule XVII (section 2) and Rule XX (section 1).

14.3 To limit allowance for temporary repairs so as to avoid any undue advantages for the Ship owner; particularly in cases where a temporary repair makes it possible for the ship to make final repairs at a place where repairs can be made cheaper than close to the port of refuges (Baily method)

To add the following to Rule XIV b).

“For the purposes only of this second paragraph the cost of temporary repairs referred to therein shall be calculated by deducting the estimated cost of effecting permanent repairs in the area of the port of refuge from the sum of the cost of the temporary repairs effected and either the cost of the permanent repairs eventually effected, or the reasonable depreciation in the value of the vessel at the completion of the voyage resulting from permanent repairs not having been effected.”

14.4 To exclude from GA Allowance for salvage

To substitute present text of Rule VI by the following text.

(a) Salvage payments, including interest thereon and legal fees associated with such payments, shall lie where they fall and shall not be allowed in General Average, save only that if one party to the salvage shall have paid all or any of the proportion of salvage (including interest and legal fees) due from another party (calculated on the basis of salvaged values and not General Average contributory values), the unpaid contribution to salvage due from that other party shall be credited in the adjustment to the party that has paid it, and debited to the party on whose behalf the payment was made.

(b) Salvage payments referred to in paragraph (a) above shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Art.13 paragraph 1(b) of the International Convention on Salvage 1989 have been taken into account.

(c) Special compensation payable to a salvor by the ship owner under Art. 14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance (such as

Scopic) shall not be allowed in General Average and shall not be considered a salvage payment as referred to in paragraph (a) of this Rule.

14.5 New rule on time limit for GA Contributions

This has been developed from the wording in the IUMI Report, and has been modelled on the equivalent provision in the International Convention on Civil Liability for Oil Pollution and Rule E of the YAR:

Rule XXIII. Prescription of Contributions in General Average.

(a) In many countries rules of prescription are considered to be matters of law, which cannot be varied by contract. Where this is not the case, the rules of prescription provided below shall supersede national law.

(b) Any rights to General Average Contribution shall be extinguished unless an action is brought by the party claiming such contribution within a period of one year after the date upon which the general average adjustment was issued. However, in no case shall such an action be brought after six years from the date of the termination of the common maritime adventure. These periods may be extended if the parties so agree after the termination of the common maritime adventure.

(c) Subject to the provisions of this rule, the rules of prescription provided in this rule shall also apply to claims under general average bonds and guarantees. This rule shall not apply as between the parties to the general average and their respective insurers.

14.6 Interest

14.6.1 Delete the following words in Rule XXI – “at the rate of 7 per cent per annum.”

Add the following new second paragraph to Rule XXI:

“Each year the Assembly of the Comité Maritime International shall decide the rate of interest which shall apply. This rate shall be used for calculating interest accruing during the following calendar year.”

14.6.2 Guidelines

Guidelines for the Assembly of the Comité Maritime International when deciding the annual interest rate provided for in YAR Rule XXI.

The Assembly is empowered to decide the rate of interest based upon any information or consideration, which in the discretion of the Assembly are considered relevant, but may take the following matters into account:

The rate shall be based upon a reasonable estimate of what is the rate of interest charged by a first class commercial bank to a ship owner of good credit rating.

Due regard shall be had to the following:

- *That the majority of all GA adjustments are drawn up in USD.*
- *That therefore the level of interest for one-year USD loans shall be given particular consideration.*
- *That most adjustments, which are not drawn up in USD, are drawn up in GBP, EUR or JPY.*
- *That, if the level of interest for one year loans in GBP, EUR or JPY differs*

substantially from the level of interest for one year loans in USD, this shall be taken into account.

- *That readily available information about the level of interest such as USD- prime rate and LIBOR shall be collected and used.*
- *Any amendment of these guidelines shall be made by a decision of a conference of the CMI.*

14.7 Administration costs

Insert the following new second paragraph in Rule E:

“Administrative costs such as communication expenses, bank charges, travel expenses or costs to collect general average security, when admissible as General Average, may be allowed on the basis of an estimate made by the average adjuster.”

15. ANNEXE C, PROPOSALS FOR TIDYING UP THE TEXT OF THE YAR

York-Antwerp Rules 1994

YORK-ANTWERP RULES, 1994

RULE OF INTERPRETATION

In the adjustment of general average the following Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.

Except as provided by the Rule Paramount and the numbered Rules, general average shall be adjusted according to the lettered Rules.

RULE PARAMOUNT

In no case shall there be any allowance for sacrifice or expenditure unless reasonably made or incurred.

RULE A

1) There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

2) General average sacrifices and expenditures shall be borne by the different contributing interests on the basis hereinafter provided.

RULE B

1) There is a common maritime adventure when one or more vessels are towing or pushing another vessel or vessels, provided that they are all involved in commercial activities and not in a salvage operation.

When measures are taken to preserve the vessels and their cargoes, if any, from a common peril, these Rules shall apply.

2) A vessel is not in common peril with another vessel or vessels if by simply disconnecting from the other vessel or vessels she is in safety; but if

General Average

the disconnection is itself a general average act the common maritime adventure continues.

RULE C

1) Only such losses, damages or expenses which are the direct consequence of the general average act shall be allowed as general average.

2) In no case shall there be any allowance in general average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure.

3) Demurrage, loss of market, and any loss or damage sustained or expense incurred by reason of delay, whether on the voyage or subsequently, and any indirect loss whatsoever, shall not be **allowed** as general average.

RULE D

Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault.

RULE E

1) The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

2) All parties claiming in general average shall give notice in writing to the average adjuster of the loss or expense in respect of which they claim contribution within 12 months of the date of the termination of the common maritime adventure.

Failing such notification, or if within 12 months of a request for the same any of the parties shall fail to supply evidence in support of a notified claim, or particulars of value in respect of a contributory interest, the average adjuster shall be at liberty to estimate the extent of the allowance or the contributory value on the basis of the information available to him, which estimate may be challenged only on the ground that it is manifestly incorrect.

RULE F

Any additional expense incurred in place of another expense, which would have been allowable as general average shall be deemed to be general average and so allowed without regard to the saving, if any, to other interests, but only up to the amount of the general average expense avoided.

RULE G

1) General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.

This rule shall not affect the determination of the place at which the average statement is to be made up.

2) When a ship is at any port or place in circumstances which would give

rise to an allowance in general average under the provisions of Rules X and XI, and the cargo or part thereof is forwarded to destination by other means, rights and liabilities in general average shall, subject to cargo interests being notified if practicable, remain as nearly as possible the same as they would have been in the absence of such forwarding, as if the adventure had continued in the original ship for so long as justifiable under the contract of affreightment and the applicable law.

The proportion attaching to cargo of the allowances made in general average by reason of applying the third paragraph of this Rule shall not exceed the cost which would have been borne by the owners of cargo if the cargo had been forwarded at their expense.

RULE I. JETTISON OF CARGO

No jettison of cargo shall be **allowed** as general average, unless such cargo is carried in accordance with the recognised custom of the trade.

RULE II. LOSS OR DAMAGE BY SACRIFICES FOR THE COMMON SAFETY

Loss of or damage to the property involved in the common maritime adventure by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be **allowed** as general average.

RULE III. EXTINGUISHING FIRE ON SHIPBOARD

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be **allowed** as general average; except that no **allowance** shall be made for damage by smoke however caused or by heat of the fire.

RULE IV. CUTTING AWAY WRECK

Loss or damage sustained by cutting away wreck or parts of the ship which have been previously carried away or are effectively lost by accident shall not be **allowed** as general average.

RULE V. VOLUNTARY STRANDING

When a ship is intentionally run on shore for the common safety, whether or not she might have been driven on shore, the consequent loss or damage to the property involved in the common maritime adventure shall be allowed in general average.

RULE VI. SALVAGE REMUNERATION

a) Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.

General Average

Expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment such as is referred to in Art.13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

b) Special compensation payable to a salvor by the shipowner under Art.14 of the said Convention to the extent specified in paragraph 4 of that Article or under any other provision similar in substance shall not be allowed in general average.

RULE VII. DAMAGE TO MACHINERY AND BOILERS

Damage caused to any machinery and boilers of a ship which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage; but where a ship is afloat no loss or damage caused by working the propelling machinery and boilers shall in any circumstances be **allowed** as general average.

RULE VIII. EXPENSES LIGHTENING A SHIP WHEN ASHORE AND CONSEQUENT DAMAGE

When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred), and any loss or damage to the property involved in the common maritime adventure in consequence thereof, shall be **allowed** as general average.

RULE IX. CARGO, SHIP'S MATERIALS AND STORES USED FOR FUEL

Cargo, ship's materials and stores, or any of them, necessarily used for fuel for the common safety at a time of peril shall be **allowed** as general average, but when such an allowance is made for the cost of ship's materials and stores the general average shall be credited with the estimated cost of the fuel which would otherwise have been consumed in prosecuting the intended voyage.

RULE X. EXPENSES AT PORT OF REFUGE, ETC.

(a) (i) When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances which render that necessary for the common safety, the expenses of entering such port or place shall be **allowed** as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be **allowed** as general average.

(ii) When a ship is at any port or place of refuge and is necessarily removed to another port or place **of refuge** because repairs cannot be carried out in the first port or place, the provisions of this Rule shall be applied to the second port or place **of refuge** as if it were a port or place of refuge and the

cost of such removal including temporary repairs and towage shall be **allowed** as general average. The provisions of Rule XI shall be applied to the prolongation of the voyage occasioned by such removal.

(b) (i) The cost of handling on board or discharging cargo, fuel or stores whether at a port or place of loading, call or refuge, shall be **allowed** as general average, when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, except in cases where the damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstances connected with such damage having taken place during the voyage.

(ii) The cost of handling on board or discharging cargo, fuel or stores shall not be **allowable** as general average when incurred solely for the purpose of restowage due to shifting during the voyage, unless such restowage is necessary for the common safety.

(c) Whenever the cost of handling or discharging cargo, fuel or stores is **allowable** as general average, the costs of storage, including insurance if reasonably incurred, reloading and stowing of such cargo, fuel or stores shall likewise be **allowed** as general average. The provisions of Rule XI shall be applied to the extra period of detention occasioned by such reloading or restowing.

But when the ship is condemned or does not proceed on her original voyage, storage expenses shall be **allowed** as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

RULE XI. WAGES AND MAINTENANCE OF CREW AND OTHER EXPENSES PUTTING IN TO AND AT A PORT OF REFUGE, ETC.

(a) Wages and maintenance of master, officers and crew reasonably incurred and fuel and stores consumed during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be **allowed** as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X(a).

(b) (i) When a ship shall have entered or been detained in any port or place in consequence of accident, sacrifice or other extra-ordinary circumstances which render that necessary for the common safety, or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master, officers and crew reasonably incurred during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be **allowed as general average**.

(ii) Fuel and stores consumed during the extra period of detention shall be **allowed** as general average, except such fuel and stores as are consumed in effecting repairs not allowable in general average.

General Average

(iii) Port charges incurred during the extra period of detention shall likewise be **allowed** as general average except such charges as are incurred solely by reason of repairs not allowable in general average.

(iv) Provided that when damage to the ship is discovered at a port or place of loading or call without any accident or other extraordinary circumstance connected with such damage having taken place during the voyage, then the wages and maintenance of master, officers and crew and fuel and stores consumed and port charges incurred during the extra detention for repairs to damages so discovered shall not be **allowable** as general average, even if the repairs are necessary for the safe-prosecution of the voyage.

(v) When the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers and crew and fuel and stores consumed and port charges shall be **allowed** as general average only up to the date of the ship's condemnation or of the abandonment of the voyage or up to the date of completion of discharge of cargo if the condemnation or abandonment takes place before that date.

(c) For the purpose of this and the other Rules wages shall include all payments made to or for the benefit of the master, officers and crew, whether such payments be imposed by law upon the shipowners or be made under the terms of articles of employment.

(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in general average when incurred in any or all of the following circumstances:

(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;

(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);

(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule **XI(b)**, provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as general average;

(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is **allowable** as general average.

RULE XII. DAMAGE TO CARGO IN DISCHARGING, ETC.

Damage to or loss of cargo, fuel or stores sustained in consequence of their handling, discharging, storing, reloading and stowing shall be **allowed** as general average, when and only when the cost of those measures respectively is **allowed** as general average.

RULE XIII. DEDUCTIONS FROM COST OF REPAIRS

a) Repairs to be allowed in general average shall not be subject to deductions in respect of "new for old" where old material or parts are replaced by new unless the ship is over fifteen years old in which case there shall be a

deduction of one third. The deductions shall be regulated by the age of the ship from the 31st December of the year of completion of construction to the date of the general act, except for insulation, life and similar boats, communications and navigational apparatus and equipment, machinery and boilers for which the deductions shall be regulated by the age of the particular parts to which they apply.

b) The deductions shall be made only from the cost of the new material or parts when finished and ready to be installed in the ship. No deduction shall be made in respect of provisions, stores, anchors and chain cables. Drydock and slipway dues and costs of shifting the ship shall be allowed in full.

c) The costs of cleaning, painting or coating of bottom shall not be allowed in general average unless the bottom has been painted or coated within the twelve months preceding the date of the general average act in which case one half of such costs shall be allowed.

RULE XIV. TEMPORARY REPAIRS

a) Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be **allowed** as general average.

b) Where temporary repairs of accidental damage are effected in order to enable the adventure to be completed, the cost of such repairs shall be **allowed** as general average without regard to the saving, if any, to other interests, but only up to the saving in expense which would have been incurred and allowed in general average if such repairs had not been effected there.

c) No deductions "new for old" shall be made from the cost of temporary repairs allowable as general average.

RULE XV. LOSS OF FREIGHT

Loss of freight arising from damage to or loss of cargo shall be **allowed** as general average, either when caused by a general average act, or when the damage to or loss of cargo is so **allowed**.

Deduction shall be made from the amount of gross freight lost, of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

RULE XVI. AMOUNT TO BE **ALLOWED** FOR CARGO LOST OR DAMAGED BY SACRIFICE

a) The amount to be **allowed** as general average for damage to or loss of cargo sacrificed shall be the loss which has been sustained thereby based on the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped-value. The value at the time of discharge shall include the cost of insurance and freight except insofar as such freight is at the risk of interests other than the cargo.

b) When cargo so damaged is sold and the amount of the damage has not been otherwise agreed, the loss to be **allowed** in general average shall be the difference between the net proceeds of sale and the net sound value as computed in the first paragraph of this Rule.

RULE XVII. CONTRIBUTORY VALUES

a) (i) The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure except that the value of cargo shall be the value at the time of discharge, ascertained from the commercial invoice rendered to the receiver or if there is no such invoice from the shipped value.

(ii) The value of the cargo shall include the cost of insurance and freight unless and insofar as such freight is at the risk of interests other than the cargo, deducting therefrom any loss or damage suffered by the cargo prior to or at the time of discharge.

(iii) The value of the ship shall be assessed without taking into account the beneficial or detrimental effect of any demise or time charterparty to which the ship may be committed.

b) To these values shall be added the amount **allowed** as general average for property sacrificed, if not already included, deduction being made from the freight and passage money at risk of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all extra charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average or fall upon the ship by virtue of an award for special compensation under Art.14 of the International Convention on Salvage, 1989 or under any other provision similar in substance.

c) In the circumstances envisaged in the third paragraph of Rule G, the cargo and other property shall contribute on the basis of its value upon delivery at original destination unless sold or otherwise disposed of short of that destination, and the ship shall contribute upon its actual net value at the time of completion of discharge of cargo.

d) Where cargo is sold short of destination, however, it shall contribute upon the actual net proceeds of sale, with the addition of any amount **allowed** as general average.

e) Mails, passengers' luggage, personal effects and accompanied private motor vehicles shall not contribute **to** general average.

RULE XVIII. DAMAGE TO SHIP

The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear caused by a general average act shall be as follows:

(a) When repaired or replaced,

The actual reasonable cost of repairing or replacing such damage or loss, subject to deductions in accordance with Rule XIII;

(b) When not repaired or replaced,

The reasonable depreciation arising from such damage or loss, but not exceeding the estimated cost of repairs. But where the ship is an actual total loss or when the cost of repairs of the damage would exceed the value of the ship when repaired, the amount to be allowed as general average shall be the

difference between the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the value of the ship in her damaged state which may be measured by the net proceeds of sale, if any.

RULE XIX. UNDECLARED OR WRONGFULLY DECLARED CARGO

a) Damage or loss caused to goods loaded without the knowledge of the Shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.

b) Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.

RULE XX. PROVISION OF FUNDS

a) A commission of 2 per cent. on general average disbursements, other than the wages and maintenance of master, officers and crew and fuel and stores not replaced during the voyage, shall be allowed in general average

b) The capital loss sustained by the owners of goods sold for the purpose of raising funds to defray general average disbursements shall be allowed in general average.

c) The cost of insuring average disbursements shall also be **allowed** in general average.

RULE XXI. INTEREST ON LOSSES **ALLOWED** IN GENERAL AVERAGE

Interest shall be allowed on expenditure, sacrifices and allowances in general average at the rate of 7 per cent. per annum, until three months after the date of issue of the general average adjustment, due allowance being made for any payment on account by the contributory interests or from the general average deposit fund.

RULE XXII. TREATMENT OF CASH DEPOSITS

Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges such deposits shall be paid without any delay into a special account in the joint names of a representative nominated on behalf of the shipowner and a representative nominated on behalf of the depositors in a bank to be approved by both. The sum so deposited together with accrued interest, if any, shall be held as security for payment to the parties entitled thereto of the general average, salvage or special charges payable by cargo in respect of which the deposits have been collected. Payments on account or refunds of deposits may be made if certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

INTRODUCTION

The International Sub-Committee ("ISC") on Places of Refuge has met once, on 17 November 2003, in London. A Report of this meeting is included as Document 2 at pages 315 to 326 below.

The background to the formation of the ISC is that two Questionnaires were sent to National Associations which were responded to, and summaries of those responses were forwarded to the IMO Legal Committee¹. A session was devoted to the topic at the Colloquium held at Bordeaux in 2003.

The materials which are provided to assist delegates to the Vancouver Conference include the papers presented at the Bordeaux Colloquium by Richard Shaw, together with a Recent Developments Update as at August 2003 (Documents 4 and 5 at pages 329 to 360), Stuart Hetherington (Document 6 at pages 361 to 374 below) and Gregory Timagenis (Document 7 at pages 375 to 379 below).

A Discussion Paper (which is Document 8 at pages 380 to 402 below) was prepared for the ISC meeting.

The ISC meeting, as will be seen from the Report, identified 8 topics which needed to be further considered. For the assistance of delegates, the International Working Group has prepared papers on each of those topics as follows:

Topics 1 and 2	Eric Van Hooydonk	at pages 403 to	445 below
Topics 3 and 4	Richard Shaw	at pages 329 to	346 below
Topics 5 and 6	Stuart Hetherington	at pages 361 and	380 below
Topic 7	Frank Wiswall	at pages 468 to	469 below
Topic 8	Gregory Timagenis	at pages 470 to	478 below

In addition to the above materials, a paper which delegates might find of interest, has been submitted to CMI by a Dutch student, Welmoed van der Velde, which is Document 14 at pages 479 to 498 below.

It is proposed that the sessions of the Conference be equally divided between the 8 topics, that the paper presenters outline their papers and delegates then express views on the issues, and suggestions for reform, contained in those papers and presentations.

STUART HETHERINGTON

April 2004

¹ The material which was sent to the IMO in relation to the First Questionnaire is attached to the Paper which Richard Shaw presented at the Bordeaux Colloquium (see below).

**INTERNATIONAL SUB-COMMITTEE ON PLACES OF REFUGE
REPORT OF THE FIRST MEETING
LONDON - 17 NOVEMBER 2003
AT THE OFFICE OF THOS R MILLER**

The International Sub-Committee ("ISC") on Places of Refuge met under the Chairmanship of Stuart Hetherington (Australia) with Gregory Timagenis (Greece) acting as Deputy Chairman and Rapporteur.

The meeting was attended by representatives of National Maritime Law Associations (Australia and New Zealand, Belgium, Greece, Ireland, Italy, The Netherlands, Norway, Singapore, South Africa, Spain, Sweden, UK, USA), Inter-Governmental organisations and Governments (IMO, IOPC Fund) and of the industry (International Association of Ports and Harbours, International Chamber of Shipping, BIMCO, ITOPI, International Group of P&I Clubs, Members of the Executive Council of CMI also attended.

The ISC had before it a Discussion Paper prepared by Stuart Hetherington and three annexes containing extracts of existing relevant Conventions.

The Chairman welcomed delegates and introduced the topic by providing a brief summary of the Discussion Paper and, in particular, how CMI became to be involved in the topic and what work had been done to date by CMI. He tabled the Discussion Paper and identified the three essential questions for the meeting to discuss as being:

- (a) Is there something for CMI to do to assist in this area?
- (b) If so, should CMI begin work on an International Convention, a Protocol to an existing Convention, a model law, guidelines or some other Instrument?
- (c) If so, what should be the content of any such Instrument?

In summary, the answers which emerged from a day of discussion were that there is work that CMI could do, and there may be some areas in which a formal Instrument (whether Convention or Protocol) might be needed, and others in which, for example, a model law might be appropriate. In order to identify the content of any such Instrument, the meeting identified the eight issues which are listed below:

1. Obligation to offer a place of refuge to a ship in distress:

- (a) Is there such an obligation on the Coastal State under existing customary law or Convention?
- (b) Does it need to be expressed in an Instrument?

2. Insurance and Financial Security:

- (a) Is the existing legal regime sufficient?
- (b) Should additional insurance/security be established?
- (c) What exactly should insurance/security cover?

Places of Refuge

- (d) Should financial security (existing in advance or established *ad hoc*) be a permissible condition for allowing entry of a distressed ship to a place of refuge?

3. Designation of places of refuge:

- (a) Should places of refuge be designated in advance or not?
 (b) If not, should there exist any criteria in the contingency plans of the Coastal State for determining the place of refuge in a specific case?
 (c) If places of refuge are determined in advance, should such places of refuge be publicised or not?

4. Mechanism of Decision making:

Should Coastal States establish in advance a mechanism for objective decision making about:

- (a) Allowing or refusing entry to a distressed ship.
 (b) Determining a specific place of refuge; and
 (c) The measures to be taken generally concerning salvage, protection, etc.

5. Civil Liability

Who has the liability for damage caused by a pollution incident after a place of refuge has been granted or refused?

- (a) Will the ship in distress be responsible for pollution damage caused and under what conditions once a place of refuge has been granted?
 (b) Will the State allowing entry to a vessel in distress have any liability?
 (c) Will the State denying a place of refuge to a distressed ship have any liability?
 (d) What are the responsibilities of Salvors?
 (Related issues: Conditions of liability, potential claimants, channelling of liability, limitation of liability, insurance, (general or specifically granted) immunity of State accepting a distressed ship vis-à-vis the ship).

6. Are there monetary incentives which can be offered by way of compensation schemes for Ports accepting ships in distress

- (a) Insurance/security?
 (b) Establishment of a fund/or even a voluntary fund?

7. Penal Liability

- (a) Should there be such liabilities; if so, in what circumstances?
 (b) Which Courts should have jurisdiction?

8. Reception Facilities for Ships in Distress

- (a) Should there be a requirement for the establishment of large (private or public) land or floating (salvage/environmental)docks to receive a distressed ship for salvage purposes and for confining risks of pollution?
 (b) Alternatively, should States designate areas within a place of refuge where a sinking or unstable casualty can be beached as part of salvage operations?

(Related issues: incentives for private docks and/or funding of private/public docks, size limitation of tankers).

In preparation for the Vancouver meeting of CMI, papers will be prepared and circulated to National Associations on each of the eight issues, so that delegates to the CMI Conference in Vancouver can determine:

- (a) Which of the above issues, which are not covered by existing Conventions are appropriate to be covered by a Treaty, guidelines, code or model law?
- (b) For those issues which are appropriate for incorporation into a Treaty or Protocol, which Instrument would be most appropriate:
 - (i) A new Treaty?
 - (ii) Amendments to one or more existing Treaties or Protocols?
 - (iii) Which are the most appropriate Treaties from the point of view of subject matter and/or from the point of view of quick and effective methods of amendment?

December 2003

**APPENDIX TO REPORT ON PLACES OF REFUGE
SUBMITTED BY COMITÉ MARITIME INTERNATIONAL (CMI)
TO THE IMO LEGAL COMMITTEE**

DETAILS OF RESPONSES TO SECOND QUESTIONNAIRE

Question 1: Where entry to a place of refuge has been permitted or granted by your country to a foreign-flag ship in distress, and the place of refuge is located in the territorial sea of your country, and pollution or other damage occurs as a direct result of that entry, would your country (i.e. government or authority) accept or assume any degree of liability for such damage

- A. if the damage took place within the jurisdiction of your country?
- B. if the damage occurs within the jurisdiction of a neighbouring country?

Argentina: The Navigation Act and CLC 1992 Convention would determine the liabilities or responsibilities of owners and salvors. Argentina is not a party to the 1976 Limitation Convention or the Salvage Convention, and there are no special rules dealing with places of refuge or liability regimes.

Australia: The various liability and compensation Conventions developed under the aegis of IMO remain applicable in determining liability for pollution damage under a place of refuge request. Those Conventions contain provisions relating to geographical scope of application that it is considered would continue to apply if a pollution incident were to occur within a place of refuge.

Brazil: If entry of a vessel in distress has been permitted the Government or Authority will not be considered responsible for any damage, whether occurring within Brazilian territory or a neighbouring country. The registered owner or bareboat charterer would be fully and solely to blame for any damage which occurred.

Canada: There would only be any liability in the Government or Authority if it was acting outside the protection of its statutory authority and the actions amounted to negligence. If the damage occurred in another jurisdiction, similar questions would apply, but also questions of conflicts of law and the law of the foreign country would arise.

China: The Chinese Government would not accept liability as the permission would have been granted under the power of the Maritime Safety Administration and the cause of the damage would be regarded as the entry of the vessel. The same applies whether the damage is local or to a neighbouring State.

Denmark: It is uncertain under Danish law whether a public authority could be held liable in these circumstances. Because the authorities are given a discretion as to whether entry is permitted or denied under the Danish Marine Pollution Act, it is considered doubtful whether an authority could be found to have been negligent in the exercise of its discretion and thus have a liability.

Finland: Unless liability arose under an International Convention ratified by Finland it is difficult to see how liability would arise under domestic tort law in either scenario.

Hong Kong: There is no specific statutory provision by which the Government would be liable for such damage.

India: No liability would be accepted by the authorities.

Indonesia: Under Article 94(1) Indonesian Law number 21 of 1992 the Government is obliged to conduct search and rescue for anyone experiencing misfortune in Indonesia but would not accept liability for pollution or other damage occurring as a result of permitting entry to a Place of Refuge.

Israel: There are no express provisions by which liability would be imposed upon the Government. There is a Wrecks and Salvage Ordinance 1926 pursuant to which there is a duty to rescue vessels stranded in the Territorial Waters, but the Ordinance does not deal with issues of liability for pollution resulting from such rescue. Polluting shipowners are solely liable for oil pollution under the Prevention of Pollution of Sea legislation.

Italy: It is unlikely that the Government would accept (or have) any liability in such circumstances, as the damage is likely to have occurred even if entry had not been granted. There would only be liability if the decision to permit entry was negligent and can be said to have caused damage. (Article 2.43 of the Italian Civil Code)

Japan: The Japanese authorities would not accept any liability.

Republic of Korea: In the event that an employee of the Korean Government was at fault for allowing a vessel to enter a place of refuge, the Korean Government would be vicariously liable for that pursuant to Article 2 of the Government Compensation Act.

Malta: If there has been causative fault by the government, then it is possible for the government to have a liability; but in practice it would seem to be unlikely in the postulated circumstances, especially in circumstances in which the vessel's entry was permitted in order to save life. Subject to considerations of Sovereign Immunity, there is no reason why such a claim could not be made in a neighbouring jurisdiction.

The Netherlands: There would be no liability in the authority unless a vessel had been ordered into the port by the authorities and damage ensued as a direct result of the entry.

Slovenia: No liability would be accepted in either situation.

Spain: The authorities would not accept liability unless it arose pursuant to Article 3.2(c) of the CLC 1992.

United Kingdom: The Secretary of State's representative and harbour masters could be liable where they have negligently exercised their powers in permitting or granting refuge to a vessel in distress in British waters. They could be subject to recourse actions in the context of charterparty disputes.

United States: If the United States Government agreed to provide a place of refuge and pollution occurred it would look to the discharging vessel's P&I coverage for reimbursement. The United States Government would only accept or assume liability if no alternative source of funding was available or if the discharging vessel had a complete defence to any claim. There is not thought to be any legal basis upon which the United States could be made liable for damage occurring in a neighbouring country if, for example, an on-scene coordinator exercising authority to eliminate environmental hazard within the EEZ accepted a request for a Place of Refuge.

Question 2: Where entry to a place of refuge has been denied or refused by your country to a foreign-flag ship in distress, and pollution or other damage occurs as a direct result of that denial or refusal, would your country (i.e. government or authority) accept or assume any degree of liability for such damage –

if the damage took place within the jurisdiction of your country?

if the damage occurs within the jurisdiction of a neighbouring country?

Australia: The various Conventions would apply, but if the intervention powers had been used, pursuant to the Intervention Convention, Article 6 stipulates “any party which has taken measures in contravention of the present Convention, causing damage to others shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end ...”

Brazil: Where entry into Brazilian waters has been refused the Brazilian Government would not accept any liability as it would regard itself as having a legitimate right to defend its territory from any threats and seeking to impose liability on it in such circumstances would be regarded as an offence to Brazilian Sovereignty.

Canada: The same as Question 1.

China: The shipowner would bear the liability. If damage is directly caused by the denial or refusal to permit entry there would be a theoretical liability in the Maritime Safety Administration if the victim could prove that the denial was illegal. It is thought that the victim would have great difficulty proving both the illegality and the direct causal link between the denial and the damage.

Denmark: The same as Question 1.

Finland: The same as Question 1.

Hong Kong: Although there is no specific legislative provision which creates a liability in such a situation, there is scope for recovery where the Director of Marine is found to have made his decision to refuse entry in

circumstances in which such refusal was not reasonably necessary under the Shipping and Port Control Ordinance or the Merchant Shipping (Prevention and Control of Pollution) Ordinance.

India: No liability would be accepted by the Indian authorities.

Indonesia: The same as question 1: the Government would not accept liability if damage ensued after rejecting a Place of Refuge.

Israel: The same as Question 1.

Italy: The same considerations as those under Question 1 would apply. If the refusal was the direct cause of the damage, the government would be unlikely to be able to recover damages from the shipowner under Article III.3 of the CLC.

Japan: The same as Question 1.

Korea: The same as Question 1.

Malta: The same as Question 1.

The Netherlands: The same as Question 1. There would only be any responsibility in the authorities if they had ordered the vessel out, in which case there may be an obligation to compensate if damage was the direct result of that order.

Slovenia: No liability would be accepted in either situation.

Spain: The Government would not accept liability.

United Kingdom: If it were held that the Secretary of State or his/her representative had acted upon improper motives or upon irrelevant considerations or had failed to take account of relevant considerations in preventing a vessel from entering a Place of Refuge in the UK there could be a liability. However the question arises as to whether exemptions from liability contained in the responder immunity provisions in the CLC and in the UK legislation would apply. It would no doubt be argued that preventive measures were being taken by the competent authority. Questions of reasonableness would then arise. Such immunities would only arise as against third parties and not in response to a recourse action by the shipowner (CLC Article III.5). Whilst the UK is party to several international agreements (OPRC, Intervention Convention 1969, Bonn Agreement, 13 September 1983, (the Mancheplan), and the Norbrit Agreement,) there are no liability schemes established under any such agreements which would give rise to a liability if damage occurred within the jurisdiction of a neighbouring country in circumstances in which a Place of Refuge was denied.

United States: There is not thought to be any legal basis upon which the United States could be compelled to pay any clean-up costs or damages arising from a refusal to permit entry to a vessel to a Place of Refuge.

Question 3: In the circumstances described in Questions 1 and 2,

- A. would any liability attach to the shipowner?
- B. If so, what defences would the shipowner have available?
- C. If liability did attach to the shipowner, would that liability be covered

by an adequate and secure compensation regime? If so, please describe the relevant regime.

Australia: The shipowner would be liable, subject to defences under CLC 92, Bunker and HNS Conventions (when in force) which would be covered by a compensation scheme. (Australia has signed the Bunker Convention, subject to ratification, and is considering the 1996 HNS Convention.)

Brazil: All responsibility would lie with the registered owner or bareboat charterer and vessels subject to CLC 1969 are required under Brazilian legislation to have a certificate or equivalent financial guarantee to navigate in Brazilian waters.

Canada: Liability would be likely to attach to the shipowner pursuant to Section 51 of the Marine Liability Act, with limited exceptions that would not apply outside Canada. Thus damage occurring in the United States could create a liability in the shipowner depending upon principles of private international law and conflicts of law questions.

China: The shipowner would be *prima facie* liable but there would be a defence if the damage arose from an act of war, a natural calamity, negligence or other wrongful acts in the exercise of the functions of the Government Department. The shipowner's liability would be expected to be met by its P&I Club or insurer.

Denmark: The shipowner would be strictly liable under the Danish Merchant Shipping Act. There would be no defences available, but it could limit its liability.

Finland: Liability would attach to the Shipowner in accordance with the CLC. The Compensation required would be that under CLC/Fund Conventions. For liabilities not covered by CLC, domestic law, such as the Act on Compensation of Environmental Damage may be applicable.

Hong Kong: There would be strict liability in the owner subject to the defences under the Shipping and Port Control Ordinance (discharge for the purpose of securing safety of the vessel, escape in consequence of damage to the vessel, or leakage, etc). Compensation would be available under the IOPC Fund.

India: By reason of Part II Sections 3 and 4 of Marine Pollution Prevention Act No. 59 of 1981 the shipowner would be liable. The Defences are those under Marine Pollution Prevention Act No. 59 of 1981.

Indonesia: The shipowner would be liable for all damage, and is required by law to have insurance coverage. There is no other compensation scheme.

Israel: There is presently before the Israeli Knesset a proposal to give effect to the CLC and Fund Conventions. Compensation, until that legislation is passed would be based on negligence law principles.

Italy: Liability would attach to the shipowner under the CLC.

Japan: The shipowner would be liable under the CLC 1992, pursuant to

the law on compensation for oil pollution damage, and similar Conventions. Some defences are available under those enactments, and the 1976 Limitation Convention would also apply. The only compensatory regime is under the IOPC Fund and other regimes.

Korea: A shipowner who causes damage will be liable. In the case of oil pollution, that is strict liability subject to the exceptions under Article 4 of the Korean Oil Pollution Compensation Act. Some defences are also available under Article 746 of the Korean Commercial Code or Article 7 of the Oil Pollution Compensation Act. Limitation of liability would also be available. There is no Korean compensatory regime, only the IOPC Fund which is incorporated into the Korean Oil Pollution Compensation Act.

Malta: In cases to which the CLC applies the shipowner would be liable and the compensation regimes under CLC and Fund Conventions will apply.

The Netherlands: The shipowner would be liable because the owner of a defective vessel is liable under the general tort law. The owner of a non-defective ship would also have a liability under Conventions such as CLC, CRTD (and soon the HNS and Bunker Conventions). It would be a defence to show that the damage was caused by the victim or the event causing the ship to become defective occurred immediately before the resulting damage and the shipowner had no opportunity to prevent it. In respect of any Convention regime defences, they will also apply. Similarly the 1976 Limitation Convention will apply. The only compensation schemes will be those covered by the CLC (including Fund) and in future the HNS and Bunker Conventions. For CRTD substances, no compensation schemes apply because Dutch law does not provide for mandatory insurance or direct action against an insurer.

Slovenia: The Shipowner would be liable, it would have defences available under the CLC and the compensation regime would be the CLC/Fund.

Spain: There are no regulations in force at present over this issue, except CLC 1992.

United Kingdom: Under Article III of the CLC Convention the registered owner would be strictly liable for compensation in respect of the direct consequences of contamination by oil. Section 154 of the Merchant Shipping Act 1995 also imposes strict liability on an owner for damage caused by spills of bunkers from non tankers. Shipowners could however make recourse claims against charterers. Liability may also be imposed on shipowners by Article 8(2)(b) of the Salvage Convention 1989.

Shipowners have exemptions from liability, such as those under Article III.2 of the CLC 1992 and Article III.3 of that Convention. There are also statutory exclusions of liability in certain circumstances in which transfers of oil are being carried out. If the proposed directive 2003/0037 is passed the existing defence contained in paragraph 11(b) of Marpol 73/78 Annex 1 will not apply.

A compulsory insurance scheme applies to any ship carrying a cargo of more than 2000 tonnes of oil in bulk pursuant to Section 163 MSA 1995.

Third parties can sue the insurer of the owners under this legislation. (Insurers have the same rights to limit liability as the owner.) Supplementary compensation is organised under the IOPC Fund regime pursuant to Section 175 MSA 1995.

United States: The shipowner would generally have the liability but it does have a complete defence where pollution damage is occasioned by an act of God, act of war, or an act or omission of third parties provided the shipowner reports the incident in a timely fashion, provides assistance and complies with all directions. Compensation would be sought under OPA 90 from the vessel's P&I Club, any assets of the shipowner and as a last resort the Oil Spill Liability Trust Fund.

Question 4: In the circumstances described in Questions 1 and 2, would any liability attach to a person other than the shipowner providing assistance to the ship in distress?

who would be liable for the costs of assisting the ship in distress and of responding to any threat of pollution or actual pollution incident?

Australia: Others would not be liable as under the CLC/Fund and HNS Conventions the channelling of liability to the shipowner provides protection to responders, unless the pollution was caused by an act or omission done with intent to cause damage. (The Bunker Convention does not have a channelling provision, so third parties may be exposed. However, Australia will be including a "responder immunity" in its legislation giving effect to the Bunker Convention.) In the first instance, the Australian Maritime Safety Authority and/or relevant State/Territory maritime agencies who respond to the incident would be liable for such costs, but would seek recovery from the vessel's insurers or the vessel itself, the Master or whoever caused the incident. If costs could not be recovered, they would be met from the oil pollution levy applied to national and foreign-flagged ships visiting Australian ports.

Brazil: The liability would remain with the registered owner or bareboat charterer.

Canada: The salvor could be liable under the Marine Liability Act (Section 57(2)). Where Convention ships are involved in an oil incident, certain categories of persons are protected from liability unless damage resulted from their personal act or omission committed with intent to cause damage or were committed recklessly or with knowledge that the damage would probably result. (These categories include persons taking measures to avoid oil pollution damage from a Convention ship.) At first instance, such costs will be met by the Ship-source Oil Pollution Fund and/IOPC Fund.

China: Where damage has been caused entirely or partly by the intentional act or negligence of a third party providing assistance to the ship, such as a salvor, they are liable accordingly. Where shipowners have been held liable in such circumstances they would be entitled to bring recourse action. The shipowner would be liable for the costs of assistance whether rendered pursuant to an agreement or ordered by the Maritime Safety Administration.

Denmark: Salvors will be liable if they are grossly negligent. Shipowners are liable for all of the public authority's reasonable costs relating to emergency preparedness and pollution prevention clean-up and are liable for a salvor's increased costs if they have prevented or minimised damage to the environment.

Finland: The same as Question 3.

Hong Kong: There is no specific provision in Hong Kong legislation, although Article 11 of the Salvage Convention has been enacted in Hong Kong.

India: Operators, masters and ship agents would be liable. The owner or operator of the ship would be liable for the costs of assisting the ship in distress under Part III Section 6(1) of the Marine Pollution Prevention Act. No. 59 of 1981.

Indonesia: The shipowner is liable for the costs incurred by anyone, who assists the ship in distress.

Israel: This issue is not covered by any national legislation.

Italy: Liability could arise in tort under Article 2043 of the Civil Code. The shipowner would have the liability to a salvor for the costs of assisting the ship and of responding to any threat of pollution.

Japan: Pursuant to the law on compensation for oil pollution damage, enacting CLC 92, persons performing salvage services cannot be liable. Similarly, persons taking preventive measures cannot be liable. There are no special laws or regulations dealing with the liability for costs, other than under the CLC enactment. However, the person who causes pollution will ultimately have the liability.

Korea: Salvors could have a liability pursuant to the general civil law theory. Salvors can limit liability under the Korean Commercial Code Article 752-2. The costs of assisting the ship in distress and of responding to pollution will be dealt with based on the theory of salvage.

Malta: Salvors could be liable under the Merchant Shipping Act, unless the CLC Convention applies and claims may be made under the Convention by those who provide assistance or respond to any threat of pollution.

The Netherlands: Salvors may have a liability if they are negligent, but they may limit their liability under the 1976 Limitation Convention. However, if damage is caused by a substance covered by the Conventions, the channelling provisions apply. The owner is liable for costs under CLC and 1989 Salvage Convention (the Netherlands made use of the possibility referred to in the second sentence of Article 13.2 of the Salvage Convention). The owner may have recourse against the authorities concerned.

Slovenia: Only the Shipowner would be liable and it would be liable for the costs of assisting the ship.

Spain: There are no legal guidelines in Spain. It is presumed that the cost of assistance will always fall on the vessel's owner.

United Kingdom: There is the potential for persons other than owners to be liable under Section 130 of MSA 1995 in connection with the transfers of cargo, stores, bunker fuel or ballast waters between ships if they fail to comply with directions. Salvors also may have liability pursuant to ordinary tortious principles, as well as pursuant to Article 8 of the Salvage Convention 1989. Salvors will however be immune from suit in negligence under Article III.4(d) CLC 1992 if they were “performing salvage operations with the consent of the owner or on the instructions of a competent public authority”. The immunity of salvors under CLC 1992 would not be available in case of a recourse action as contained in Article 3.5.

Where damage occurs during a towage operation provisions of standard agreements might well absolve the tug owner, its servants or agents, from any liability (Towhire and Towcon) and UK Standard Conditions for Towage and Other Services. Claims by third parties against tug owners would probably result in recourse claims and pursuant to rights of indemnity under such contractual arrangement. Similar issues arise under wreck removal agreements such as “Wreckhire 99”.

The cost of assisting a ship in distress and of responding to any threat of pollution would fall upon the ship owner under Section 153(1)(b) MSA 1995 but there is provision under Section 138 of MSA 1995 to recover compensation where costs were incurred as a result of a direction having been given to it and the action taken “was not reasonably necessary to prevent or reduce pollution, or risk of oil pollution” or “was such that the good it did or was likely to do was disproportionately less than the expense incurred”

By Section 293(4)A MSA 1995 the Secretary of State may agree to indemnify any person with whom it is agreed that they shall take any measures to prevent, reduce or minimise the effects of marine pollution, in respect of liabilities which that person incurs in connection with taking those measures.

Article 9 of the Bonn Agreement provides for reimbursement being made by one contracting party to another where assistance has been requested by one party and provided by the other.

United States: OPA 90 exempts any person from liability for removal costs and damages resulting from acts or omissions taken under the National Contingency Plan, or as otherwise directed by the President of the United States. Certain State laws also provide qualified immunity to spill responders and “Good Samaritans” generally – these would not apply where they have acted with gross negligence or intentional misconduct is involved.

**REPORT ON PLACES OF REFUGE
SUBMITTED BY COMITE MARITIME INTERNATIONAL (CMI)
TO THE IMO LEGAL COMMITTEE**

Executive Summary

At the 85th session in October 2002 the IMO Legal Committee received a report (LEG/85/10/3) from CMI. In considering the report the Legal Committee identified a number of additional issues which it wished to explore concerning the liabilities that might arise as a result of decisions to permit or deny entry to a place of refuge, compensation that might be payable as a result of such a decision and the position of third parties who became involved, such as salvors. The following report has been prepared on the responses received to a further questionnaire sent to National Associations by CMI, by the International Working Group of the CMI consisting of Stuart Hetherington (Chairman), Gregory Timagenis (Vice Chairman), Prof. Eric van Hooydonk, Richard Shaw and Dr Derry Devine.

A detailed summary of the responses received from National Associations is contained in an Appendix to this Report, which has been deposited in the IMO Library and copies will be made available in the English, Spanish and French languages by the CMI Observer delegation to the Legal Committee meeting.

Summary of Responses to Second Questionnaire:

Question 1: Where entry to a place of refuge has been permitted or granted by your country to a foreign-flag ship in distress, and the place of refuge is located in the territorial sea of your country, and pollution or other damage occurs as a direct result of that entry, would your country (i.e. government or authority) accept or assume any degree of liability for such damage:

- A. if the damage took place within the jurisdiction of your country?
- B. if the damage occurs within the jurisdiction of a neighbouring country?

Response: The consensus of responses received is that Governments would not have a liability for granting a Place of Refuge when damage ensues, whether within their own jurisdiction or in that of a neighbouring country. Most responders referred to the channelling provisions of the Civil Liability Convention (CLC), although some responders considered that where the Government or Authority acted negligently they could face a liability provided any damage suffered was directly attributable to the decision to grant a Place of Refuge.

Question 2: Where entry to a place of refuge has been denied or refused by your country to a foreign-flag ship in distress, and pollution or other damage

Places of Refuge

occurs as a direct result of that denial or refusal, would your country (i.e. government or authority) accept or assume any degree of liability for such damage:

- A. if the damage took place within the jurisdiction of your country?
- B. if the damage occurs within the jurisdiction of a neighbouring country?

Response: The responses were largely the same where a Government refuses a Place of Refuge. Many responders anticipated that there could be a liability on a Government or Authority which acted negligently in declining a Place of Refuge provided there is a sufficient degree of causative connection between the refusal and the ensuing damage. It has been pointed out in some responses that the immunity provisions in the CLC could apply if the Government or Authority concerned sought to suggest that their actions were taken as preventive measures. An issue as to whether the actions taken were done recklessly would then arise.

Question 3: In the circumstances described in Questions 1 and 2,

- A. would any liability attach to the shipowner?
- B. If so, what defences would the shipowner have available?
- C. If liability did attach to the shipowner, would that liability be covered by an adequate and secure compensation regime? If so, please describe the relevant regime.

Response: Most responders have identified the provisions of the CLC as confirming that the shipowner would be liable, subject to any available defences under the Convention, and any right to limit liability. Compensation, for most responders, would be expected from the ship's P&I insurance and/or the IOPC Fund.

Question 4: In the circumstances described in Questions 1 and 2,

- A. would any liability attach to a person other than the shipowner providing assistance to the ship in distress?
- B. who would be liable for the costs of assisting the ship in distress and of responding to any threat of pollution or actual pollution incident?

Response: Most responders have identified the channelling provisions in the CLC which grant responder immunity and confirm that the shipowner would have the responsibility, unless third parties have acted with intent to cause damage or with knowledge that the damage would probably result, and pointed out that recourse actions may lie at the suit of the shipowner where there has been negligence by a third party.

Interestingly, very few responders referred to conventions, such as UNCLOS as potentially giving rise to liabilities in Governments or authorities where they have refused a Place of Refuge, or to the Intervention Convention which expressly creates an obligation in a party to pay damages in certain circumstances.

PLACES OF REFUGE INTERNATIONAL LAW IN THE MAKING?

RICHARD SHAW¹

The sinking of the 70,000 tonne tanker *Prestige* off the coast of Spain in December 2002 has focussed attention on the topic of places of refuge for distressed ships, already on the agenda of the International Maritime Organisation (IMO) and the Comité Maritime International (CMI). The subject is not a new one. Salvors have for many years been concerned at the reluctance of national maritime administrations to allow damaged ships to be brought into sheltered waters where their condition can be studied and hopefully stabilised. It is self-evident that the best way of preventing damage to the environment from oil or other pollutants carried in a ship is to keep it inside the ship and to keep the ship afloat.

The cases of the *Christos Bitas* in 1978 and the *Atlantic Empress* in 1979² are notable past examples of coastal state authorities ordering salvors to tow a damaged tanker out to sea and sink her (or allow her to sink) rather than risk the environmental damage which might occur if she is allowed into sheltered water. In doing so the authorities in question accepted the risk of some pollution of the oceans by oil, but removed the problem from their own doorstep. When the oil from these ships came ashore, as assuredly some did, its origin was almost certainly not traceable, and no claims for compensation have been made.

The regime of compensation for oil pollution damage has evolved significantly since the time of the *Christos Bitas* and *Atlantic Empress* casualties, and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1989 International Convention on Salvage have now entered into force. This paper will examine the changes in international and national law which have come about, and the likely direction of new international law in the light of the work currently in progress at the IMO and CMI.

¹ M.A. Oxon, Senior Research Fellow, University of Southampton Institute of Maritime Law, Titulary Member of CMI; Member of the CMI Working Group on Places of Refuge; Advisor to the UK Delegation at the 1989 International Conference on Salvage; CMI Delegate to the International Oil Pollution Compensation Fund. The author records his appreciation of the advice of many colleagues, but particularly Patrick Griggs, President of CMI, Stuart Hetherington, Chairman of the CMI Working Group, and Professor Nicholas Gaskell of the University of Southampton Institute of Maritime Law, in the preparation of this paper. This is an extended version of an article published in the International Journal of Shipping Law Volume 9 Issue 2 (March April 2003) reproduced with kind permission.

² The facts of these casualties are summarised at page 568 of Colin de la Rue and Charles Anderson *Shipping and the Environment* pub. LLP 1998.

1. The Legal Background

It is universally accepted that there is a general duty on seafarers to go to the assistance of a vessel in distress. This principle is codified in Article 98 of UNCLOS. This particular article is included in Part VII dealing with The High Seas, although the terms of article 98 do not restrict its obligations to a vessel in distress on the High Seas. Similar obligations are set out in Article 10 of the 1989 Salvage Convention.³

The general principles were recognised in the judgment in the case of *Kate A Hoff (The Rebecca)* (1929)⁴ That case did not question the validity of the general principle, but was more concerned with the degree of distress to which the vessel in question should be subject before it was entitled to immunity from the local laws of the coastal state.⁵

The *Rebecca* Case appears to recognise a right of a vessel in distress to pass through the internal waters of a state, where the right of innocent passage (which exists though the territorial sea) does not apply.⁶ It is very hard to envisage a geographical configuration which lies in the territorial sea (and is thus beyond the limits of internal waters) which is sufficiently sheltered to offer substantial benefits to a distressed vessel and thus to be regarded as a place of refuge.

Article 18 of UNCLOS contains a definition of innocent passage including stopping and anchoring *rendered necessary by force majeure or distress*. This is one of the rare mentions of distress in UNCLOS. It indicates a recognition of the exceptional nature of such conditions when other general principles may be suspended, but it appears that Article 18 is unlikely, for the reasons stated in the previous paragraph, to be applicable to a ship seeking a place of refuge.

The principles cited in the *Rebecca* Case were developed long before the concerns for the marine environment became as important as they are today. A reference to the prevention of the escape of oil by a salvor first appeared in the 1980 edition of Lloyds Standard Form of Salvage Agreement, little more than 20 years ago. Prior to the loss of the tanker *Torrey Canyon* off Cornwall in 1967 it is fair to say that assistance to ships in distress was directed primarily to the saving of life and secondarily by the need to save property, namely the ship herself and her cargo.

It is only in the final decades of the twentieth century that the importance of protecting the marine environment has been recognised. Indeed it may be

³ which is a re-statement of Article 11 of the 1910 Salvage Convention.

⁴ 4 R.A.A.A. P 444 The material section of the award is cited by Brown in *The International Law of the Sea* pub. Dartmouth Publishing Co. 1994 at page 39.

⁵ It is interesting to note that this principle of immunity is recognised in the US Coast Guard Marine Safety Manual Volume VI Chapter 1 a copy of which is annexed to the August 2002 CMI report to IMO - see section 4 of this paper.

⁶ UNCLOS Art. 17

said that the principal motivation for the 1989 Salvage Convention was to recognise this by an international instrument.⁷

To what extent then can the Master of a ship in distress, or a salvor assisting such a ship, look to International Law to help him persuade a reluctant coastal state to allow him bring the casualty into sheltered water? Apart for the *Rebecca* Case cited above, there appears to be little authority.

The most significant provision appears in Article 11 of the 1989 Salvage Convention, which reads:

“Co-operation of Contracting States

*A State Party shall, whenever regulating or deciding upon matters relating to salvage operations **such as admittance to ports of vessels in distress** or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”* (emphasis added).

The relevant section of the CMI Report on the Montreal Draft of the Salvage Convention⁸ reads

“The discussions within the CMI revealed that cooperation from public authorities of coastal states would often be indispensable to the success of the salvage operations. On the other hand, it was recognised that the drafting of provisions on this subject was a most delicate matter. Art. [11] should be read in the light of this.”

This provision was adopted in the final text of the 1989 Salvage Convention without amendment. Research conducted by the CMI in 2002 revealed that none of the states which have ratified the Salvage Convention have expressly adopted legislation to give effect to Article 11, apart of course, from enacting the express terms of the Convention into their national law.⁹

Perhaps the most tangible action which reflects the objectives of Article 11 is the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation, which has been ratified by a large number of states which are party to the 1989 Salvage Convention.¹⁰ This Convention does not expressly mention the admission of ships in distress to a place of refuge, but it does envisage the development by states of oil pollution

⁷ See generally *Shipping and the Environment* cited above and the article by the author “The 1989 Salvage Convention and English Law” [1996] LMCLQ 202.

⁸ Set out at p. 840 of Kennedy and Rose, *Law of Salvage* (6th edn.) pub. Sweet and Maxwell 2001

⁹ The CMI Report is document LEG 85/10/2. A copy of this report is annexed to this paper, and is also available on the CMI website www.comitemaritime.org A more detailed version of the paper and additional documents including the responses to the CMI questionnaire, a schedule of casualty experience and excerpts from Manuals issued by Queensland and the USA has been lodged in the IMO Library.

¹⁰ This convention entered into force on 13th May 1995 and has been ratified by 55 states.

response contingency plans, and some states (few in number) have such plans which expressly provide for the possibility of admission to their ports or havens of ships in distress which may prove to threaten pollution.

Article 5 requires the Authorities of a state receiving advice of a pollution incident to assess the nature, extent and possible consequences of such an incident and to advise without delay all states likely to be affected by it, together with details of its assessment and any action it has taken or intends to take to deal with the incident.

Such action may well include admission of a distressed ship to a place of refuge, or the refusal of such admission, but there is no record of such advice.

It should be remembered however, that the Intervention Convention 1969 gives powers to a coastal state to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate *grave and imminent danger* to their coastline or related interests from pollution of the sea by oil following a maritime casualty.¹¹ The UK has used this convention to justify the exercise of wide-ranging powers to direct the movement of a ship which threatens such damage.¹² It is however important to bear in mind that the measures taken by the coastal state under the Intervention Convention must be proportionate to the actual or threatened damage.¹³ It is likely that the Intervention Convention may be invoked by a coastal state in ordering a damaged ship to steam or to be towed clear of a coastline threatened with pollution, but the stringent limits set out in Article V on the powers conferred by that convention must be respected, and the obligation on a state to pay compensation in the event of the taking of measures which exceed those reasonably necessary in the circumstances will, or should, be a deterrent against the arbitrary exercise of such powers.

2. Two recent incidents - the *Castor* and *Prestige* casualties.

*a. The Castor – December 2000*¹⁴

This vessel, a tanker of 30,068 tons deadweight, was in the course of a voyage from Black Sea ports with a full cargo of gasoline in December 2000 when she developed a large crack on the main deck during a storm in the western Mediterranean off the coast of Morocco. She was taken in tow by a salvor, Tsavliris, on the terms of Lloyds Standard Form of Salvage Agreement when she was not far from the coast of Spain. The damage to the hull proved to be serious and the salvors decided to lighten the cargo in order to relieve the stresses in the vessel before she could be taken to a port of repair. Requests were made by the salvors to the authorities of many Mediterranean countries

¹¹ Emphasis added.

¹² See note 18 *infra*.

¹³ Art. V. The principles in the Intervention Convention, including the requirement that the proposed measures must be proportionate to the actual or threatened damage, are also set out in Article 221 of UNCLOS.

¹⁴ Summary based on information published by the International Salvage Union, supplemented from other sources.

to allow the casualty to be brought into a sheltered place of refuge for the transshipment to take place. The details of these requests are not public, but it is understood that Tsavliris undertook to keep at least one salvage tug standing by to ensure the safety of the ship and cargo during the transshipment operation. The *Castor* undoubtedly had a quantity of fuel and lubricating oils on board for her own consumption, but her cargo of gasoline did not fall within the categories of “persistent oil” as recognised by the International Oil Pollution Compensation Fund (IOPC Fund) as a serious cause of marine pollution. Nevertheless no state was willing to allow the laden *Castor* to enter their waters, and the salvors were obliged to perform a ship-to-ship transfer on the high seas after towing the vessel over 2,000 miles around the western Mediterranean. Fortunately this was completed successfully.

*b. The Prestige – November 2002*¹⁵

This tanker of 42,820 tons gross laden with about 77,000 tonnes of heavy fuel oil was in the course of a voyage from Ventspils, Latvia to Singapore when she suffered structural damage in heavy seas some 30 miles off Cape Finisterre, Spain. The *Prestige* drifted to within 5 miles of the coast before salvage vessels were able to make fast towlines to the vessel on 14th November 2002. A request by the salvors to the Spanish authorities to allow them to bring the casualty into a sheltered place of refuge was declined, and the order was given that the *Prestige* should be towed away from the coast. The weather conditions deteriorated and the vessel eventually broke in two and sank in about 3,500 metres of water about 170 miles west of Vigo, Spain. The majority of her cargo went to the bottom with the vessel, from which it continues to leak slowly, but a substantial quantity of fuel oil had already escaped from the vessel.

The west coast of Spain over a stretch of about 800 kilometres, including 270 beaches, has been polluted with oil to varying degrees. Oil has also entered Portuguese waters, but the extent of pollution is as yet unknown. In the meantime a major operation to clean up the coast has been mounted by the Spanish authorities, with collaboration from other European governments. The area has a very active fishing industry, and the Spanish Government has imposed a ban on all fishing and shellfish harvesting over an extensive area. It is expected that the total compensation claims arising from this incident will exceed the present limit of compensation available from the IOPC Fund, currently 135 million Special Drawing Rights (or about US\$170 million or £117 million).

The legal issues arising out of both these casualties are on-going, but it is self evident that if each of these ships had been allowed into a place of refuge where her cargo could be transferred the very substantial costs incurred, and in the case of the *Prestige* the substantial losses, could have been significantly reduced. The price of such a step would have been the running

¹⁵ Summary based on reports to the IOPC Fund and Lloyds List casualty reports.

of a risk of pollution of the immediate area which must be acknowledged to be significant, but in both cases the impact would have been unlikely to prove as expensive as what eventually occurred.

*c. An interesting comparison – the Sea Empress – February 1996*¹⁶

This tanker of 147,273 tons deadweight, laden with a cargo of 130,018 tonnes of Forties light crude oil, ran aground off the port of Milford Haven, UK on 15th February 1996. In the course of salvage operations it was decided by the salvors that it was necessary to lighten the vessel by pressurising her cargo tanks with compressed air, even though it was accepted that the inevitable result of this would be to drive out through her damaged bottom a certain quantity of her oil cargo.¹⁷ In fact a larger quantity of cargo than anticipated was lost though her bottom damage when the vessel was held on rocks as the falling tide reduced the hydrostatic pressure which had retained the cargo in the damaged tanks. Nevertheless when the *Sea Empress* was eventually refloated on 21st February she still had on board some 58,000 tonnes of crude oil. Throughout the salvage operation a number of proposals were made that the vessel should be taken out to sea as soon as possible.¹⁸ However the final decision was taken to bring the vessel into Milford Haven where she was moored at a jetty and her remaining cargo removed safely. There was no doubt some reluctance on the part of the Milford Haven Port Authority to allow a severely damaged tanker into the Haven, but the decision to allow her in proved to be the correct one in the circumstances.¹⁹

The decision in every case will turn on its particular circumstances, but some general policy principles may be drawn from these examples. The reluctance of a government or port or local authority to allow a damaged ship into the waters under its control is entirely understandable, if there is a serious risk of pollution as a result. However there will be many cases when positive action which results in some inevitable pollution may be the right course in order to avoid or minimise the threat of greater pollution. There are few areas of the law more littered with popular misconceptions than that of salvage at sea, and it is difficult to expect a politician or government employee with little or no knowledge of the intricacies of salvage law or naval architecture to make a right judgment in circumstances of great urgency and high media attention. The temptation to opt for a “who will rid me of this troublesome priest” position is not therefore surprising. It is to assist in more informed and objective appraisals that the current work of the IMO is directed.

¹⁶ This summary is based on the Report of the UK Marine Accident Investigation Branch (MAIB) HMSO 1997.

¹⁷ MAIB Report paragraph 19.14

¹⁸ MAIB Report pages 62-64.

¹⁹ Powers to give the order to the Milford Haven Port Authority derived from the blanket provisions in sect 137 (2) and (4) of the Merchant Shipping Act 1995. Sect 2(3) of the Merchant Shipping and Maritime Security Act 1997 subsequently extended the 1995 Act to include express powers to give such directions to a harbour authority.

3. IMO Initiatives

The public and media interest in the *Castor* case caused the Secretary-General of the IMO to include the subject of places of refuge on the work programme of the Legal Committee at the meeting in October 2001. The issue of Places of Refuge involved several of the organs of the IMO, but the Sub-Committee on Safety of Navigation (NAV) was designated the principal co-ordinating Sub-Committee, with input from all other interested Sub-Committees. This Sub-Committee has established a Working Group with the principal task of developing two sets of guidelines; one for the master of a vessel in need of a place of refuge, together with any salvor assisting such a vessel, and the second for the actions expected of coastal states and for the evaluation of risks associated with the provision by them of places of refuge.

In August 2002 the Sub-Committee on Safety of Navigation submitted a draft assembly resolution with an Annexe containing the recommended wording for both sets of guidelines to the Maritime Safety Committee,²⁰ the text of which is annexed to this paper. The wording is straightforward and practical, while recognising the political difficulties inherent in such situations. In particular paragraphs 1.1.3 to 1.1.5 read:

“When a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration is to transfer its cargo and bunkers, and to repair the casualty. Such an operation is best carried out in a place of refuge.

However, to bring such a ship into a place of refuge near a coast may endanger the Coastal State, both economically and from an environmental point of view, and local authorities and populations may strongly object to the operation.

Therefore, granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis with consideration of the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast.”

In the world of the search for harmony of international law ²¹ the words “case-by-case basis” are usually a sign of failure to achieve a common principle of universal application, but in the area of places of refuge it must, it is submitted, be recognised that each distress situation is different from all others, and that guidelines, rather than hard and fast rules, are the appropriate formula.

In October 2001 the IMO Legal Committee was advised by MEPC of the work in hand on this topic. Many delegates to the Legal Committee were well aware of the questions raised by the *Castor* case. The Legal Committee therefore decided to put this subject on its work programme, and readily

²⁰ Document NAV 48/19 Annexe 12.

²¹ The principal object of the CMI.

accepted an offer by CMI to circulate a questionnaire to its member National Maritime Law Associations (NMLAs) to ascertain the approach adopted by their legislatures and government agencies to the problems raised by distressed ships seeking a place of refuge.

In December 2002 the Maritime Safety Committee authorised the Sub-Committee on Safety of Navigation, taking into account any proposals and comments by other IMO organs including the Marine Environment Protection Committee and the Legal Committee, to submit the final text of the Guidelines, together with the draft Assembly resolutions, directly to the Meeting of the IMO Assembly scheduled for November 2003 for final adoption.

At the meeting of the IMO Legal Committee in April 2003 the Draft Guidelines prepared by the Sub-Committee on Safety of Navigation were considered by the Legal Committee. Since these are non-mandatory guidelines, the Legal Committee did not find any matters within them on which it felt the need to comment. The debate was however somewhat eclipsed by a paper presented by the delegation of Spain which sought to amend the guidelines in a number of important respects. Notable among them was an attempt to reverse the presumption in paragraph 3.2.1 of the Guidelines that the coastal state should weigh all the risks and give shelter to a ship in distress whenever reasonably practicable. The tenor of the discussions in the Legal Committee was such that it was clear that there was very little support for the Spanish proposal from other delegations. The Legal Committee therefore diplomatically declined to rule on the Spanish proposals but referred them back to the Maritime Safety Committee and the Sub-Committee on Safety of Navigation.

The Legal Committee also accepted an offer by CMI to conduct further studies through its national Maritime Law Associations into the issues of liability and compensation arising out of the admission of distressed vessels to places of refuge. The working group under the chairmanship of Stuart Hetherington (Australia) is continuing its investigation of these issues. Member states represented at the IMO Legal Committee have also been requested by that committee to collaborate with their national Maritime Law Associations in formulating their state's responses to the CMI questionnaire on this subject. This may indeed mark a milestone in the development of greater collaboration between CMI and national governments in the development of international maritime law.

The Spanish proposals previously presented to the Legal Committee were considered in the June 2003 meeting of the Sub-Committee on Safety of Navigation. At the plenary session at the end of the meetings the Spanish proposals were not adopted.

At the October 2003 meeting of the Legal Committee the draft guidelines were finally approved, but no further decisions were taken on any other aspects pending the final report from the CMI on the questions of liability and compensation. The Guidelines, together with associated draft Assembly resolutions, will therefore be submitted to the IMO Assembly in November 2003 for final adoption.

4. The CMI Work Programme

Following the establishment of the IMO Legal Committee as a consequence of the 1967 *Torrey Canyon* disaster, the role of the CMI as the principal international organisation promoting the development of new international conventions on international maritime law was somewhat eclipsed. The 1976 International Convention on Limitation of Liability for Maritime Claims and the 1989 International Convention on Salvage both resulted from CMI initiatives, but the importance of the intergovernmental role of the IMO (and its predecessor IMCO) relegated the CMI to a subordinate position.

In the last decade of the twentieth century, however, the relationship between the two organisations has matured significantly, with the increased awareness of all UN Agencies of the budgetary constraints under which they are obliged to work, and appreciation by all concerned that the resources of the CMI, which include the widespread diversity of membership of its constituent member National Maritime Law Associations (NMLAs), are made available to the IMO without charge. There have been many instances of the IMO availing itself of such assistance, and the subject of Places of Refuge provides an excellent example.

Following the Legal Committee meeting in October 2001 the CMI set up a working group, chaired by Stuart Hetherington, which prepared and distributed a questionnaire on the legal issues raised by the question of Places of Refuge to its member NMLAs. The activities of the CMI are generally concerned primarily with questions of private law, but in this case the focus of the questionnaire was to start with the relevant international law provisions, in the 1989 Salvage Convention and in UNCLOS in particular, and to ascertain the extent to which these provisions had become part of the private and public law of the states in question. Questions were also raised as to the actual practice of the states, and their experience in dealing with casualties where a place of refuge was sought.

The responses to the questionnaire were exceptionally full, indicating a high level of interest among the membership of the NMLAs. Even more exceptional was the speed of response, which enabled the Working Group to prepare a detailed report which was submitted to the October 2002 meeting of the IMO Legal Committee. A copy of that Report ²² is annexed to this paper. The constraints imposed by the IMO as to the length of such documents, which have to be translated into the working languages of the Legal Committee, meant that this paper is very compact, but a longer version of the paper, with a summary of the responses from each of the NMLA's and copies of other relevant documents, has been lodged with the IMO Library for reference by interested parties. Particularly illuminating are the extracts from the Guidelines published by the State of Queensland, Australia (which has the custody of the Great Barrier Reef) and from the United States Coastguard

²² IMO document LEG 85/10/3.

Places of Refuge

Marine Safety Manual. This latter extract, as has been mentioned earlier, recognises the immunity of a distressed ship putting into a place of refuge as applied in the *Rebecca* case.²³

The CMI Report was adopted with appreciation by the Legal Committee, which asked the CMI to continue its work with particular reference to two questions: what are the legal liabilities of a state which allows a ship into a place of refuge under its jurisdiction, and secondly, what are the liabilities of a state which refuses such entry?

Members of the Legal Committee also noted that, while few states have adopted legislation which expressly gives effect to the principles set out in Article 11 of the Salvage Convention, many states may well have dealt with this matter by executive action. This emphasises the importance of the information on casualty experience in the states whose NMLAs responded to the CMI questionnaire, and details of which are in the papers lodged at the IMO Library.

Mr Hetherington and his working group delivered an interim report on this subject to the delegates at the CMI Colloquium in Bordeaux in June 2003. This provoked a lively discussion, from which it is evident that there is a widespread interest in this subject. Comments by Spanish maritime lawyers present indicated that opinions on the handling of the *Prestige* casualty by the government of Spain differ widely even within Spanish legal circles.

The current focus of the working group's work is the field of liability and compensation consequent upon the admission, or refusal of admission, of a distressed ship to a place of refuge. A further questionnaire has already been sent out addressing these questions. Oil pollution from such a ship will be covered by the CLC and IOPC Fund regime if it is a tanker.²⁴ At the present time pollution by Hazardous and Noxious Substances and also by Ships' Bunkers are not covered by an international compensation regime, but there is every reason to hope that the HNS Convention of 1996 and the 2001 Bunkers Convention will enter into force shortly²⁵. Perhaps the public and press interest in this topic generated by the *Prestige* casualty²⁶ may even provide a welcome incentive to states to ratify these conventions.

Places of Refuge has therefore been listed as a major topic for discussion at the CMI Conference to be held in Vancouver, Canada in June 2004.

²³ See note 4 *supra*.

²⁴ International Convention on Civil Liability for Oil Pollution Damage 1969, as amended by the Protocol of 1992, and the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage 1971 as amended by the Protocol of 1992.

²⁵ An important intergovernmental meeting was held in Ottawa in June 2003 to progress the ratification of the HNS Convention.

²⁶ And the pressures emanating from the European Union.

5. The European Union

The impact of the *Prestige* casualty has continued to provoke repercussions in the European Union, and in particular in the new European Maritime Safety Agency (EMSA). Two meetings of the European Group of Experts have been held, the latter meeting in May 2003 under the chairmanship of the recently-appointed head of EMSA Mr Willem de Ruiter (Netherlands). At these meetings a difference of approach has been noted between certain States, in particular Denmark and Norway (the latter attending the meetings by invitation although not a member of the EU) who prefer an open public declaration of the places of refuge in their territory, and those who would prefer to prepare an inventory of such places but not to disclose them publicly for fear of provoking either an outcry from the local authorities of the areas concerned, or a flotilla of decomposing ships heading towards them.²⁷ The UK supports this latter view.

Previously the EU Office responsible for vessel traffic monitoring had charged member states with preparing, not later than February 2004, an inventory of suitable places of refuge on their coastlines. However the Ministers in the Transport Council subsequently advanced this deadline to 1st July 2003, but it is noteworthy that, while they required member states to forward details of the inventory to EMSA, they did not specify whether the list should be made public. The 1st July has come and gone, but it is still evident that many European states, while they may well have taken action internally to identify sheltered waters to which a distressed vessel may be directed, are still reluctant to publish the identity of those locations to the world at large.

6. The Way Ahead

The facts of the *Prestige* casualty clearly demonstrate that this problem is certainly not going to go away. It is too early to venture any comment as to the outcome of the debate as to whether the Spanish Authorities were right or wrong in ordering the salvors to tow the vessel out to sea. It is interesting to speculate whether the *Prestige* and most of her cargo could have been kept in one place if she had been brought into one of the sheltered “rias” on the west coast of Spain. Some pollution of the immediate area would have been inevitable, and one can envisage a good deal of reluctance on the part of the relevant authorities to allow the vessel in, but in the light of the considerable pollution damage which has now been suffered by the Spanish coast, it may well be that such a solution would have been the lesser of two evils.

Other interesting legal issues will follow when the IOPC Fund considers the claims of the Spanish Government for reimbursement of the clean-up costs incurred by them.

²⁷ See the article in “Lloyds List” 4th August 2003.

In this context it is interesting to recall the **CMI Guidelines on Oil Pollution Damage**²⁸ paragraph 1 of which reads:

“1. The importance is to be recognised of maintaining internationally a uniform treatment of claims for pollution damage, including a uniform application of the International Convention on Liability for Oil Pollution Damage (CLC 1969) and the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage (Fund Convention 1971) together with any amendments thereof, and to that end due weight should be attached to any relevant policy, decisions or resolutions of the International Oil Pollution Compensation Fund.

2. Compensation may be refused or reduced if a claimant fails to take reasonable steps to avoid or mitigate any loss, damage or expense.”

As the authors of “Shipping and the Environment” state in their introductory note²⁹, the CMI has, in preparing these guidelines, aimed, inter alia, to state the extent to which claims are thought to be recoverable under the law applied in the majority of countries, and with due account being taken also of the criteria developed by the International Oil Pollution Compensation Fund.

The duty to mitigate loss is a legal principle of almost universal application, and it must surely apply to claims where the CLC and Fund Conventions apply as well as those to which the CMI Guidelines may be applicable. That duty, and the concept of shared responsibility, are recognised by Article III paragraph 3 of the CLC Convention, which reads:

*“If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or **from the negligence of that person**, the owner may be exonerated wholly or partially from his liability to such person.”* (Emphasis added).

Paragraph 4(e) goes on to state that *“No claim for compensation for pollution damage may be made against... any person taking preventive measures.”*

Similar provisions appear in Article 4 paragraph 3 of the Fund Convention.

Legal principles of causation are easy to state in general terms, but notoriously difficult to apply in practice, and it remains to be seen how these provisions will apply, if at all, to the facts of the *Prestige* case. The question of shared responsibility has however, already been applied in the case of the *Aegean Sea* which also involved the Government of Spain. In that case the amounts recoverable by Spain from the IOPC Fund were reduced in the

²⁸ Adopted at the CMI Conference in Sydney in 1994 – see *Shipping and the Environment* (op.cit.) pp 1179 – 1182; also set out in the CMI Handbook of Maritime Conventions doc. 6-5 Pub. Lexis Nexis 2001.

²⁹ Op. cit. at p. 1180.

overall settlement concluded by the Fund to reflect the liability of the Spanish Government for the negligence of the pilot which was held by the Spanish Court to be a cause of the casualty.³⁰

It is not, at the present time, possible to formulate a general theory for the legal liability of a state which unreasonably refuses to allow a ship in distress to enter its sheltered waters. The principles recognised in the *Rebecca* case³¹ would indicate that International Law recognises the distress as a defence to the application of local laws, but it was also held that the claimant could recover compensation from the Government of Mexico for the loss of the vessel due to a judicial sale by the Mexican Court. That decision was however made by a General Claims Commission set up to assess such claims at a time (1929) when concern for damage to the environment was not accorded the importance which it has today.

However the provisions of Article VI of the 1969 Intervention Convention clearly recognise the legal obligation of any party which has taken measures causing damage to others which do not satisfy the requirement that they shall be proportionate to the damage, actual or threatened, to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to prevent, mitigate or eliminate the threat of pollution.

It will always be necessary for Coastguards and Maritime Safety Officers to balance the conflicting interests cited above in deciding whether or not to allow a distressed vessel to enter the waters under their control. The IMO Guidelines adopted by the Maritime Safety Committee in December 2002 and annexed to this paper recognise the difficulties. It is to be hoped that there will be no delays in their formal adoption by the IMO Assembly in November 2003, and that they will then help in ensuring that decisions are taken by Coastal States in a common-sense and consistent manner.

In doing so the officers concerned will be obliged to make a reasoned assessment of the prospects of a successful outcome to the salvage operation. Only if there is a reasonable chance of success will the risks of pollution damage to the immediate vicinity of the place of refuge be justified. It must also be recognised that the salvor working on a “no cure – no pay” basis has a substantial financial interest in a successful outcome to the salvage operation, and that there is a risk that the salvor’s own reports as to the chances of success may be coloured by this. Arguments in this vein were advanced in the press at the time of the *Prestige* incident.

However the addition of the SCOPIC clauses into the 2000 edition of Lloyds Form of Salvage Agreement mean that the risk of a “no pay” outcome for the salvor is substantially reduced, particularly where the ship and her cargo represent a threat of damage to the environment. The Special Compensation introduced by the 1989 Salvage Convention, incorporated into

³⁰ IOPC Fund’s Annual Report 2001 p. 47.

³¹ See note 4 *supra*.

the 1990 Lloyds Form had already gone some way to provide an incentive to the salvor to save a ship which represents such a threat, even when the salvage operation had become uneconomic when judged by conventional salvage principles. The welcome given to SCOPIC by the salvage industry and insurers alike suggests that it represents a significant improvement.

There are, as previously mentioned, more popular misconceptions in the field of salvage than in any other field of maritime law, and the complexity of these provisions will make it even more difficult for the officer in a Coastal State to make the balanced judgment required. Apart from the IMO Guidelines, probably the best analysis of the problems in this field is the Report of Lord Donaldson's Review of Salvage and Intervention and their Command and Control³² This report was principally concerned with the interaction between Government agencies responsible for safety at sea and the protection of the marine environment with the owners and salvors of a distressed vessel. The various government agencies have their own areas of responsibility and conflicts of interest between them can arise. The representation of "the public interest" by a set of officers representing different areas of responsibility, however honest and well meaning they all may be, has the potential to create increased confusion and conflicting decisions, particularly in the highly charged atmosphere of a major casualty. Lord Donaldson recommended, inter alia, the appointment of a single individual, to be known as the Secretary of State's Representative or "SOSREP", to be the focal point for all government agencies, and an interface with the owners and salvors.

In the case of a distressed vessel seeking refuge in UK waters therefore, the British Government already has in place a person who is aware of the conflicting interests, is familiar with salvage law and the principal professional salvors, can seek specialist advice when he needs it and knows where to seek it, and has the powers to make whatever decision needs to be made with the minimum of delay. It must be recognised that this a position unique to the UK. However Appendix 2 to Lord Donaldson's Review lists the approaches of several other governments to these problems³³, and any state conducting a review of its law and policy with regard to Places of Refuge would do well to take into account the solutions developed in the countries reported.

Is a new International Convention on Places of Refuge likely to be useful in promoting a common approach to this problem? One might envisage a short instrument recommending the adoption of the IMO Guidelines at the level of National Law and the nomination by coastal states of a government agency with the necessary communications and decision-making powers to whom the Owner or salvor of a distressed vessel could apply for a decision

³² Pub. H.M.S.O. 1999 Cm. 4193.

³³ Page 71 – Australia, Belgium, Canada, France, Germany, The Netherlands, Norway, South Africa, Sweden and USA.

whether or not to admit the vessel to a place of refuge, and if so where that place should be given the circumstances of the casualty. The international conventions of 100 years ago such as the 1910 Salvage and Collision Conventions, promoted by CMI and adopted by Diplomatic Conferences in Brussels, had a brevity and simplicity which are sadly lacking in the conventions and protocols more recently produced by IMO. Is there a chance of a return to those halcyon days? Probably not.

On the other hand executive action by a coastal state which is not part of a coordinated international initiative is like the case-by-case solution of a legal problem. It may deal with the immediate problem but it establishes no universal principle of international law or practice, and gives no guidance to the luckless master of a distressed vessel. In terms of the harmonisation of international maritime law in all its aspects it is a failure. It remains to be seen whether the IMO Legal Committee, working no doubt in conjunction with the CMI, will take up this challenge.

November 2003

Annex to Document 4**IMO**

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**Adopted on December 2003
(Agenda item 17)**

**GUIDELINES ON PLACES OF REFUGE FOR SHIPS
IN NEED OF ASSISTANCE**

THE ASSEMBLY,

RECALLING Article 15(j) of the Convention on the International Maritime Organization concerning the functions of the Assembly in relation to regulations and guidelines concerning maritime safety and the prevention and control of marine pollution from ships,

RECALLING ALSO the obligations and procedures for the master to come to the assistance of persons in distress at sea, established by regulation V/33 of the International Convention for the Safety of Life at Sea, 1974, as amended,

RECALLING FURTHER that the International Convention on Maritime Search and Rescue, 1979, as amended, establishes a comprehensive system for the rescue of persons in distress at sea which does not address the issue of ships in need of assistance,

CONSCIOUS OF THE POSSIBILITY that ships at sea may find themselves in need of assistance relating to the safety of life and the protection of the marine environment,

RECOGNIZING the importance of and need for providing guidance for the masters and/or salvors of ships in need of assistance,

IMO Guidelines on Places of Refuge

RECOGNIZING ALSO the need to balance both the prerogative of a ship in need of assistance to seek a place of refuge and the prerogative of a coastal State to protect its coastline,

RECOGNIZING FURTHER that the provision of a common framework to assist coastal States to determine places of refuge for ships in need of assistance and respond effectively to requests for such places of refuge would materially enhance maritime safety and the protection of the marine environment,

HAVING CONSIDERED the recommendations made by the Maritime Safety Committee at its seventy-sixth and seventy-seventh sessions, by the Marine Environment Protection Committee at its forty-eighth session, by the Legal Committee at its eighty-seventh session and by the Sub-Committee on Safety of Navigation at its forty-ninth session,

1. ADOPTS the Guidelines on places of refuge for ships in need of assistance, the text of which is set out in the annex to the present resolution;
2. INVITES Governments to take these Guidelines into account when determining and responding to requests for places of refuge from ships in need of assistance;
3. REQUESTS the Maritime Safety Committee, the Marine Environment Protection Committee and the Legal Committee to keep the annexed Guidelines under review and amend them as appropriate;
4. REQUESTS the Legal Committee to consider, as a matter of priority, the said Guidelines from its own perspective, including the provision of financial security to cover coastal State expenses and/or compensation issues, and to take action as it may deem appropriate.

ANNEX**GUIDELINES ON PLACES OF REFUGE FOR SHIPS
IN NEED OF ASSISTANCE****Table of Contents****1 General**

- 1.1 to 1.7 Introduction**
- 1.8 to 1.11 Background**
- 1.12 to 1.17 Purpose of the guidelines**
- 1.18 to 20 Definitions**

2 Guidelines for action required of masters and or salvors in need of places of refuge

- 2.1 Appraisal of the situation**
- 2.2 Identification of hazards and assessment of associated risks**
- 2.3 Identification of required actions**
- 2.4 Contacting the authority of the coastal State**
- 2.5 to 2.6 Establishment of responsibilities and communications with all parties involved**
- 2.7 to 2.8 Response actions**
- 2.9 Reporting procedures**

3 Guidelines for actions expected of coastal States

- 3.4 to 3.8 Assessment of places of refuge**
- 3.9 Event-specific assessment**
- 3.10 to 3.11 Expert analysis**
- 3.12 to 3.14 Decision-making process for the use of a place of refuge**

Appendix 1 Applicable international conventions**Appendix 2 Guidelines for the evaluation of risks associated with the provision of places of refuge**

1. General

Introduction

Objectives of providing a place of refuge

1.1 Where the safety of life is involved, the provisions of the SAR Convention should be followed. Where a ship is in need of assistance but safety of life is not involved, these guidelines should be followed.

1.2 The issue of places of refuge is not a purely theoretical or doctrinal debate but the solution to a practical problem: What to do when a ship finds itself in serious difficulty or in need of assistance without, however, presenting a risk to the safety of life of persons involved. Should the ship be brought into shelter near the coast or into a port or, conversely, should it be taken out to sea?

1.3 When a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge.

1.4 However, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation.

1.5 While coastal States may be reluctant to accept damaged or disabled ships into their area of responsibility due primarily to the potential for environmental damage, in fact it is rarely possible to deal satisfactorily and effectively with a marine casualty in open sea conditions.

1.6 In some circumstances, the longer a damaged ship is forced to remain at the mercy of the elements in the open sea, the greater the risk of the vessel's condition deteriorating or the sea, weather or environmental situation changing and thereby becoming a greater potential hazard.

1.7 Therefore, granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis with due consideration given to the balance between the advantage for the affected ship and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast.

Background

1.8 There are circumstances under which it may be desirable to carry out a cargo transfer operation or other operations to prevent or minimize damage or pollution. For this purpose, it will usually be advantageous to take the ship to a place of refuge.

1.9 Taking such a ship to a place of refuge would also have the advantage of limiting the extent of coastline threatened by damage or pollution, but the specific area chosen may be more severely threatened. Consideration must also be given to the possibility of taking the affected ship to a port or terminal

where the transfer or repair work could be done relatively easily. For this reason the decision on the choice and use of a place of refuge will have to be carefully considered.

1.10 The use of places of refuge could encounter local opposition and involve political decisions. The coastal States should recognize that a properly argued technical case, based on a clear description of the state of the casualty, would be of great value in any negotiations which may take place.

1.11 At the international level, the Conventions listed in Appendix 1, as may be amended, constitute, *inter alia*, the legal context within which coastal States and ships act in the envisaged circumstances.

Purpose of the Guidelines

1.12 The purpose of these Guidelines is to provide Member Governments, shipmasters, companies¹ (particularly in connection with the ISM Code and procedures arising therefrom), and salvors with a framework enabling them to respond effectively and in such a way that, in any given situation, the efforts of the shipmaster and shipping company concerned and the efforts of the government authorities involved are complementary. In particular, an attempt has been made to arrive at a common framework for assessing the situation of ships in need of assistance.

1.13 **These Guidelines do not address the issue of operations for the rescue of persons at sea**, inasmuch as the practical difficulties that have given rise to the examination of the issue of places of refuge relate to problems other than those of rescue. Two situations can arise:

- the ship, according to the master's assessment, is in need of assistance but not in a distress situation (about to sink, fire developing, etc.) that requires the evacuation of those on board; or
- those on board have already been rescued, with the possible exception of those who have stayed on board or have been placed on board in an attempt to deal with the situation of the ship.

1.14 **If, however, in an evolving situation, the persons on board find themselves in distress, the rules applicable to rescue operations under the SAR Convention, the IAMSAR Manual and documents arising therefrom have priority over the present Guidelines (and procedures arising herefrom).**

1.15 In any case the competent MRCC should be informed about any situation which may develop into a SAR incident.

1.16 Even though a rescue operation, as defined in the International Convention on Maritime Search and Rescue (SAR) is not the case, the safety of persons must nevertheless be constantly borne in mind in the application of these Guidelines, particularly in two respects:

¹ As defined in the ISM Code.

IMO Guidelines on Places of Refuge

- if the ship poses a risk (explosion, serious pollution, etc.) to the life of persons in the vicinity (crews of salvage vessels, port workers, inhabitants of the coastal area, etc.);
- if persons voluntarily stay (master, etc.) or go (fire-fighters and other experts, personnel of marine salvage or towage companies, etc.) on board to attempt to overcome the difficulties experienced by the ship.

1.17 These Guidelines do not address the issue of liability and compensation for damage resulting from a decision to grant or deny a ship a place of refuge.

Definitions

1.18 **Ship in need of assistance** means a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard.

1.19 **Place of refuge** means a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment.

1.20 **MAS** means a maritime assistance service, as defined in resolution A.950(23), responsible for receiving reports in the event of incidents and serving as the point of contact between the shipmaster and the authorities of the coastal State in the event of an incident.

2 Guidelines for action required of masters and or salvors in need of places of refuge

Appraisal of the situation

2.1 The master should, where necessary with the assistance of the company and/or the salvor, identify the reasons for his/her ship's need of assistance. (Refer to paragraph 1 of Appendix 2.)

Identification of hazards and assessment of associated risks

2.2 Having made the appraisal referred to in paragraph 2.1 above, the master, where necessary with the assistance of the company and/or the salvor, should estimate the consequences of the potential casualty, in the following hypothetical situations, taking into account both the casualty assessment factors in their possession and also the cargo and bunkers on board:

- if the ship remains in the same position;
- if the ship continues on its voyage;
- if the ship reaches a place of refuge; or
- if the ship is taken out to sea.

Identification of the required actions

2.3 The master and/or the salvor should identify the assistance they require from the coastal State in order to overcome the inherent danger of the situation. (Refer to paragraph 3 of Appendix 2.)

Contacting the authority of the coastal State

2.4 The master and/or the salvor should make contact with the coastal State in order to transmit to it the particulars referred to in paragraphs 2.1 to 2.3 above. They must in any case transmit to the coastal State the particulars required under the international conventions in force. Such contact should be made through the coastal State's Maritime Assistance Service (MAS), as referred to in resolution A.950(23).

Establishment of responsibilities and communications with all parties involved

2.5 The master and/or the salvor should notify the MAS of the actions that are intended to be taken and within what period of time.

2.6 The MAS should notify the master and/or the salvor of the facilities that it can make available with a view to assistance or admittance of the ship to a place of refuge, if required.

Response actions

2.7 Subject, where necessary, to the coastal State's prior consent, the shipmaster and the shipping company concerned should take any necessary response actions, such as signing a salvage or towage agreement or the provision of any other service for the purpose of dealing with the ship's situation.

2.8 The master, the company and, where applicable, the salvor of the ship should comply with the practical requirements resulting from the coastal State's decision-making process referred to in paragraphs 3.12 to 3.14.

Reporting procedures

2.9 The reporting procedures should be in accordance with the procedures laid down in the safety management system of the ship concerned under the ISM Code or resolution A.852(20) on Guidelines for a structure of an integrated system of contingency planning for shipboard emergencies, as appropriate.

3 Guidelines for actions expected of coastal States

3.1 Under international law, a coastal State may require the ship's master or company to take appropriate action within a prescribed time limit with a view to halting a threat of danger. In cases of failure or urgency, the coastal State can exercise its authority in taking responsive action appropriate to the threat.

3.2 It is therefore important that coastal States establish procedures to address these issues, even if no established damage and/or pollution has occurred.

3.3 Coastal States should, in particular, establish a Maritime Assistance Service (MAS).²

² Unless neighbouring States make the necessary arrangements to establish a joint service.

Assessment of places of refuge*Generic assessment and preparatory measures*

3.4 It is recommended that coastal States endeavour to establish procedures consistent with these Guidelines by which to receive and act on requests for assistance with a view to authorizing, where appropriate, the use of a suitable place of refuge.

3.5 The maritime authorities (and, where necessary the port authorities) should, for each place of refuge, make an objective analysis of the advantages and disadvantages of allowing a ship in need of assistance to proceed to a place of refuge, taking into consideration the analysis factors listed in paragraph 2 of Appendix 2.

3.6 The aforementioned analysis, which should take the form of contingency plans, is to be in preparation for the analysis provided for below when an incident occurs.

3.7 The maritime authorities, port authorities, authorities responsible for shoreside safety and generally all governmental authorities concerned should ensure that an appropriate system for information-sharing exists and should establish communications and alert procedures (identification of contact persons, telephone numbers, etc.), as appropriate.

3.8 The aforementioned authorities should plan the modalities for a joint assessment of the situation.

Event-specific assessment*Analysis factors*

3.9 This analysis should include the following points:

- seaworthiness of the ship concerned, in particular buoyancy, stability, availability of means of propulsion and power generation, docking ability, etc.;
- nature and condition of cargo, stores, bunkers, in particular hazardous goods;
- distance and estimated transit time to a place of refuge;
- whether the master is still on board;
- the number of other crew and/or salvors and other persons on board and an assessment of human factors, including fatigue;
- the legal authority of the country concerned to require action of the ship in need of assistance;
- whether the ship concerned is insured or not insured;
- if the ship is insured, identification of the insurer, and the limits of liability available;
- agreement by the master and company of the ship to the proposals of the coastal State/salvor to proceed or be brought to a place of refuge;
- provisions of the financial security required;

Places of Refuge

- commercial salvage contracts already concluded by the master or company of the ship;
- information on the intention of the master and/or salvor;
- designation of a representative of the company at the coastal State concerned;
- risk evaluation factors identified in Appendix 2; and
- any measures already taken.

Expert analysis

3.10 An inspection team designated by the coastal State should board the ship, when appropriate and if time allows, for the purpose of gathering evaluation data. The team should be composed of persons with expertise appropriate to the situation.

3.11 The analysis should include a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment. Such comparison should cover each of the following points:

- safeguarding of human life at sea;
- safety of persons at the place of refuge and its industrial and urban environment (risk of fire or explosion, toxic risk, etc.);
- risk of pollution;
- if the place of refuge is a port, risk of disruption to the port's operation (channels, docks, equipment, other installations);
- evaluation of the consequences if a request for place of refuge is refused, including the possible effect on neighbouring States; and
- due regard should be given, when drawing the analysis, to the preservation of the hull, machinery and cargo of the ship in need of assistance.

After the final analysis has been completed, the maritime authority should ensure that the other authorities concerned are appropriately informed.

Decision-making process for the use of a place of refuge

3.12 When permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible.

3.13 In the light of the outcome of the assessment provided for above, the coastal State should decide to allow or refuse admittance, coupled, where necessary, with practical requirements.

3.14 The action of the coastal State does not prevent the company or its representative from being called upon to take steps with a view to arranging for the ship in need of assistance to proceed to a place of refuge. As a general rule, if the place of refuge is a port, a security in favour of the port will be required to guarantee payment of all expenses which may be incurred in

connection with its operations, such as: measures to safeguard the operation, port dues, pilotage, towage, mooring operations, miscellaneous expenses, etc.

APPENDIX 1

APPLICABLE INTERNATIONAL CONVENTIONS

At the international level, the following Conventions and Protocols are in force and constitute, *inter alia*, the legal context within which coastal States and ships act in the envisaged circumstances³:

- United Nations Convention on the Law of the Sea (UNCLOS), in particular article 221 thereof;⁴
- International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the Intervention Convention), 1969, as amended;
- Protocol relating to Intervention on the High Seas in Cases of Pollution by substances other than Oil, 1973;
- International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974), as amended, in particular chapter V thereof;
- International Convention on Salvage, 1989 (the Salvage Convention);⁵

³ It is noted that there is at present no international requirement for a State to provide a place of refuge for vessels in need of assistance.

⁴ “1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purposes of this article, “maritime casualty” means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.”

⁵ Parties to the International Convention on Salvage, 1989 (Salvage 1989), are obliged under article 11 of the Convention when considering a request for a place of refuge, to take into account the need for co-operation between salvors, other interested parties and public authorities to ensure the efficient and successful performance of salvage operations. Article 11 of the Salvage Convention states: “A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”

Places of Refuge

- International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990 (the OPRC Convention);
- International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 (MARPOL 73/78);
- International Convention on Maritime Search and Rescue, 1979 (SAR 1979), as amended.
- Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972
- Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, 1971
- Convention on Limitation of Liability for Maritime Claims (LLMC), 1976
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969
- International Convention on Civil Liability for Oil Pollution Damage (CLC), 1992
- International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992.

APPENDIX 2**GUIDELINES FOR THE EVALUATION OF RISKS ASSOCIATED WITH THE PROVISION OF PLACES OF REFUGE**

When conducting the analysis described in paragraphs 3.4 to 3.8, in addition to the factors described in paragraph 3.9, the following should be considered.

1 Identification of events, such as:

- fire
- explosion
- damage to the ship, including mechanical and/or structural failure
- collision
- pollution
- impaired vessel stability
- grounding.

2 Assessment of risks related to the identified event taking into account:**.1 Environmental and social factors, such as:**

- safety of those on board
- threat to public safety
- What is the nearest distance to populated areas?
- pollution caused by the ship
- designated environmental areas
 - Are the place of refuge and its approaches located in sensitive areas such as areas of high ecological value which might be affected by possible pollution?
 - Is there, on environmental grounds, a better choice of place of refuge close by?
- sensitive habitats and species
- fisheries
 - Are there any offshore and fishing or shellfishing activities in the transit area or in the approaches to the place of refuge or vicinity which can be endangered by the incoming ship in need of assistance?
- economic/industrial facilities
 - What is the nearest distance to industrial areas?
- amenity resources and tourism
- facilities available
 - Are there any specialist vessels and aircraft and other necessary means for carrying out the required operations or for providing necessary assistance?

Places of Refuge

Are there transfer facilities, such as pumps, hoses, barges, pontoons?

Are there reception facilities for harmful and dangerous cargoes?

Are there repair facilities, such as dockyards, workshops, cranes?

.2 Natural conditions, such as:

Prevailing winds in the area.

Is the place of refuge safely guarded against heavy winds and rough seas?

Tides and tidal currents.

– weather and sea conditions

Local meteorological statistics and number of days of inoperability or inaccessibility of the place of refuge.

– bathymetry

Minimum and maximum water depths in the place of refuge and its approaches.

The maximum draught of the ship to be admitted.

Information on the condition of the bottom, i.e., hard, soft, sandy, regarding the possibility to ground a problem vessel in the haven or its approaches.

– seasonal effects including ice

– navigational characteristics

In the case of a non-sheltered place of refuge, can salvage and lightering operations be safely conducted?

Is there sufficient space to manoeuvre the ship, even without propulsion?

What are the dimensional restrictions of the ship, such as length, width and draught?

Risk of stranding the ship, which may obstruct channels, approaches or vessel navigation.

Description of anchorage and mooring facilities in the place of refuge.

– operational conditions, particularly in the case of a port

Is pilotage compulsory and are pilots available?

Are tugs available? State their number and horsepower.

Are there any restrictions? If so, whether the ship will be allowed in the place of refuge, e.g. escape of poisonous gases, danger of explosion, etc.

Is a bank guarantee or other financial security acceptable to the coastal State imposed on the ship before admission is granted into the place of refuge?

.3 Contingency planning, such as:

- competent MAS
- roles and responsibilities of authorities and responders
 - Fire fighting capability
- response equipment needs and availability
- response techniques
 - Is there a possibility of containing any pollution within a compact area?
- international co-operation
 - Is there a disaster relief plan in the area?
- evacuation facilities

.4 Foreseeable consequences (including in the media) of the different scenarios envisaged with regard to safety of persons and pollution, fire, toxic and explosion risks.

3 Emergency response and follow-up action, such as:

- lightering
- pollution combating
- towage
- stowage
- salvage
- storage.

RECENT DEVELOPMENTS - UPDATE AS AT AUGUST 2003

RICHARD SHAW

The paper written by Richard Shaw entitled “Places of Refuge – International Law in the Making?” went to press at the end of January 2003. Since then there have been a number of significant developments, both in the IMO and at the European level. This note summarises those developments and the position as at 12th August 2003.

IMO Legal Committee

At the meeting in April 2003 the Draft Guidelines prepared by the Sub-Committee on Safety of Navigation were considered by the Legal Committee. Since these are non-mandatory guidelines, the Legal Committee did not find any matters within them on which it felt the need to comment. The debate was however somewhat eclipsed by a paper presented by the delegation of Spain which sought to amend the guidelines in a number of important respects. Notable among them was an attempt to reverse the presumption in paragraph 3.2.1 of the Guidelines that the coastal state should weigh all the risks and give shelter to a ship in distress whenever reasonably practicable. The tenor of the discussions in the Legal Committee was such that it was clear that there was very little support for the Spanish proposal from other delegations. The Legal Committee therefore diplomatically declined to rule on the Spanish proposals but referred them back to the Maritime Safety Committee and the Sub-Committee on Safety of Navigation.

The Legal Committee also accepted an offer by CMI to conduct further studies through its national Maritime Law Associations into the issues of liability and compensation arising out of the admission of distressed vessels to places of refuge. The working group under the chairmanship of Stuart Hetherington (Australia) is continuing its investigation of these issues as this note goes to press.

IMO NAV Sub-Committee

The Spanish proposals previously presented to the Legal Committee were considered in the June 2003 meeting of the Sub-Committee on Safety of Navigation. At the plenary session at the end of the meetings the Spanish proposals were not adopted. The draft Guidelines, together with associated draft Assembly resolutions, will therefore be submitted to the IMO Assembly in November 2003 for final adoption.

The European Union

The impact of the *Prestige* casualty has continued to provoke repercussions in the European Union, and in particular in the new European

Maritime Safety Agency (EMSA). Two meetings of the European Group of Experts have been held, the latter meeting in May 2003 under the chairmanship of the recently-appointed head of EMSA Mr Willem de Ruiters (Netherlands). At these meetings a difference of approach has been noted between certain States, in particular Denmark and Norway (attending the meetings by invitation although not a member of the EU) who prefer an open public declaration of the places of refuge in their territory, and those who would prefer to prepare an inventory of such places but not to disclose them publicly for fear of provoking either an outcry from the local authorities of the areas concerned, or a flotilla of decomposing ships heading towards them.¹ The UK supports this latter view.

Previously the EU Office responsible for vessel traffic monitoring had charged member states with preparing, not later than February 2004, an inventory of suitable places of refuge on their coastlines. However the Ministers in the Transport Council subsequently advanced this deadline to 1st July 2003, but it is noteworthy that, while they required member states to forward details of the inventory to EMSA, they did not specify whether the list should be made public. The 1st July has come and gone, but it is still evident that many European states, while they may well have identified sheltered waters to which a distressed vessel may be directed, are still reluctant to publish the identity of those locations to the world at large.

The Comité Maritime International

Mr Hetherington and his working group delivered an interim report on this subject to the delegates at the CMI Colloquium in Bordeaux in early June. This provoked a lively discussion, from which it is evident that there is a widespread interest in this subject. Comments by Spanish maritime lawyers present indicated that opinions on the handling of the *Prestige* casualty by the government of Spain differ widely even within Spanish legal circles.

The current focus of the working group's work is the field of liability and compensation consequent upon the admission, or refusal of admission, of a distressed ship to a place of refuge. Oil pollution from such a ship will be covered by the CLC and IOPC Fund regime.² At the present time pollution by Hazardous and Noxious Substances and also by Ships' Bunkers are not covered by an international compensation regime, but there is every reason to hope that the HNS Convention of 1996 and the 2001 Bunkers Convention will enter into force shortly³. Perhaps the public and press interest in this topic

¹ See the article in *Lloyds List* 4th August 2003-08-12

² International Convention on Civil Liability for Oil Pollution Damage 1969, as amended by the Protocol of 1992, and the International Convention on the Establishment of an International Fund for Compensation of Oil Pollution Damage 1971 as amended by the Protocol of 1992.

³ An important intergovernmental meeting was held in Ottawa in June 2003 to progress the ratification of the HNS Convention.

Places of Refuge

generated by the *Prestige* casualty⁴ may even provide a welcome incentive to states to ratify these conventions.

Member states represented at the IMO Legal Committee have also been requested by that committee to collaborate with their national Maritime Law Associations in formulating their state's responses to the CMI questionnaire on this subject. This may indeed mark a milestone in the collaboration between CMI and national governments in the development of international maritime law.

August 2003

⁴ And the pressures emanating from the European Union.

Document 6

“PRESTIGE” – CAN THE LAW ASSIST?

STUART HETHERINGTON*

It has been hard recently to pick up an issue of the shipping press without seeing yet another article arising from the *Prestige*.

For those who have not seen such articles I quote some of the recent ones that have come across my desk:

- *Lloyd's List* 28 November 2002:
Two of the largest shipowner representative bodies have demanded the issue of places of refuge be dealt with. Intertanko and Bimco called on Thursday for a worldwide agreement that stricken vessels should be offered safe refuge... EU member states have until February 2004 to implement plans to provide places of refuge for ships in distress off their coastline. The Commission, along with its embryonic European Maritime Safety Agency, will try to speed up the process.
- *Lloyd's List* 13 February 2003
“Spain’s Internal Development Minister, Francisco Alvarez Cascos yesterday defended Madrid’s decision to refuse the *Prestige* refuge and said it was the only possible decision a maritime authority could have taken.”
- *Lloyd's List* 27 February 2003:
“London’s Greek Shipping Cooperation Committee has lashed out at what it describes as political demagoguery, claiming this is driving the European Union agenda for shipping in the wake of the *Prestige* disaster.”
- *Lloyd's List* 27 February 2003:
“European Commission officials have said they are keen to see member governments speed up action within this year to introduce defined “places of refuge” for aiding ships in distress.”
- *Sydney Morning Herald* 22-23 March 2003:
“The Captain of the tanker that caused one of Europe’s worst oil slicks when it sank off Spain has said Spanish authorities precipitated the disaster by forcing him away from the coast and out into rough seas.”
- *Lloyd's List* March 2003
“The Spanish Government has engaged leading US maritime law firm Haight Gardner Holland & Knight to sue ABS over the *Prestige* disaster, according to reliable shipping industry sources.”

* Partner, Withnell Hetherington, Sydney, NSW, Australia. Chairman, CMI International Working Group: Places of Refuge.

– *Lloyd's List* 10 March 2003

“Madrid demands hole truth over ‘Gruyere cheese’ *Prestige*”.

In another article in the last few months, the Managing Director of Smit Salvage responded to allegations made by a member of the Spanish Government to the effect that the salvors were only keen to take the *Prestige* into a safe port in a bid to make money out of the disaster. He said: “In the first instance we knew *Prestige* was damaged in a certain way and five days in rough seas would threaten the integrity of the vessel and it would become more and more weak.” He was critical that Smit had at no point dealt with any specialist Spanish technical team or experts, and only with politicians which he blamed for the problems. He also called for a compensation system for any safe port so it should be easier for ports to become safe havens.

What are the rights of a State in this situation?

The question arises as to whether States are entitled to deny entry to their jurisdiction of vessels in distress. This question was considered by Agustin Blanco Bazan in a recent paper entitled: “Law of the Sea. Places of Refuge.”

An instructive case is that of the “Long Lin”. I am indebted to the paper co-written by another member of the International Working Group Eric van Hooydonk and Christian Dieryek published in Volume 2 of “Marine Insurance at the Turn of the Millennium”, Antwerp 2000 for the following details concerning that case.

The “Long Lin” had collided in the North Sea east of Ramsgate. The vessel was carrying barrels of resin and was heavily damaged. Part of the cargo was lost overboard and sank. Fuel tanks were damaged and oil leaked into the sea. A salvage contract was concluded and a repair yard in the mouth of the River Scheldt cleared one of its docks. Authorisation to enter Dutch territorial waters was only granted subject to specified nautical conditions and the provision of a bank guarantee by the P&I Club of the distressed vessel. The P&I Club was only prepared to issue a guarantee provided that the ship and the Club’s rights to limit liability were preserved. The Dutch authorities eventually prohibited the vessel entering Dutch territorial waters. The Belgian authorities did likewise. The French authorities, however, granted unconditional permission for the vessel to enter French territorial waters towards the port of Dunkerque, where she could be repaired in the inner harbour. The Dutch repair yard challenged the Dutch Ministry’s decision. The Dutch Court (*Raad van State (Netherlands) Afdeling bestuursrechtspraak, 10 April 1995 Ms Long Lin, Schip en schade*, 1995, 394, No. 96) held that the right of innocent passage through the territorial sea is not also enjoyed by casualty ships. In reaching that conclusion, it held that the right of innocent passage could only be exercised for normal navigational purposes and not in order to bring a damaged vessel into port.

The authors of the article are critical of this decision and point to inconsistent provisions in UNCLOS which permit stopping and anchoring. As they argued, the requirement that passage be continuous and expeditious does not require that the vessel navigate at “full speed ahead” through the territorial

sea. Article 19 identifies the circumstances in which activities are deemed to be prejudicial to the peace, good order or security of the coastal State. They include “any act of wilful and serious pollution contrary to this Convention.” (Article 19.2)

The authors go on to point out that international law recognises the basic humanitarian right to seek refuge in distress situations, and the duty to render assistance to vessels and persons in distress at sea is an axiom of international maritime law. They draw attention to the fact that the Court stated that international law does not allow authorities to make it impossible for a ship in distress and needing repairs to enter territorial and coastal waters and to seek refuge in port or near the coast, but somewhat vaguely, the Court concluded that in such a case the gravity of the ship’s situation has to be balanced with the threat the ship poses to the coastal State.

The same authors called for an International Convention to establish the rights and duties of shipowner and their insurers, salvors and coastal States. They supported that on two main grounds:

“First it is unclear to what extent a State is entitled to refuse entry and to impose special financial conditions; the legal basis of present day practice of some States at least is questionable. Moreover, the inhospitable attitude of many States is in flat contradiction to the long standing customary right of entry of ships in distress, the continuing existence whereof is nevertheless maintained by a quasi-unanimity of legal writers. Secondly, State practice, even on a regional European scale, completely lacks uniformity: some States categorically refuse casualties, others try to exact (and collect) huge financial securities as a condition for entry, and still others seem only too happy to welcome damaged ships in their repair yards. Does one really have to await another shipping disaster before international maritime law is adjusted? A new catastrophe purely provoked by the unclarity of the law in this field and by the lack of a co-ordinated policy of coastal States is in no way fanciful hypothesis.

We therefore agree with the view expressed earlier by others that an express regulation of the status of casualty ships in a new Convention is desirable. Such a Convention should recognise the right of entry as a general principle, and further only allow expressly and exhaustively specified restriction. Demanding financial securities as a condition for admittance should be completely excluded, or at least radically restricted. Ships in distress should be treated more favourably than normal ships, not the other way round.”

Another member of the International Working Group, Derry Devine in a Paper entitled “Ships in Distress – a judicial contribution from South Africa” Marine Policy Vol 20 No. 3 pp 229-234 1996 has written:

“It would appear that a foreign ship in distress or subjected to force majeure has two main rights. In the first place it has a right to enter the internal waters, including ports, of a foreign State. Secondly it has a right, also conceded by international law, to be accorded certain immunities from the jurisdiction of the host State. Both of these rights were in issue in *Merk and Djakimah v the Queen*, a case decided in 1992 by the Court

of Appeal for St Helena. The main purpose of this paper is to analyse the contribution made by *Merk*'s case to the law in question but before doing so a brief outline of the law on the topic will be given.

Right of entry in distress

This right evolved essentially from humanitarian considerations. It is firmly entrenched and time-hallowed. It might be argued that at the time when it evolved it could have been absolute in nature and not admitting of exceptions. In former times ships were smaller in size, they did not carry inherently dangerous cargoes, they did not threaten substantial or calamitous damage to a coastal State into whose internal waters they might enter and finally coastal States would normally be in a position to contain possible threats posed by such ships. Since these early times circumstances have changed greatly. The size of ships has increased enormously. The cargoes carried have increased greatly. Substances are carried, both as cargo and as fuel, which are inherently dangerous should they escape. Coastal States are no longer in a position to counteract damage caused by ships in distress in many cases. The prospect of a damaged laden oil tanker finding a safe haven in ecologically sensitive internal waters is enough to raise a political storm – onshore! The new potential catastrophic damage to coastal States is of course of an environmental nature and it will mainly come from ships carrying oil, nuclear products, toxic wastes or chemicals in bulk. It is possible too that virtually every sizeable vessel is a potential threat to the environment if only because of the source of its propulsion – invariably oil or nuclear power. It is very probable that in these new circumstances the right of entry of ships in distress into internal waters is not an absolute one. Circumstance may arise in which a coastal State may limit, or even annul the right of entry in the interests of protecting imminent and substantial damage to its environment.”

Derry Devine went on to discuss the decision in the case of *Merk and Djakimah v the Queen* which involved a question as to whether a ship could be in distress in circumstance in which it has brought about its own difficulties (in that case illegal activities and consequential fuel shortage, i.e. self inflicted distress). As the author points out “the legal consequence of a self inflicted distress are different from those of an ordinary distress. In the latter case there is a right of entry and certain immunities are enjoyed. In the former case there is only a right of entry. Immunities are forfeited.”

IMO/CMI

The *Prestige* has certainly brought to the forefront the problems that were first identified in international law in late 2000 when the “*Castor*” was in difficulties in the Mediterranean and no State was willing to permit her to enter their waters, leading to the vessel being towed over 2,000 miles around the western Mediterranean and then performing a ship to ship transfer on the high seas. That incident caused the IMO Legal Committee to request assistance from the Comité Maritime International (CMI) to ascertain what different countries had done relevantly to international law provisions, such as the 1989

Salvage Convention, the United Nations Law of the Sea Convention 1982 and the International Convention on Oil Pollution Preparedness, Response and Cooperation 1990.

For a summary of the “incident”, “clean-up”, “impact of the spill”, “the wreck” and “compensation arrangements” concerning the *Prestige I* commend the latest issue of ITOPF’s “Ocean Orbit”: March 2003. It records that at the time of the spill Spain, France and Portugal were parties to CLC and Fund Conventions and the total amount of compensation potentially available from the shipowner, P&I Club and 1992 Fund is SDR 135 million (about US \$180 million).

CMI First Questionnaire

The results of CMI’s questionnaire were submitted to the IMO late last year. A copy has been provided to delegates. In summary the results disclosed:

1. Slightly less than 50% of respondent Associations had not ratified the Salvage Convention, which contains a provision (Article 11) requiring State parties to take into account the need for co-operation with Salvors when, for example, regulating or deciding upon matters relating to salvage, such as admittance to ports of refuge.
2. Only 3 of the respondent Associations have designated Ports of Refuge in their jurisdiction: Germany, Norway and UK.
3. The United Nations Law of the Sea Convention (“UNCLOS”) 1982 has been given effect to by most respondent Associations but very few have given effect to any legislation with respect to ships which are the victims of force majeure or distress and their rights to seek a place of refuge. (See Articles 17, 18, 21 and 39(I)(c) of UNCLOS.)
4. Very few countries have expressly enshrined in their legislation the principles contained in Article 192 to 199 and 221 of UNCLOS and especially Article 195 which is to the effect that in taking measures to prevent, reduce or control pollution States should act so as not to transfer, directly or indirectly any damage or hazards from one area to another.
5. Although Article 199 of UNCLOS required States to develop contingency plans to respond to oil spills and the majority of respondent Associations do have contingency plans very few contain any Guidelines for dealing with requests for a place of refuge.
6. Similarly, under the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (“OPRC”) most respondent Associations have ratified the Convention and have adopted legislation to give effect to Articles 3, 4 and 5 but have not included, with some exceptions, within their contingency plans, any provisions dealing with ships in distress.

CMI Second Questionnaire

Another questionnaire has been submitted to National Associations containing further questions which had been identified. Those questions were devised with a view to seeking to ascertain what the likely liability would be

for a country which grants a place of refuge to a ship in distress which then causes pollution or other damage, and conversely, what, if any, liability a country would have if it denied or refused a place of refuge to a ship in distress and damage occurs either within the jurisdiction or within the jurisdiction of a neighbouring country. The questions formulated also sought to ascertain what liability would attach to a shipowner, what defences that shipowner would have and what compensation regime would apply in a situation in which such damage occurred when a place of refuge had been granted or when a place of refuge had been denied. The final area in which questions were directed was as to whether or not any other person who provides assistance to a ship in distress in those scenarios would face liabilities (for example, a salvor).

At the time of writing, only a very limited number of responses have been received from National Associations. In summary, the responses were:

1. *Where entry of a ship in distress is permitted by a State and pollution occurs would the State accept liability.*

The responses have referred to the Oil Pollution Conventions which would apply, in the absence of negligence by the State.

2. *Where entry of a ship in distress is refused and pollution occurs would the State accept liability.*

Again, the responses have referred to the Oil Pollution Conventions and also Article 6 of the Intervention Convention and steps taken to order vessels out of a port which could create a liability in the State.

3. *Where the entry of a distressed vessel is permitted or denied and pollution occurs what is the liability of the shipowner.*

Again, the Oil Pollution Conventions are said to provide the answers to this question and reference has been made to the defences, for example, under the CLC Convention.

4. *Would liability in such circumstances attach to anyone else who assists ships in distress.*

Some responses have drawn attention to the channelling provisions of Conventions which preclude such liabilities unless an act or omission has been committed with intent to cause damage.

In essence, most responses to date have pointed to the International Oil Pollution Conventions which are in effect internationally and the Bunker and HNS Conventions which are yet to be in effect as providing answers to the questionnaire. Some have referred to the channelling provisions in those Conventions and reference has also been made to local laws dealing with recovery of damages against negligent wrongdoers.

What if the State has acted negligently?

Assuming that it can be established that the activities of a State or Authority had a part to play in the ensuing pollution damage it is relevant, as Richard Shaw, Senior Research Fellow, University of Southampton Institute of Maritime Law, has said in a recent paper (published in the *Journal of International Maritime Law* (JIML) (2003) 2 p.158), "to recall the CMI Guidelines on Oil Pollution Damage (adopted at the CMI Conference in Sydney in 1994), paragraph 2 of which reads:

“2. Compensation may be refused or reduced if a claimant fails to take reasonable steps to avoid or mitigate any loss, damage or expense.”

As Richard Shaw has pointed out in his paper:

“The duty to mitigate loss is a legal principle of almost universal application, and it must surely apply to claims where the CLC and Fund Conventions apply, as well as those to which the CMI Guidelines may be applicable. That duty, and the concept of shared responsibility, are recognised by Article III paragraph 3 of the CLC Convention.”

It is worth recalling what Article III of the CLC Convention provides in its entirety. (The Bunker Convention of 2001 mirrors those provisions, with the exception of a large part of Article III paragraph 4 dealing with servants, agents, pilots, charterers and salvors.)

Article III paragraph 1

“Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident.”

“‘Incident’ is itself defined in Article I as meaning ‘any occurrence, or series of occurrences, having the same origin, which causes pollution damage or creates a grave and immediate threat of causing such damage.’”

Article III paragraph 2

“No liability for pollution damage shall attach to the owner if he proves that the damage:

- (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable, and irresistible character, or*
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or*
- (c) was wholly caused by the negligence or other wrongful act of any Government or Authority responsible for the maintenance of lights or other navigational aids in the exercise of that function”.*

Article III paragraph 3

“If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage, or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.”

Article III paragraph 4

“No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention, or otherwise may be made against:

- (a) the servants or agents of the owner or the members of the crew;*
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;*

Places of Refuge

- (c) any charterer, howsoever described (including a bareboat charterer), manager or operator of the ship;
 - (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
 - (e) any person taking preventive measures;
 - (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);
- unless the damage resulted from their personal act or omission committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result."

Article III paragraph 5

"Nothing in this Convention shall prejudice any right of recourse of the owner against third parties."

When States permit vessels into their ports as places of refuge and damage then occurs, both to the interests of the States and to third parties, they are likely to be entitled to compensation under the CLC and Fund Conventions against the shipowner, (assuming the Conventions are applicable) unless the shipowner can bring itself within the exceptions contained in Article III paragraph 2, or where the claimant has itself been negligent within Article III paragraph 3.

If an exception is available to the shipowner or where the CLC and Fund Conventions apply and the Fund is insufficient to meet all claims, or the Conventions do not apply or there are limitation issues involved there may be Claimants who will seek to bring claims against the State if they want compensation. This could give rise to difficult questions of causation such as: was the admission, simpliciter, of the stricken vessel into the port negligent and did it cause the ensuing damage, or was it the initial damage sustained by the vessel which caused it to be a stricken vessel, which is responsible for the ensuing damage? Under Article 111 paragraph 3 of the CLC, as we have seen, it is only necessary for the ship owner to prove that the pollution damage partially caused the damage to achieve some amelioration in the extent of its liability.

Questions of contributory negligence, inevitable accident / agony of the moment and causation will arise. Some jurisdictions no longer favour the "but for" test of causation. In respect of those jurisdictions in which such a test still prevails, it could be held that "but for the decision of the port authority to allow the stricken vessel into the port, the ensuing damage would not have occurred ...", thus creating a liability in the port authority. Other jurisdictions which do not favour such a test may take a more generalised view and look to the original cause of the damage and determine that it was not the decision to permit the vessel to enter the port which caused the ensuing damage but whatever had caused it to be a stricken vessel in the first place. For example, in a collision situation, it is not too far beyond the realms of possibility to consider that the vessel most to blame for the casualty may have a continuing liability to those damaged either by its pollution or even by the innocent vessel as a result of their admission into a port of refuge. Such further damage might well be

considered to have been foreseeable by the negligent vessel. An instructive case, in Australia, is that of *March v EMH Stramare Pty Limited (1991) 171 CLR 506* in which McHugh J favoured using “the ‘*causa sine qua non*’ test as the exclusive test of causation.” He regarded the “but for” test, in general, as being the most appropriate test of legal causation.

In contrast Mason C J, with whom the other Judges of the Court agreed decided to the contrary. The facts in that case were that the Respondents, respectively a wholesale fruit and vegetable merchant and the driver of its truck had negligently parked the truck so that it straddled the centre line of a multi lane carriage way while loading produce. The Appellant, driving his vehicle when greatly under the influence of alcohol, collided with the truck and was injured. In concluding his judgment Mason CJ said:

“The Respondents’ negligence was a cause of the accident and of the Appellant’s injuries. The Second Respondents’ wrongful act in parking the truck in the middle of the road created a situation of danger, the risk being that a careless driver would act in the way that the Appellant acted. The purpose of imposing the common law duty on the Second Respondent was to protect motorists from the very risk of injury that befell the Appellant. In these circumstances, the Respondents’ negligence was a continuing cause of the accident. The chain of causation was not broken by a *novus actus*. Nor was it terminated because the risk of injury was not foreseeable; on the contrary, it was plainly foreseeable.”

In circumstances in which the damage caused by the stricken vessel also causes damage to another State, the same questions and considerations will arise.

Where, however, a State refuses entry to a place of refuge and that decision can be seen to have been made negligently, the State concerned will not only fail to recover all the damage which it sustains by reason of any ensuing pollution or other damage, but may be liable to compensate third parties who suffer damage. Once again, difficult questions of causation will arise. A claimant who wishes to sue the port authority that has refused access would, presumably, have a difficult burden of showing that, had access been granted to the stricken vessel, the ensuing damage would not have been occasioned. That would require a great deal of speculation by a Court as to what would have happened in the event that a port of refuge had been provided. It would, no doubt, be difficult for a Court to reach such a conclusion if the damage sued upon took place at or shortly after the time at which a place of refuge had been denied. If, however, a considerable time had elapsed such a conclusion might be easier to reach. The reasoning which the High Court of Australia replied in the *March v Stramare* case, to which reference has been made earlier, might also be applicable in the circumstances. It is of interest however to note that McHugh J in his judgment, having made the statement which was quoted earlier to the effect that the “but for” test should be seen as the test of legal causation also said:

“One obvious exception to this rule must be the unusual case where the damage is the result of the simultaneous operation of two or more separate and independent events each of which were sufficient to cause

the damage. None of the various tests of causation suggested by Courts and writers, however, is satisfactory in dealing with this exceptional case. Perhaps no more can be done in this situation than to treat each wrongful act as an independent cause for legal purposes."

McHugh J. had a few years earlier been on the New South Wales Court of Appeal which had given judgment in the case of *the Dredge "W.H. Goomai" v Australian Oil Refining Pty. Ltd* (1989) 94 FLR 298. In that case a fuel pipeline had been fractured during dredging operations. The dredge owner was found to have been negligent but sought to argue that the owner of the pipeline had also been negligent when it subsequently flushed the pipeline to remove the oil from the broken pipeline, as a result of which fuel escaped. In holding that the owner of the pipeline's actions were not a "novus actus interveniens" McHugh J. held that :

"Their conduct is not to be judged by what lawyers and experts sitting in the relaxed atmosphere of a court room and with the benefit of hindsight think was the preferable course. Their conduct can only be characterised as negligent if reasonable persons in their position would have refused to take the course they did. In his essay "Jesting Pilate" (1965) Sir Owen Dixon pointed out (at pp.2-3): "The legal system would seem to assume always that the course of human affairs is discoverable, that there is time and opportunity for inquiry, that the connection of events or causes can be ascertained, that principles of conduct can be determined by forms of reasoning and that intentions of men and documents are neither so fleeting nor so unreal as to be proof against a dialectical search. In this the law adopts a standpoint that of necessity must be denied to those whose responsibility is to act at the call of events. In their case the need of knowledge often is no less. They would wish in matters of consequence to know as much of the situation with which they are about to deal, and to know with as much certainty, as a judicial inquiry is considered to assure. But they cannot. More often than not they must do their best, profiting by whatever information they already possess and summoning experience to their aid, but using, in place of the prolonged search after truth of the judicial process, their own intuitive judgements."

McHugh J. also quoted from Lord Dunedin in *United States Shipping Board v Laird Line Ltd* (1924) AC 286 in which His Lordship said: "it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger".

Reference has already been made to the Intervention Convention which could afford a direct remedy to a third party adversely affected by the actions of a State under that Convention, against the Authority concerned.

Further scope for a direct action against a country which has given effect to the Salvage Convention and acts negligently could arise if it could be said that it has breached its responsibilities under Article 11 of that Convention. That article provides that:

"A state party shall, whenever regulating or deciding upon matters relating to salvage operations, such as admittance to ports of vessels in

distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”

In a paper on the 1989 Salvage Convention and the Lloyds Open Form Salvage Agreement, Volume 16 Tulane Maritime Law Journal (1991) Professor Nicholas Gaskell made the following comments, which are equally relevant today:

“Salvors have found that, while States are loud in their support for introducing legal rules to protect the environment, not all are sufficiently active when it comes to casualties in their own waters. Many states have legislation prohibiting foreign salvors operating in their waters, yet delay caused by sending a local contractor could be disastrous – even assuming it had the necessary expertise. States are also reluctant to take into their ports the “international leper”, the damaged oil tanker under tow. Article 11 is a rather empty exhortation to States to “take into account” the need for co-operation when exercising powers relating to salvage operations. An unlikely combination of environmental organisations and shipowners wanted this provision strengthened in order to put an obligation on States to admit vessels in distress in their ports. But there was no support for such a proposal and it was withdrawn. Once again, this is a matter that would be best dealt with in a general public law Convention dealing with rights and obligations arising out of casualties threatening the environment.”

Further relevant provisions in International Conventions include:

Article 5 of the Oil Pollution Preparedness, Response and Co-operation Convention 1990, which requires the authorities of the State receiving a report from a Master which flies its flag and/or the nearest coastal State to the Master of the ship reporting a discharge or probable discharge of oil, to assess the nature, extent and possible consequences of such an incident and to inform without delay all States likely to be affected by it together with details of its assessments and any action it has taken or intends to take, to deal with the incident.

Article 192 of UNCLOS, which provides as follows:

“States have the obligation to protect and preserve the marine environment.”

Article 194(2) of UNCLOS (headed “Measures to Prevent, Reduce and Control Pollution of the Marine Environment”) is also relevant in this regard. It provides:

“States shall take all measures necessary to ensure that activities under their jurisdictional control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

Article 194(3) of UNCLOS, which provides as follows:

“The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimise to the fullest possible extent:

- (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
- (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges and regulating the design, construction, equipment, operation and manning of vessels;
- (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;
- (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea and regulating the design, construction, equipment, operation and manning of such installations or devices.”

Article 195 of UNCLOS (headed “Duty not to transfer damage or hazards or transform one type of pollution into another”), which provides as follows:

“In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution to another.”

Article 197 of UNCLOS (headed “Co-operation on a Global or Regional Basis”), which provides as follows:

“Each State shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.”

Article 198 of UNCLOS (headed “Notification of Imminent or Actual Damage”), which provides as follows:

“When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged, or has been damaged by pollution, it has immediately notify other States it deems likely to be affected by such damage, as well as the competent international organisation.”

Article 199 of UNCLOS (headed “Contingency Plans against Pollution”), which provides as follows:

“In the cases referred to in Article 198, States in the area affected, in accordance with their capabilities and the competent international

organisations shall co-operate to the extent possible, in eliminating the effects of pollution and preventing or minimising the damage. To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.”

In this regard it is also worth recalling the contents of Article 235 of UNCLOS:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation such as compulsory insurance or compensation funds.

An Australian text writer (*International Law in Australia*, Second Edition, by K W Ryan, CBE, 1984) has stated that “Australia has generally taken a strong view that a State is internationally responsible to ensure that activities under its jurisdiction and control do not cause damage to other States or areas beyond national jurisdiction. If activities do cause damage, the State is internationally liable and should pay compensation accordingly. This liability is not dependant on attribution of fault to a State or evidence that it has not exercised due diligence. Interestingly the same author also quoted Australia in the debate on Article 236 in 1979 (now Article 235) as being a little more hesitant. It stated that in relation to the suggestion that one could:

“lay down a general principle of a right to compensation for all damage where ever or however it may occur such a principle could only be sustained in a situation where there is strict liability for all damage caused A principle of compensation in all cases could only be supported where there is provision for a compensation fund, compulsory insurance and also, presumably some limitation on the extent of liability for payment of damages.”

The author commented that the wording of Article 235(2) would seem to mean that, if a State does not ensure that recourse is available in accordance with its legal system for compensation caused by natural or juridical persons under its jurisdiction, it may itself be liable.

It is also of note that the International Association of Ports and Harbours, in May 2001 urged coastal States to “review their contingency arrangements to provide adequate assistance and facilities to disabled ships”, and “that contingency arrangements are directed at the safety of life at sea without however compromising the safety of the on-shore population, the need to

Places of Refuge

mitigate environmental damage to the port as well as to coastal areas and as well as certain operational and commercial needs of the ports.”

These exhortations recognise the essential and often contradictory responsibilities which States face.

Conclusion

In conclusion, although the work being done by IMO and CMI is still in its relative infancy, it can be said that the current International Conventions and ordinary legal principles provide considerable scope for sufferers of oil pollution damage caused by a distressed vessel to pursue recovery against the stricken vessel, its insurers or the IOPC Fund and, hopefully in the not too distant future, under the HNS and Bunker Conventions. Also, States who fail to comply with their obligations under Conventions to which they have become parties because they have, for example, refused a place of refuge to a salvor for a stricken vessel, may face liabilities.

Perhaps the most useful work which will emerge from the IMO's initiatives in this area is the establishment of guidelines to assist States in making decisions as to whether to grant a place of refuge. By giving priority to those guidelines it might be hoped that politicians will be removed from the decision-making processes, thus enabling the best possible technical advisers to make the sensible, practical decisions that need to be made in these situations. It may be that, if States became more aware of the potentiality for liability that they have to shipowners and third parties for pollution damage which can be said to arise (or be caused by) their own actions in refusing a place of refuge to a stricken vessel, they will become more helpful in providing such assistance even at the risk of pollution damage being a likely consequence.

If States need greater encouragement to admit vessels in distress then perhaps only immunity from liability and the establishment of a fund to meet any loss or damage which ensues will have to be considered. If immunity is to be granted to port authorities, then the question might well be asked as to why employees and contractors engaged by port authorities should not also be provided with the same immunity. Whether a new International Convention needs to be developed, which spells out the liabilities which occur when a Place of Refuge is granted or refused and damage ensues, and a fund established are matters which clearly need considerable further investigation, but any such Convention needs to take account of and be consistent with current Conventions, and, no doubt, will have to balance the interests which States have to protect their property, and that of their citizens as well as the environment and seek to comply with their humanitarian duties to crews on damaged ships and their general responsibilities under international law to provide places of refuge to damaged vessels.

PLACES OF REFUGE AS A LEGISLATIVE PROBLEM*

GREGORY J. TIMAGENIS**

Introduction

In this paper an effort is made to present in very simple terms (a) what is the essence of the problem relating to the Places of Refuge and (b) to put this issue in its broader legislative context. This approach presents interest, *first*, because this is a matter which is not specifically and sufficiently regulated at least at the international level and *second*, because the role of CMI itself is primarily legislative, i.e. CMI has outstanding achievements in the international unification of rules of maritime law in the past and it is committed to the establishment of international rules and standards for shipping and the avoidance of unilateral or fragmentary regional action in the future.

A. The Essence of the Problem

“Places of Refuges” is the latest and possibly the last act in a long process of creation of international rules for the protection of the marine environment. There will be forthcoming developments in this connection and it is worth watching them.

The essence of the problem is that no matter what preventing measures may be taken, accidents may be reduced but they will always happen. For this reason individual states and the international community should be ready to face the consequences of pollution from accidents.

This has been realized and contingency planning has developed. Thus for example a general rule in this connection is included in article 199 of UNCLOS, while the “Oil Pollution Preparedness, Response and Cooperation Convention 1990” is specifically dedicated to this issue.

This contingency planning includes provisions for the availability of people and equipment as well as the creation of regional stations all of which to be readily available to face a pollution incident. This contingency planning, however, faces the problem of combating pollution as an operational matter, i.e. as a matter to be faced in the form of the salvage operations by boats, skimmers, booms, pumps etc. The Places of Refuge is a further step in the context of contingency planning for preventing, reducing and controlling pollution from marine accidents. Practice proves that it is not enough to try to plug a ship or pump oil out of her and it is not enough to use floating booms to restrict the pollution. Something more permanent and more effective is

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required in order to confine the pollution and avoid its spread. This is the Places of Refuge.

Experience has shown that vessels leaking oil or other persistent pollutants after an accident cause less pollution when they are in easily accessible areas exactly because the antipollution measures may be taken more easily and more effectively. On the contrary ships left on the high seas or to sink in very deep waters may continue leaking for a very long time without control and thus cause long term damage to the environment. Experience has further shown that pollution from accidents in most cases is not an instantaneous phenomenon. Distressed ships usually remain afloat for a considerable time and salvage tags have sufficient time to reach the scene of the accident but weather conditions especially in the open sea prevent effective combat of pollution.

For this reason instead of allowing distressed vessels without a place of refuge it is clearly advisable not only to fix places of refuge (i.e. certain confined areas where pollution could be combated more efficiently) but even to consider some kind of "reception facilities" for vessels in distress like a large dock (even floating dock) where the vessel in distress and the pollution therefrom may be confined and combated. This idea draws analogy from the oil reception facilities which once did not exist, but now are perceived as an inevitable integral part of an effective system for preventing pollution. By the same token that oil residues is a reality and could not be stopped only by prohibitions or preventive measures, accidents may not be prevented completely and for this reason in the context of contingency planning for combating pollution, "reception facilities for distressed ships" may be set up. These are the Places of Refuge and they may need to be coupled also with size limitation at least for tankers, funding arrangements etc.

B. The Broader Legislative Framework

1. Types of Marine Pollution according to the Source

In order to make the above points clearer it is useful to put the issue of Places of Refuge in the broader legislative framework concerning the protection of the marine environment.

Thus in the course of the development of international legislation, five forms of marine pollution have been distinguished on the basis of the source of pollution. Thus reference is made separately to pollution from (a) land-based sources, (b) vessels, (c) dumping, (d) exploration and exploitation of the seabed and (e) the air. Each of these forms of pollution is marked by certain particular features which make differing legal treatment necessary.

Ship-generated pollution is the object of intense international concern. Ships are moveable things and the harm from them -though admittedly less than that from land-based sources- may affect third States directly. In addition, although ships are in principle under the authority of the State in which they are registered (flag State), they may be found in areas of the sea over which another State has jurisdiction (coastal State) and for this reason vessel-generated pollution raises special jurisdictional problems.

2. Types of Marine Pollution according to the Cause

This classification is based on the causes of pollution, regardless of the source and it is also material for the legal treatment of pollution. In this context reference should be made to (a) operational pollution and (b) accidental pollution.

(a) Operational Pollution. Operational pollution is incidental to, or derived from, the normal operation of the source of pollution (for example, vessel, drilling platform, or factory) and includes certain automatic releases as well as certain intentional discharges incidental to its normal operation, for example, cleaning of tanks or deballasting of vessels. To reduce or eliminate automatic releases, rules should be established for the improvement of design, construction and equipment of vessels, aircraft, drilling machines, factories, etc. as the case may be. To reduce intentional discharges, laws should be passed prohibiting such discharges in certain or all areas of the sea and imposing penalties for violators of these laws. These rules should be complemented by an effective enforcement system. Further, where discharges are prohibited in large areas of the sea, this prohibition should be coupled with the establishment of port reception facilities for the disposal of operational residues. This is necessary because in fact, no matter how severe penalties may be, certain operational discharges cannot be avoided unless alternative disposal methods are devised. Ultimately, elimination of such pollution comes down to the problem of design, construction and equipment – either alone or in combination with reception facilities.

Thus, historically operational pollution has been attempted to be prevented and controlled by: (a) prohibitions (i.e. creations of zones where discharges were prohibited and then the broadening of such zones), (b) by changes in the operation of the vessels (e.g. the load on top system in accordance with which the tanks were not cleaned at the end of each voyage but new cargo was loaded on top of the existing residues thus reducing the number of discharges), (c) by structural changes of the ships (i.e. the creation of dedicated or segregated ballast tanks) and finally (d) by the establishment of reception facilities.

(b) Accidental Pollution. Accidental pollution is caused by release following an accident, e.g. collision or grounding of vessels. Clearly, since accidents cannot simply be prohibited, the objective must be to remove the causes of accidents. This can be achieved by requiring vessels, to observe certain standards of safety connected with their design (for example, double hull vessels) construction (that is, use of appropriate materials and in a proper manner), equipment (for example, instalment of radar or blow-out preventers) and manning (that is, appropriate training and qualification of crews). In addition the establishment of traffic separation schemes and sea lanes is connected with and aimed at preventing accidents. On the other hand if an accident take place, plans should exist (contingency planning) for the immediate reduction and control of pollution.

Consequently in connection with accidental pollution we have seen preventive measures, contingency planning and now the issue of Places of Refuge is coming up prominently. If one compares historically the

development of rules in connection with the prevention of marine pollution, it will become immediately apparent the analogy in the development of rules in connection with operational pollution and accidental pollution. The Places of Refuge in accidental pollution is the equivalent of reception facilities in operational pollution. By the same historical analysis one can also predict that such places is inevitable to be established and the quicker this is realized, the quicker international measures will be taken and unilateral and fragmentary regional action will be prevented.

In this connection it is interesting to note that the issue of Places of Refuge is faced up to now (even after the *Prestige* incident) more as an operational matter involving mainly two aspects: The first is the decision making about the appropriate place of refuge and the second is guidelines for operational steps to be taken in order to face an incident of accidental pollution. It is also interesting to note that the "Guidelines on Places of Refuge for Ships in Need of Assistance" prepared by IMO move along these lines.

It is obvious that guidelines on decision making and on operational steps are not appropriate for transformation into a treaty because they have to be adjusted on a case by case basis to the actual facts. However, obligations for information, obligations for establishment of Places of Refuge (not just ports of refuge), perhaps size limitation for tankers and funding arrangements for the creation and maintenance of these Places of Refuge are matters which may be appropriate for a convention or a new protocol to an existing convention.

At this point it might be appropriate to draw a distinction between ports of refuge and places of refuge. With the – well justified – proliferation of areas specially protected (not only internationally but also by various States) or areas of special beauty around the coast of a state, it will be almost impossible to determine an area which will be left to be polluted in case of an accident if such place is designated as a port of refuge. For this reason the term Places of Refuge is much more restricted. It may be a specially build place or a dock (even floating dock) where once the vessel is inserted the nearby coasts will not run further risk.

3. Types of Rules on Marine Pollution

A different matter (and separate from the distinction of types of pollution) is the distinction between the various types of rules concerning the control of marine pollution on a functional basis. Thus one may distinguish four basic types of rules concerning the control of marine pollution on a functional basis:

(a) *Principal rules*, including basic prohibitions (for example of discharges) or establishing standards (for, say, design, construction, equipment or manning of vessels).

(b) *Enforcement rules*, providing for penalties and methods for the punishment of contraventions of the principal rules, or, in more general terms, for the effective application of these rules. In earlier periods the importance of including express enforcement rules in the conventions had not been

appreciated and this was one of the reasons why marine pollution conventions were not sufficiently effective.

(c) *Rules concerning Responsibility and Liability for Pollution Damage.* These rules do not establish basic obligations and do not devise methods for the enforcement of the basic obligations but they refer to compensation for damage caused by pollution. In fact traditional concepts of responsibility and liability cannot solve the problem because the causal connection between pollution and damage, the extent of knowledge required, the foreseeability of harm and the standard of proof required are matters which lie beyond the traditional legal standards. Therefore, such rules often provide for absolute liability, channelling of liability, maximum limits of such absolute liability, compulsory insurance and the establishment of funds for compensation for pollution damage.

(d) *Abatement of pollution* is faced by a different category of rules. These rules concern the cleaning of spillages or other pollution caused by either intentional discharges or accidents. It is one thing to punish a violator (in cases of voluntary discharges) or to compensate for damage, and a different thing to abate the pollution and to clean up the marine environment. Therefore, these rules provide for contingency planning, for the coordination of efforts by various States, and for intervention on the high seas in cases of necessity.

What perhaps should be added as a final comment in connection with the issue of the Places of Refuge is that: (a) The issue of the Places of Refuge falls within the category of rules concerning abatement of pollution and contingency planning and (b) the second questionnaire circulated by CMI for reporting to IMO relates to matters concerning responsibility and liability.

In this connection it is interesting to note that the two basic questions posed by this questionnaire are whether a state will admit responsibility of pollution caused by (a) accepting a distressed vessel in a port or (b) by denying entry to a distressed vessel in a port. These questions highlight an almost impossible (no win) situation, because in either case a state may in theory have responsibility. However at the same time this type of questions show the need to establish principal rules about the places of refuge and then consider the responsibility. It is very difficult to talk about the responsibility unless you have a rule which, if you comply with, you avoid responsibility and liability and, if you do not comply with, you are responsible to pay damages. You cannot talk of a responsibility without having a principal rule. It is preposterous. The first replies to the questionnaire show exactly the lack of such rules. Notwithstanding it is important for the National Maritime Law Associations to reply to these questionnaires because ideas are drawn from national law for international solutions and at the same time such replies show the gaps and deficiencies which should be covered by international rules.

In conclusion the issue of Places of Refuge is an important matter. It should be taken seriously. It will have developments and it is worth for CMI to deal with this subject.

INTERNATIONAL SUB-COMMITTEE DISCUSSION PAPER

STUART HETHERINGTON*

At the 83rd Session of the Legal Committee of the International Maritime Organisation (IMO) held in October 2001 the problems encountered by the tanker “Castor” in finding a place of safety were discussed. Delegates to the Legal Committee decided to give a mandate to the IMO Secretariat, working in collaboration with the CMI, to make a study of the legal issues¹. Shortly thereafter CMI sent a questionnaire (the “first questionnaire”) to National Associations which identified provisions in International Conventions touching on this topic. The International Conventions concerned were: The Salvage Convention 1989, the United Nations Convention on the Law of the Sea 1982 (“UNCLOS”), and the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (“OPRC”). The provisions referred to in the first questionnaire are reproduced, for ease of reference, as Appendix 1 to this paper. Many of the other Conventions, Protocols and instruments referred to in this paper are to be found in CMI’s Handbook of Maritime Conventions. Appendix 2 reproduces some other relevant provisions from International instruments.

The responses to the first questionnaire disclosed that slightly less than 50% of respondent Associations had not ratified the Salvage Convention; only 3 of the Respondent Associations had designated Ports of Refuge in their jurisdiction; UNCLOS had been given effect to by most respondent Associations but very few had given effect to any legislation with respect to ships which are the victims of force majeure or distress and their rights to seek a Place of Refuge; very few countries had expressly enshrined in their legislation the principles contained in Articles 192 to 199 and 221 of UNCLOS; whilst most States have contingency plans to respond to oil spills very few contain any guidelines for dealing with requests for a Place of Refuge and whilst most respondent nations have ratified the OPRC Convention and have adopted legislation to give effect to Articles 3, 4 and 5 they have not included, with some exceptions, within their contingency plans, any provisions dealing with ships in distress.²

At the 85th Session of IMO Legal Committee in October 2002 a number of additional issues were identified concerning liabilities that might arise as a

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¹ The relevant document is Leg 83/13/3, on the IMO website at www.imo.org/home.html.

² The appendix to this discussion paper contains all relevant provisions which were identified in the Questionnaires submitted to National Associations by CMI.

result of decisions to permit or deny entry to a Place of Refuge, the compensation that might be payable as a result of such a decision and the position of third parties who became involved, such as salvors.

In late 2002 a further Questionnaire (the “second questionnaire”) was sent to National Associations by CMI seeking to ascertain whether their jurisdiction would accept liability in circumstances in which Places of Refuge are permitted or refused and damage ensues, whether within the jurisdiction or in another jurisdiction. The Questionnaire also sought information as to whether liability were attached to the shipowner or a third party in such circumstances.

The consensus of responses received from National Associations to the second questionnaire was that Governments would not have a liability for granting a Place of Refuge when damage ensues, whether within their jurisdiction or in that of a neighbouring country. Most responders referred to the channelling provisions of the Civil Liability Convention (CLC), although some responders considered that where the Government or Authority had acted negligently they could face a liability provided any damage suffered was directly attributable to the decision to grant a Place of Refuge. The responses were largely the same where a Government refuses a Place of Refuge. Many responders anticipated that there could be a liability on a Government or Authority which acted negligently in declining a Place of Refuge provided there is a sufficient degree of causative connection between the refusal and the ensuing damage. It was pointed out in some responses that the immunity provisions in the CLC would apply if the Government or Authority concerned sought to suggest that their actions were taken as preventive measures. An issue as to whether the actions taken were done recklessly would then arise. Most responders identified the provisions of the CLC as confirming that the shipowner would be liable, subject to any available defences under the Convention and any right to limit liability. Compensation, for most responders, would be expected from the ship’s P&I insurance and/or the IOPC Fund. So far as third parties were concerned most responders identified the channelling provisions in the CLC which grant responder immunity and confirmed that the shipowner would have the responsibility, unless third parties had acted with intent to cause damage or with knowledge that the damage would probably result and pointed out that recourse actions may lie at the suit of the shipowner where there had been negligence by a third party.

The provisions of Article 111 of CLC which impose strict liability on the shipowner, subject to the exclusions contained in paragraph 2 of that Article (damage resulting from acts of war or caused by intentional acts of third parties, or caused by the negligence of any Government or Authority responsible for maintenance of lights or navigational aids) are clearly significant, as are the provisions of paragraph 3. Pursuant to those provisions an owner is not liable for damage to any person whose negligence caused the pollution damage. Paragraph 5 preserves a shipowner’s rights of recourse against third parties.

Other Developments

In August 2002 the IMO Sub-Committee on Safety of Navigation submitted a Draft Assembly Resolution with an annex containing the recommended wording for guidelines for the master of a vessel in need of a Place of Refuge, including a salvor assisting such a vessel, and for the actions expected of the coastal States and for the evaluation of risks associated with the provision by them of Places of Refuge. Those draft guidelines were considered by the IMO Legal Committee in April 2003 and it did not find any matters within them on which it felt the need to comment. The draft guidelines will be submitted to the IMO Assembly in November 2003 for final adoption.

Within the European Union a difference of approach has been noted between certain States as to those who prefer an open public declaration of Places of Refuge in their Territory and, on the other hand, those who would prefer to prepare an inventory of such places but not to disclose them publicly.

The EC Vessel Traffic Monitoring Directive dated August 2002, contains in Article 20 a requirement that member States draw up plans to accommodate in the waters under their jurisdiction ships in distress. Such plans are required to contain the necessary arrangements and procedures to take into account operation and environmental constraints to ensure that ships in distress may immediately go to a Place of Refuge subject to authorisation by the competent authorities. The same article provides that where the member State considers it necessary and feasible "the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response." It goes on to provide that "plans for accommodating ships in distress shall be made available upon demand. Member States shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph."

Options

The question arises as to what further work CMI should do, in the area of liability and responsibility, which would assist the present international legal position.

In a recent paper Patrick Griggs has said:

".... if proper attention is given to the selection of the project, the appropriate instrument is used, and painstaking ground work is undertaken before the drafting process starts, there remain areas of maritime and maritime/commercial law which would benefit from harmonisation."³

There is no doubt that some painstaking ground work has already been undertaken. Reference has already been made to the two questionnaires sent out by CMI to National Associations. In addition, papers were presented to the CMI Colloquium at Bordeaux in June 2003 by Richard Shaw⁴ and Stuart

³ Obstacles to uniformity of Maritime Law the Nicholas J Healy Lecture, Journal of Maritime Law and Commerce 34 No. 2 April 2003.

⁴ Senior Research Fellow Maritime Law, University of Southampton: Places of Refuge: International Law in the Making; (JIML 9 (2003) 2. 159).

Hetherington⁵. Gregory Timagenis⁶ also spoke at that Colloquium, as did the Chairman of IMO Legal Committee, Alfred Popp QC.

There has been no shortage of articles and papers given on this topic. They include an article by Derry Devine: “Ships In Distress – A Judicial Contribution from the South Atlantic”⁷; Eric van Hooydonk and Christian Dieryck: “Some Remarks on Financial Securities Imposed by Public Authorities on Casualty Ships as a Condition for Entry into Ports”⁸; Agustín Blanco-Bazan: *Law of the Sea : Places of Refuge*⁹; Patrick Griggs : *Places of Refuge*¹⁰.

In his Nicholas J Healy lecture Patrick Griggs identified the alternatives to an International Convention as : “Codes, Model Laws, Guidelines and Rules.”

The first question for the International Sub-Committee is whether it should be embarking on the preparation of an International Convention or one of the alternatives to which reference has been made, or some other instrument.

Convention

In a paper delivered as long ago as 1991 Nicholas Gaskell¹¹ said as follows:

“Salvors have found that, while States are loud in their support for introducing legal rules to protect the environment, not all are sufficiently active when it comes to casualties in their own waters. Many States have legislation prohibiting foreign salvors operating in their waters, yet delay caused by sending a local contractor could be disastrous, even assuming it had the necessary expertise. States are also reluctant to take into their ports the “international leper”, the damaged oil tanker under tow. Article 11 is a rather empty exhortation to States to “take into account, the need for cooperation when exercising powers relating to salvage operation.” An unlikely combination of environmental organisations and ship owners wanted this provision strengthened in order to put an obligation on States to admit vessels in distress into their ports. But there was no support for such a proposal and it was withdrawn. Once again, this is a matter that would be best dealt with in a general public law Convention dealing with rights and obligations arising out of casualties threatening the environment.”

In a footnote Professor Gaskell went on to suggest “It might be that a

⁵ “Prestige” – Can the Law Assist?

⁶ *Places of Refuge as a Legislative Problem.*

⁷ *Marine Policy* Vol 20 number 3pp 229 to 234 1996.

⁸ Vol 2: *Maritime Insurance at the Turn of the Millennium* Antwerp 2000.

⁹ *Canadian Council on International Law 2002* Kluwer Law International.

¹⁰ Paper given to the Propeller Club April 2003.

¹¹ Nicholas Gaskell, Professor Maritime and Commercial Law, Director of the Institute of Maritime Law, Faculty of Law, University of Southampton: 1989 *Salvage Convention and Lloyds Open Form Salvage Agreement* (Volume 16 *Tulane Maritime Law Journal* (1991)).

revision of the Intervention Convention 1969 is a vehicle for producing a more wide ranging instrument. Note also the IMO Convention on Oil Pollution Preparedness and Response 1990.”

In his paper given to the Propeller Club, Patrick Griggs said:

“It would be easy to create a Convention (possibly by way of a Protocol to the OPRC Convention) which would place an obligation on States to find a place of refuge for any ship in distress. However, such a Convention would never be ratified unless that obligation to grant access had clearly defined reservations. The danger is that those reservations will almost certainly take away the right of access which the masters of ships require in an emergency. Where there are reservations there will arise the need for assessments and decision making which will take time. In the most recent distress cases, time has been of the essence. It follows that anything which makes the decision making process more difficult and time consuming needs to be avoided”.

Interestingly, an IMO delegate suggested that the Intervention Convention might be a suitable vehicle for incorporating the provisions being discussed at the 84th Session of the IMO Legal Committee’s consideration of the Draft Convention on Wreck Removal.

Eric van Hooydonk and Christian Dieryck, to whose paper reference has already been made, stated in that paper:

“The problem of casualty ships becoming maritime lepers, not welcome in any port or refuge, is certainly not a recent one. It may be called surprising that so far no action has been taken in order to work out an international Convention, establishing rights and duties of ship owners and their insurers, salvors and coastal States. In our view an International Regulation is indispensable for two main reasons. First, it is unclear to what extent a State is entitled to refuse entry and to impose special financial conditions; the legal basis of present – day practice of some States at least is questionable moreover, the inhospitable attitude of many States is in flat contradiction to long standing customary right of entry of ships in distress, the continuing existence whereof is nevertheless maintained by a quasi unanimity of legal writers. Secondly, State practice, even on a regional European scale, completely lacks uniformity; some States categorically refuse casualties, others try to exact (and collect) huge financial securities as a condition for entry, and still others seem only too happy to welcome damaged ships in their repair yards. Does one really have to await another shipping disaster before International maritime law is adjusted? A new catastrophe purely provoked by the unclarity of the law in this field and by the lack of a co-ordinated policy of coastal States is in no way a fanciful hypothesis.

We therefore agree with the view expressed earlier by others that an express regulation of the status of casualty ships in a new Convention is desirable. Such a Convention should recognise the right of entry as a general principle and further only allow expressly and exhaustively specified restrictions. Demanding financial securities as a condition for admittance should be completely excluded, or at least radically

restricted. Ships in distress should be treated more favourably than normal ships, not the other way around.”

In a paper submitted to the Maritime Safety Committee¹² the International Union of Marine Insurance (IUMI) stated, in part, as follows:

“This association believes that there is a need for a Port of Refuge Convention which applies world wide: the maritime leprosy problem needs international co-ordination – at the moment it is easy for a country simply to turn away a vessel in distress in the hope that it would just go away and become someone else’s problem. An obligation to provide Places of Refuge (similar to those which currently exist between the members of the OPRC Convention) needs to be imposed on as many countries as possible worldwide. Ideally some kind of international body should be able to recommend a course of action to States in relation to serious incidents. It could identify and recommend safe havens within the territorial waters of signatory States to which vessels in distress can be directed. A good start on this has been made in Europe with the OPRC Convention coupled with the Directive made in June 2002. This is a welcome development of the duty which already exists under Article 11 of the 1989 Salvage Convention as implemented in the United Kingdom’s National Contingency Plan (which recognises the need for Places of Refuge). However, it is limited in its geographical spread to Western Europe and contains no duty to provide a Place of Refuge to vessels in distress, no way of determining how best to deal with a particular crisis and no guarantee of compensation should the worst fears of the country which is providing the safe haven come to pass.”

The IUMI paper went on to identify the issues which should be considered for such an International Convention. They were identified as follows:

- “(i) An obligation upon Convention States to provide ports or places of refuge in signatory States for vessels in distress
- (ii) An overall body (the “Supervisory Body”) or a number of regional bodies which can direct vessels in distress to particular places of refuge as the needs of the particular incident require. To facilitate the provisions of ports or places of refuge the Supervisory Body should be manned by appropriate independent professional, technically competent, non-political personnel. They should identify certain ports, anchorages and areas within the Convention state waters which are suitable for vessels in distress and locate and identify equipment and vessels which can go to their assistance.
- (iii) The Supervisory Body (whether worldwide or, probably more workably, regional) would have the overall interests of the environment, protection of life and property in mind and would make its recommendations on an international basis. Ideally they would have powers to override national

¹² MSC 77/8/2.

governments. However, it would be impractical to imagine that many countries' politicians would be prepared to relinquish their country's sovereignty over its own territorial waters. Most probably the Supervisory Body's decisions would (a little like those of OSPAR's Commission) be recommendations only (but see (iv) below).

- (iv) Convention countries in the area surrounding a vessel in distress would have an obligation to co-operate with each other in the event of a maritime emergency (similar to the obligation contained in OPRC). However, if any State authorities failed to comply with a decision of the Supervisory Body provisions could be introduced to make that State authority liable in damages to any third party which suffers damage as a consequence unless it can show that on the balance of probabilities the action it took avoided or minimised damage or a risk of damage to the environment, life and property more effectively than the measures recommended by the Supervisory Body. Some States may refuse to volunteer to accept liability in this way on principle but most have already conceded the principle by virtue of Article VI of the Intervention Convention (paragraph 9(c) above).
- (v) Vessels would be required to have compulsory insurance for compensation in relation to:
 - (a) Pollution damage arising out of a spillage of bunkers and oil cargoes.
 - (b) Pollution damage caused by a spillage of hazardous and noxious substances.
 - (c) Wreck removal expenses.
 - (d) Possibly also damage by impact, explosions etc.

The insurance would include a direct right of action against insurers with no intervening "pay to be paid" complications for bona fide claimants.

- (vi) A policing mechanism would have to be introduced to ensure that vessels could not call at ports in Convention States without having the compulsory insurance outlined in (v) above. This policing mechanism is already in place in many countries of the world which require the provision of CLC Certificates. The certification could perhaps be along the lines of CLC Certificates issued by liability insurers but simply covering more risks. The objective of the compulsory insurance scheme is to reassure countries which are designated as being required to provide safe havens that at least they will receive compensation if anything goes amiss as a result of them providing assistance to vessels in distress. Until a scheme of this sort is implemented vessels in distress will continue to be turned away with considerable risk to the lives not only of the ships' crews but also salvors, the environment and those interested in the ships and cargoes concerned."

In his comments at the Bordeaux Colloquium, Alfred Popp QC recalled the debates which had taken place concerning Article 11 of the Salvage Convention and suggested: "If you try to establish rights and duties and financial obligations which implicate States, you are in for a long debate. Most States ferociously defend their rights to permit ships into their waters".

Codes, Model Laws, Guidelines and Rules

In his Nicholas J Healy lecture, Patrick Griggs referred to Model Laws such as the UNCITRAL Model Law on Arbitration and CMI's Model Law on Piracy and Acts of Maritime Violence. He also referred to the IMO Guidelines on Shipowners' Responsibilities in respect of Maritime Claims, but commented: "The problem with such guidelines is that they are unenforceable, and will probably be ignored by the very shipowners and flag States at which the exercise was initially aimed. Guidelines are certainly the poor relation of Conventions, but they may be better than nothing". Guidelines, which could become Directives for the use of regional grouping of States maybe of more practical benefit. Alternatively some form of voluntary International Agreement (such as Tovalop) might be of practical benefit.

Other examples are the Guidelines on Oil Pollution Damage, produced by CMI in 1994. CMI has also produced the Model Contractual Clauses for Use in Agreements between Classification Societies and Government and Classification Societies and Shipowners (1999); the Principles of Conduct for Classification Societies (1998); perhaps best known, in the area of Rules, are the York Antwerp Rules (1994); and also the Rules for Assessment of Damages in Collision Cases (1998), Uniform Rules for Electronic Bills of Lading (1990), Uniform Rules for Sea Waybills (1990) and the Voyage Charterparty Laytime Interpretation Rules (1993).

Content of Convention or Alternative Instrument

The second question which arises for the International Sub-Committee is the content of any new Convention, Protocol or other Instrument.

The IUMI paper to which reference has been made earlier contains many useful suggestions as to what might be included within a Convention. In his comments at the Bordeaux Colloquium, Gregory Timagenis suggested that a Convention or Protocol to an existing Convention might not only identify or require the establishment of places of refuge (not just ports of refuge), but also require "reception facilities", such as a dock (even a floating dock) to be available, and also contain obligations for the provision of information, the size limitation for tankers and funding arrangements for the creation or maintenance of such places of refuge. In his paper "Places of Refuge: International Law in the Making", Richard Shaw concluded:

"Is a new International Convention on Places of Refuge likely to be useful in promoting a common approach to this problem? One might envisage a short instrument recommending the adoption of the IMO Guidelines at the level of National law and the nomination by coastal States of a government agency with the necessary communications and decision-making powers to whom the owner or salvor of a distressed vessel could apply for a decision whether or not to admit the vessel to a place of refuge, and if so where that place should be, given the circumstances of the casualty. The International Conventions of a hundred years ago, such as the 1910 Salvage and Collision Conventions, promoted by CMI and adopted by Diplomatic Conferences in Brussels,

Places of Refuge

had a brevity and simplicity which are sadly lacking in the Conventions and Protocols more recently produced by IMO. Is there a chance of a return to those halcyon days? Probably not.”

Matters which may need to be considered for inclusion in any such instrument might be: the scope of application; compulsory insurance or financial security, and/or the provision of letters of comfort by insurers to port authorities; the provision of a fund and its management; the ability to limit liability; time limits and jurisdiction.

Significant issues which will arise in the debate as to whether a fund should be established to meet the costs of any pollution or other damage which ensues as a result of a State granting a place of refuge are: whether the present regimes are inadequate to meet such liabilities and whether States would respond more favourably to the granting of a request for a place of refuge in the knowledge that such a fund is available. If such a fund is to be established subsidiary questions which will arise include how the fund is to be established, by whom, and in what amounts. It should also be noted that whilst there is no special fund created under the Bunker Convention, there are of course funds under the CLC/Fund and the HNS Conventions. Limitation of liability is a significant issue in the context of places of refuge. CLC does of course, provide its own limitation regime. In the context of wreck removal expenses a ship owner is entitled to limit its liability under the 1976 Convention, unless the country in which it seeks to limit liability has excluded that right under its legislation giving effect to the Convention. (See Article 2 paragraph 1(d) and paragraph 2 of the Convention). Under the Bunker Convention (2001) the right of an owner to limit liability is preserved in Article 6 and thus a shipowner may be entitled to limit liability in respect of the removal of bunkers, since Article 2 paragraph 1 (d) of the Limitation Convention 1976 refers to “claims in respect of the raising, removal... of a ship... including anything that is or has been on board such ship”. (Those words are also, presumably, apt to apply to the removal of the cargo). A question for the Sub-Committee to consider will be how these different regimes can be reconciled in any new instrument.

In describing the CLC as the “perfect Convention” Patrick Griggs in his Nicholas J Healy Lecture said: “it offered a clear liability regime, compensation for the consequences of oil spills, and a direct cause of action against liability insurers”. The question for the Sub-Committee is whether such a Convention (or other Instrument) is desirable and achievable for places of refuge.

September 2003

APPENDIX 1

INTERNATIONAL CONVENTION ON SALVAGE 1989

Article 11 Co-operation

A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 ("UNCLOS")

Article 17

Right of innocent passage.

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

Article 18

Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:
 - (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
 - (b) proceeding to or from internal waters or a call at such roadstead or port facility.
2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Article 21

Laws and regulations of the coastal State relating to innocent passage.

1. The coastal State may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following:
 - (a) the safety of navigation and the regulation of maritime traffic;
 - (b) the protection of navigational aids and facilities and other facilities or installations;
 - (c) the protection of cables and pipelines;
 - (d) the conservation of the living resources of the sea;
 - (e) the prevention of infringement of the fisheries laws and regulations of the coastal State;
 - (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof;

Places of Refuge

- (g) marine scientific research and hydrographic surveys;
- (h) the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State.
- 2. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.
- 3. The coastal State shall give due publicity to all such laws and regulations.
- 4. Foreign ships exercising the right of innocent passage through the territorial sea shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

Article 39

Duties of ships and aircraft during transit passage.

1. Ships and aircraft, while exercising the right of transit passage, shall:
 - (a) proceed without delay through or over the strait;
 - (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
 - (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;
 - (d) comply with other relevant provisions of this Part.
2. Ships in transit passage shall:
 - (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
 - (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

Article 192

General obligation

States have the obligation to protect and preserve the marine environment.

Article 193

Sovereign right of States to exploit their natural resources

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Article 194

Measures to prevent, reduce and control pollution of the marine environment

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in

- accordance with their capabilities, and they shall endeavour to harmonise their policies in this connection.
2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.
 3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimise to the fullest possible extent:
 - (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
 - (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;
 - (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;
 - (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.
 4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.
 5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

Article 195

Duty not to transfer damage or hazards or transform one type of pollution into another.

In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution to another.

Article 196

Use of technologies or introduction of alien or new species

Places of Refuge

1. States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.
2. This article does not affect the application of this Convention regarding the prevention, reduction and control of pollution of the marine environment.

Article 197**Co-operation on a global or regional basis**

States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

Article 198**Notification of imminent or actual damage**

When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organisations.

Article 199**Contingency plans against pollution**

In the cases referred to in Article 198, States in the area affected, in accordance with their capabilities, and the competent international organisations shall co-operate, to the extent possible, in eliminating the effects of pollution and preventing or minimising the damage. To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.

Article 221**Measures to avoid pollution arising from maritime casualties**

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.
2. For the purposes of this article, “maritime casualty” means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

International Convention on Oil Pollution Preparedness, Response and Co-Operation 1990 (“OPRC”)**Article 3****Oil pollution emergency plans**

- (1) (a) Each Party shall require that ships entitled to fly its flag have on board a shipboard oil pollution emergency plan as required by and in accordance with the provisions adopted by the Organisation for this purpose.
- (b) A ship required to have on board an oil pollution emergency plan in accordance with subparagraph (a) is subject, while in a port or at an offshore terminal under the jurisdiction of a Party, to inspection by officers duly authorised by that Party, in accordance with the practices provided for in existing international agreements or its national legislation.
- (2) Each Party shall require that operators of offshore units under its jurisdiction have oil pollution emergency plans, which are co-ordinated with the national system established in accordance with Article 6 and approved in accordance with procedures established by the competent national authority.
- (3) Each Party shall require that authorities or operators in charge of such sea ports and oil handling facilities under its jurisdiction as it deems appropriate have oil pollution emergency plans or similar arrangements which are co-ordinated with the national system established in accordance with Article 6 and approved in accordance with procedures established by the competent national authority.

Article 4

Oil pollution reporting procedures

- (1) Each Party shall:
 - (c) require Masters or other persons having charge of ships flying its flag and persons having charge of offshore units under its jurisdiction to report without delay any event on their ship or offshore unit involving a discharge or probable discharge of oil:
 - (i) in the case of a ship, to the nearest coastal State;
 - (ii) in the case of an offshore unit, to the coastal State to whose jurisdiction the unit is subject;
 - (d) require Masters or other persons having charge of ships flying its flag and persons having charge of offshore units under its jurisdiction to report without delay any observed event at sea involving a discharge of oil or the presence of oil:
 - (i) in the case of a ship, to the nearest coastal State;
 - (ii) in the case of an offshore unit, to the coastal State to whose jurisdiction the unit is subject;
 - (e) require persons having charge of sea ports and oil handling facilities under its jurisdiction to report without delay any event involving a discharge or probable discharge of oil or the presence of oil to the competent national authority;
 - (f) instruct its maritime inspection vessels or aircraft and other appropriate services or officials to report without delay any observed event at sea or at a sea port or oil handling facility involving a discharge of oil or the presence of oil to the competent national authority or, as the case may be, to the nearest coastal State;
 - (g) request the pilots of civil aircraft to report without delay any observed

event at sea involving a discharge of oil or the presence of oil to the nearest coastal State.

- (2) Reports under paragraph (1)(a)(i) shall be made in accordance with the requirements developed by the Organisation and based on the guidelines and general principles adopted by the Organisation. Reports under paragraph (1)(a)(ii), (b), (c) and (d) shall be made in accordance with the guidelines and general principles adopted by the Organisation to the extent applicable.

Article 5

Action on receiving an oil pollution report

- (1) Whenever a Party receives a report referred to in Article 4 or pollution information provided by other sources, it shall:
 - (a) assess the event to determine whether it is an oil pollution incident;
 - (b) assess the nature, extent and possible consequences of the oil pollution incident; and
 - (c) then, without delay, inform all States whose interests are affected or likely to be affected by such oil pollution incident, together with
 - (i) details of its assessments and any action it has taken, or intends to take, to deal with the incident, and
 - (ii) further information as appropriate,until the action taken to respond to the incident has been concluded or until joint action has been decided by such States.
- (2) When the severity of such oil pollution incident so justifies, the Party should provide the Organisation directly or, as appropriate, through the relevant regional organisation or arrangements with the information referred to in paragraph (1)(b) and (c).
- (3) When the severity of such oil pollution incident so justifies, other States affected by it are urged to inform the Organisation directly or, as appropriate, through the relevant regional organisations or arrangements of their assessment of the extent of the threat to their interests and any action taken or intended.
- (4) Parties should use, in so far as practicable, the oil pollution reporting system developed by the Organisation when exchanging information and communicating with other States and with the Organisation.

International Convention Relating to the Intervention on the High Seas in Cases of Oil Pollution Casualties (1969)

Article V

1. Measures taken by the coastal State in accordance with Article I shall be proportionate to the damage actual or threatened to it.
2. Such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as that end has been achieved; they shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.
3. In considering whether the measures are proportionate to the damage, account shall be taken of:

- (a) the extent and probability of imminent damage if those measures are not taken; and
- (b) the likelihood of those measures being effective; and
- (c) the extent of the damage which may be caused by such measures.

Article VI

Any Party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article I.

Article VII

Except as specifically provided, nothing in the present Convention shall prejudice any otherwise applicable right, duty, privilege or immunity or deprive any of the Parties or any interested physical or corporate person of any remedy otherwise applicable.

APPENDIX 2**UNCLOS****Article 2 – Legal Status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil**

The sovereignty of a coastal State extends beyond its land territory and internal waters and in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea described as the territorial sea.

This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.

The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

Article 25 – Rights of Protection of the Coastal State

1. The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.

Article 98 – Duty to render assistance

1. Every State shall require the master of a ship flying its flag in so far as he can do so without serious danger to the ship, crew or passengers:
 - (a) to render assistance to any person found at sea in danger of being lost;
 - (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;
 - (c) after a collision, to render assistance to the other ship, its crew and its passengers, and, where possible, to inform the other ship of the name of his own ship; its port of registry and the nearest port at which it will call.

2. Every coastal State shall promote the establishment and operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea, and where circumstances so require by way of mutual regional arrangements co-operate with neighbouring States for this purpose.

Articles 125 – Right of access to and from the sea and freedom of transit

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.
2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.
3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

Article 130 – Measures to avoid or eliminate delays or other difficulties of a technical nature in traffic in transit

1. Transit States shall take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit.
2. Should such delays or difficulties occur, the competent authorities of the transit States and land-locked States concerned shall co-operate towards their expeditious elimination.

Article 131 – Equal treatment in maritime ports.

Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

Article 211 – Pollution from vessels.

1. States, acting through the competent international organisation or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routing systems designed to minimise the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.
2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.
3. States which establish particular requirements for the prevention,

reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organisation. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonise policy, the communication shall indicate which States are participating in such co-operative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such co-operative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such co-operative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.

4. Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part 11, section 3, not hamper innocent passage of foreign vessels.
5. Coastal States, for the purpose of enforcement as provided for in Section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.
6. (a) Where the international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognised technical reasons in relation to its oceanographical and ecological conditions, as well as its utilisation or the protection of its resources and the particular character of its traffic, the coastal States, after appropriate consultations through the competent international organisation with any other States concerned, may, for that area, direct a communication to that organisation, submitting scientific and technical evidence in support and information on necessary reception facilities. Within 12 months after receiving such a communication, the organisation shall determine whether the conditions in that area correspond to the requirements set out above. If the organisation so determines, the coastal States may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organisation, for special areas. These laws and

regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organisation.

(b) The coastal States shall publish the limits of any such particular, clearly defined area.

(c) If the coastal States intend to adopt additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels, they shall, when submitting the aforesaid communication, at the same time notify the organisation thereof. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards; they shall become applicable to foreign vessels 15 months after the submission of the communication to the organisation, provided that the organisation agrees within 12 months after the submission of the communication.

7. The international rules and standards referred to in this article should include inter alia those relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges.

Article 235 – Responsibility and liability.

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Safety of Life at Sea Convention (SOLAS) 1974

Chapter V. Safety of Navigation

Regulation V/34.3

The owner, the charterer or the Company as defined in regulation IX/I, operating the ship or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safe navigation and protection of the marine environment.

Article IV

A ship which is not subject to the provisions of the present Convention at the time of its departure on any voyage shall not become subject to the provisions of the present Convention on account of any deviation from its intended voyage due to stress of weather or any other case of force majeure.

Regulation 15. Search and Rescue

- (a) Each Contracting Government undertakes to ensure that any necessary arrangements are made for coast watching and for the rescue of persons in distress at sea round its coasts. These arrangements should include the establishment, operation and maintenance of such maritime safety facilities as are deemed practicable and necessary having regard to the density of the seagoing traffic and the navigational dangers and should, so far as possible, afford adequate means of locating and rescuing such persons.
- (b) Each Contracting Government undertakes to make available information concerning its existing rescue facilities and the plans for changes therein, if any.

Salvage Convention**Article 9. Rights of Coastal States**

Nothing in this Convention shall affect the right of the Coastal State concerned to take such measures in accordance with generally recognised principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.

Convention on Facilitation of International Maritime Traffic (1965)**Article V(2)**

Nothing in the present Convention or its Annex shall be interpreted as precluding a Contracting Government from applying temporary measures considered by that Government to be necessary to preserve public morality, order and security or to prevent the introduction or spread of diseases or pests affecting public health, animals or plants.

Annex Section 1

- B. In conjunction with paragraph 2 of Article V of the Convention the provisions of this Annex shall not preclude public authorities from taking such appropriate measures including calling for further information, as may be necessary in cases of suspected fraud or to deal with problems constituting a grave danger to public order (ordre public), public security or public health, or to prevent the introduction or spread of diseases or pests affecting animals and plants.

Convention on the International Regime of Maritime Ports (1923)**Statute Article 2**

Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8 every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situation under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers. The equality of treatment thus established shall cover facilities of all kinds, such as allocation of berths, loading and unloading facilities, as well as dues and charges of all kinds levied in the name or for the account of the Government, public authorities, concessionaries or undertakings of any kind.

Article 3

The provisions of the preceding Article in no way restrict the liberty of the competent port authorities to take such measures as they may deem expedient for the proper conduct of the business of the port provided that those measures comply with the principle of equality of treatment as defined in the said Article.

Convention and Statute on Freedom of Transit (1921)**Statute****Article 2**

Subject to the other provisions of this Statute the measures taken by Contracting States for regulating and forwarding traffic across territory under their sovereignty or authority shall facilitate free transit by rail or waterway on routes in use convenient for international transit. No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destruction or in any circumstances relating to the ownership of goods or of vessels, coaching on goods stock or other means of transport.

In order to ensure the application of the provisions of this Article, Contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters.

Article 7

The measures of a general or particular character which a Contracting State is obliged to take in case of an emergency affecting the Safety of the State or the vital interests of the Country may in exceptional cases, and for as short a period as possible, involve a deviation from the provisions of the above Articles, it being understood that the principle of freedom of transit must be observed to the utmost possible extent.

Convention on the Regime of Navigable Waterways of International Concern (1921)**Statute****Article 3**

Subject to the provisions contained in Articles 5 and 17, each of the Contracting States shall accord free exercise of navigation to the vessels flying the flag of any one of the other Contracting States on those parts of navigable waterways specified above which may be situated under its sovereignty or authority.

Article 6

Each of the Contracting States maintains its existing right, on the navigable waterways in ports of navigable waterways referred to in Article 1 and situated under its sovereignty and authority, to enact stipulations and to take measures necessary for policing the territory and for applying the laws and regulations relating to customs, public health, precautions against the diseases of animals and plants, emigration or immigration and to the import or export of prohibited goods, it being understood that such stipulations and measures must be reasonable, must be applied on a footing of absolute equality between the nationals, property and flags of any of the Contracting States, including the State which is their author, and must not without good reason impede the freedom of navigation.

Article 9

Subject to the provisions of Articles 5 and 17, the nationals, property and flags of all the Contracting States shall, in all ports situated on a navigable waterway of international concern, enjoy in all that concerns the use of the port, including port dues and charges, a treatment equal to that accorded to the nationals, property and flag of the riparian State under whose sovereignty or authority the port is situated. It is understood that the property to which the present paragraph relates is property originating in, coming from or destined for, one or other of the Contracting States. The equipment of ports situated on a navigable waterway of international concern, and the facilities afforded in those ports to navigation, must not be withheld from public use to an extent beyond what is reasonable and fully compatible with the free exercise of navigation ...

APPENDIX 3**INTERNATIONAL CONVENTION ON THE PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER 1972****Article III**

For the purposes of this Convention

1(a) "Dumping" means:

- (i) Any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea.

Places of Refuge

- (ii) Any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structures at sea.”

Article IV

In accordance with provisions of this Convention Contracting Parties shall prohibit the dumping of any waste or other matter in whatever form or condition except as otherwise specified below”

Article V

The provisions of Article IV shall not apply when it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea in cases of force majeure caused by stress of weather, or in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such dumping will be less than would otherwise occur. Such dumping shall be so conducted as to minimise the likelihood of damage to human or marine life and shall be reported forthwith to the Organisation.

Article VIII

In order to further the objectives of this Convention, the Contracting Parties with common interests to protect in the marine environment in a given geographical area shall endeavour, taking into account characteristic regional features, to enter into regional agreements consistent with this Convention for the prevention of pollution, especially by dumping. The Contracting Parties to the present Convention shall endeavour to act consistently with the objectives and provisions of such regional agreements, which shall be notified to them by the Organisation. Contracting Parties shall seek to cooperate with the Parties to regional agreements in order to develop harmonised procedures to be followed by Contracting Parties to the different conventions concerned. Special attention shall be given to co-operation in the field of monitoring and scientific research.

Article XII

The Contracting Parties pledge themselves to promote, within the competent specialised agencies and other international bodies, measures to protect the marine environment against pollution caused by:

- (a) hydrocarbons, including oil, and their wastes;
- (b) other noxious or hazardous matter transported by vessels for the purposes other than dumping;
- (c) wastes generated in the course of operation of vessels, air craft, platforms and other man-made structures at sea

THE OBLIGATION TO OFFER A PLACE OF REFUGE TO A SHIP IN DISTRESS

A plea for granting a salvage reward to ports
and an international convention on ports of refuge

ERIC VAN HOOYDONK*

Contents

1. Introduction
2. The right of ships in distress to enter a port of refuge
 - 2.1. The problem
 - 2.2. First theory – The absolute right of access
 - 2.2.1. Scope and legal basis
 - 2.2.2. Critical Assessment
 - 2.3. Second Theory – The absolute right of refusal
 - 2.3.1. Scope and legal basis
 - 2.3.2. Critical Assessment
 - 2.4. Third Theory – Balancing Interests
 - 2.4.1. Scope and legal basis
 - 2.4.2. Critical Assessment
 - 2.5. Fourth theory – Good management on the basis of the right of access
 - 2.5.1. Scope and legal basis
 - 2.5.2. Critical assessment
- 2.6. Conclusions
3. Liability of port and other authorities
4. Compensation for port and other authorities
5. Towards an international convention on places of refuge and ships in distress?
6. Conclusions

1. Introduction

The need for specific legal arrangements governing ships in distress and places of refuge is one of the most topical problems in both public and private maritime law. Quite apart from the headline-grabbing shipping disasters involving the loss of the Erika (1999) and the Prestige (2002), several other incidents, such as those involving the Castor in the Mediterranean (2000) and

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Places of Refuge

the Vicky off the Belgian coast (2003), also attracted the attention of the IMO¹, the CMI², the Bonn Agreement for cooperation in dealing with pollution of the North Sea³, the European Union, the national maritime authorities, the maritime industry in general – comprising ship owners and operators, P & I Clubs, port authorities, vessel traffic services, rescue services, pilots and salvors – and environmentalists. Ultimately the impact of pollution on local economies and the environment was enough to arouse the concern of a broad swath of public opinion.

The reason for this contribution is the sudden move to the top of the agenda of the subject of places of refuge in 2003. Pursuant to the EU Traffic Monitoring Directive, a number of European member states designated places of refuge, and the CMI has established an International Sub-Committee on Places of Refuge⁴. Furthermore the European Parliament has asked the European Commission to formulate proposals for liability and compensation rules by February 2004⁵. In December 2003 the IMO approved the IMO

¹ See http://www.imo.org/Newsroom/mainframe.asp?topic_id=72 (consulted on 8 February 2004).

² See *CMI Yearbook 2002*, Antwerp, 2003, 117-146 and <http://www.comitemaritime.org/worip/place.html> (consulted on 8 February 2004).

³ During the fifteenth meeting of the Contracting Parties to the Bonn Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances, at Stockholm from 23 to 25 September 2003 it was decided that in 2004 a definitive chapter of the Counter Pollution Manual on Places of refuge would be prepared on the basis of the relevant instruments and reports of the IMO and the European institutions (including EMSA) (Summary Record, items 2.18-2.20).

⁴ The first meeting of the Sub-Committee was held in London on 17 November 2003. The Sub-Committee is the successor to the Working Group that the CMI had established in the past.

⁵ In its Resolution on improving safety at sea in response to the Prestige accident (2003/2066(INI)) dated 23 September 2003 the European Parliament:

“9. Notes that the Prestige disaster has clearly shown that arrangements to accommodate vessels in distress are inadequately regulated; calls on Member States to cooperate with EMSA in ensuring timely and full compliance with national emergency planning arrangements and the designation of safe havens, with Member States in particular specifying under what circumstances they will make the use of safe havens compulsory and providing them with the resources needed to implement their respective emergency plans;

10. Calls on the Commission to submit proposals not later than February 2004 for financial compensation for safe havens and to study the possibility of establishing a financial liability regime for ports refusing to give access to ships in distress;

11. Insists that each Member State must have at its disposal a clear decision-making structure and chain of command for maritime emergencies, together with an independent authority that in turn has at its disposal the necessary judicial, financial and technical say in taking decisions having binding effect in emergencies within territorial waters and the exclusive economic zone;

12. Calls on the Commission to arrange for EMSA to take an inventory of the different command structures and authorities responsible in maritime emergencies (cf. the French ‘Préfecture maritime’ and the British Secretary of State’s Representative), and to submit recommendations for exchanging best practice, promoting cooperation between Member States and introducing European guidelines or minimum requirements in that connection;

[...]

38. Calls on the Commission and on Member States to make their best efforts to reach an agreement within the IMO on an international public law convention on places of refuge”.

“Guidelines on places of refuge for ships in need of assistance”⁶ and an international workshop on ports of refuge was organized at the University of Antwerp⁷. On that occasion, the European Commission said that a response to the request of the European Parliament will only be forthcoming towards the end of 2004. The considerations set out in the following are an attempt to contribute to the now open debate about the need for a specific legal framework for places of refuge and ships in distress. It is expected that a significant response will come at the CMI conference due to be held in Vancouver from 31 May to 4 June 2004⁸.

⁶ Resolution A.949(23).

⁷ International Workshop on Places of Refuge, UA City Campus, 11 December 2003 (jointly organized by the European Institute of Maritime and Transport Law and the European Seaports Organization). The present contribution is a written text based on a PowerPoint presentation made at this workshop by the author. For the papers presented and the proceedings, see http://www.espo.be/news/event_11-12-2003.asp (consulted on 8 February 2004).

⁸ See in connection with places of refuge and ships in distress i.a. Blanco-Bazan, A., *Places of refuge*, intervention at the 30th annual conference on international law, Ottawa, 18-20 October 2001, 4 p.; Boisson, Ph., *Politiques et droit de la sécurité maritime*, Paris, Bureau Veritas, 1998, 197 e.v., nos. 356 e.v.; Browne, B., *Places of refuge - The IUMI Solution*, paper presented at the IUMI Congress in Seville in September 2003, 26 p.; Devine, D.J., “Ships in distress - a judicial contribution from the South Atlantic”, *Marine Policy*, 1996, 229-234; de Zayas, A.-M., “Ships in distress”, in *Encyclopedia of public international law*, XI, Amsterdam, North-Holland, 1989, 287-289; Griggs, P., “Places of refuge”, http://www.espo.be/news/event_11-12-2003.asp (consulted on 8 February 2004); Hetherington, S., “‘Prestige’ Can the Law Assist ?” <http://www.comitemaritime.org/future/futuridx.html> (consulted on 8 February 2004); Janbon, L., “Les lieux de refuge”, *Droit maritime français*, 2003, 157-167; Kasoulides, G.C., “Vessels in distress. ‘Safe havens’ for crippled tankers”, *Marine Policy*, 1987, 184-195; Le Garrec, M.-Y., “L’intervention de l’autorité portuaire dans le contrôle des navires”, *Droit maritime français*, 2003, (476), 483-489; Maes, F., “De Belgische wet ter bescherming van het mariene milieu (1999) en zeeverontreiniging”, to be published in Van Hooydonk, E. (Ed.), *Zeeverontreiniging. Preventie, bestrijding en aansprakelijkheid*, Antwerp/Apeldoorn, Maklu, 2003, item 7.2.4; Oya Özçayir, Z., “Ports of refuge”, *JIML*, 2003, 486-495; Rézenthel, R., “L’accès aux ports des navires en détresse”, *Droit maritime français*, 2000, 276-281; Rézenthel, R., “Le port de refuge: de la bouée de sauvetage à la bombe”, *Revue de droit de l’environnement*, 2002, 94 et seq.; Shaw, R., “Places of refuge: international law in the making ?”, *JIML*, 2003, 159-180, <http://www.comitemaritime.org/future/futuridx.html> (consulted on 8 February 2004); Timagenis, G.J., “Places of Refuge as a Legislative Problem”, <http://www.comitemaritime.org/future/futuridx.html> (consulted on 8 February 2004); van der Velde, W., “The position of coastal States and casualty ships in international law”, not yet published, 38 p.; Van Hooydonk, E., “Casualty ships, vessels in distress and maritime lepers”, *Lloyd Special Report*, November 1999, 21-25; Id., “Some Remarks on Financial Securities Imposed by Public Authorities on Casualty Ships as a Condition for Entry into Ports”, in Huybrechts, M. (Ed.), Van Hooydonk, E. and Dieryck, C. (Co-eds.), *Marine insurance at the turn of the Millennium*, II, Antwerp/Groningen/Oxford, Intersentia, 2000, 117-136; Id., “Ports of refuge for ships in distress: not in my front pond ?”, *Transport Insurance in Belgium*, Special Lloyd, December 2003, 3-11, http://www.espo.be/news/event_11-12-2003.asp (consulted on 8 February 2004); Young, C., “The International Maritime Organization and the development of an international legal framework for places of refuge”, http://www.espo.be/news/event_11-12-2003.asp (consulted on 8 February 2004).

2. The right of ships in distress to enter a port of refuge

2.1. The problem

The basic question is whether a ship in distress has the right to enter a port of refuge, or, alternatively, whether a coastal state and/or port authority has the right to refuse a ship in distress. This question must be clearly distinguished from the question of whether the state is required to designate and establish named places of refuge in advance. In principle the answer to the second question must be no, except where specific texts, such as the European Traffic Monitoring Directive⁹, impose this obligation. In the following it will be examined whether ships in distress have the right to enter places of refuge of any nature whatsoever. There are no simple yes or no answers to this question. A range of views has been defended in case law and legal theory. In the author's opinion there are essentially four different approaches.

2.2. First theory – The absolute right of access

2.2.1. Scope and legal basis

According to this first theory ships in distress always have the right to enter any port or place of refuge whatsoever regardless of the cause of the distress. This is an old rule of international customary law, which is defended in virtually all manuals of international law¹⁰, including the most recent¹¹.

⁹ See below, item 2.4.1.

¹⁰ Colombos, C.J., *The International Law of the Sea*, London, Longmans, 1962, 160, § 181; Jennings, R. and Watts, A., *Oppenheim's International Law*, I, Peace, Parts 2 to 4, London / New York, Longman, 1996, 624, § 204; Reuter, P., *Droit international public*, Paris, Presses Universitaires de France, 1973, 265. For further analyses, see de Zayas, A.-M., *o.c.*, 287-289; Hydeman, L.M. and Berman, W.H., *International Control of Nuclear Maritime Activities*, Michigan, University of Michigan/Ann Arbor, 1960, esp. 153-162; Nelissen, F.A., *Scheepswrakken en wrakkeschepen. Een volkenrechtelijke beschouwing vanuit milieu-perspectief*, Deventer, W.E.J. Tjeenk Willink, 1997, 60; O'Connell, D.P., *The International Law of the Sea*, II, Oxford, Clarendon Press, 1984, 853-858; Van Bogaert, E., "Het internationaal havenstatuut", *Mededelingen Marine Academie*, vol. XXIV, 1976-77, (95), 111-112; Van Hooydonk, E., *Beginselen van havenbestuursrecht*, Bruges, Die Keure, 1996, 504, no. 178. Vattel already only accepted that a state had the right to refuse foreigners access to the territory of the state "pourvu que l'on ne refusât point les secours de l'humanité à ceux que la tempête ou quelque nécessité contraignait de se présenter à la frontière" (Vattel, *Le droit des gens*, I, Parijs, J.P. Aillaud, 1835, 381 (Liv. II, Chap. VII, § 94)). According to Degan, the distress exception has no parallel on the mainland (Degan, V.D., "Internal Waters", *Netherlands Yearbook of International Law*, vol. XVII, Martinus Nijhoff Publishers, 1986, (3), 11).

¹¹ See for example Alland, D., *Droit international public*, Paris, Presses Universitaires de France, 2000, 679, no. 649; Beckert, E. and Breuer, G., *Öffentliches Seerecht*, Berlin/New York, Walter de Gruyter, 1991, 138, no. 368; Bleckmann, A., *Völkerrecht*, Baden-Baden, Nomos Verlagsgesellschaft, 2001, 207, no. 627; Booysen, H., *Volkereg*, Kaapstad/Wetton/Johannesburg, Juta, 1989, 332; Brownlie, I., *Principles of public international law*, Oxford, Oxford University Press, 2003, 315 (cautiously however, using the word "perhaps"); Gardiner, R.K., *International law*, Harlow, Pearson Longman, 2003, 408; Goy, R., "Les droits des navires de commerce en séjour dans les ports", in *Espaces et ressources maritimes*, 1995, n° 9, Paris, A. Pedone, 1996, (298), 303; Hillier, T., *Principles of Public International Law*, London/Sydney, Cavendish, 1999,

It is an exception to the rules of international customary law that provide that in normal circumstances foreign ships have no right of access to ports, that coastal states may close their ports to international traffic¹², and that they can make access dependent on compliance with standards relating to the safe condition of the ship. In normal circumstances and insofar municipal law gives them this power – which is usually the case – the authorities of the coastal state can refuse access to a port to a ship that constitutes a danger by reason of its damaged condition¹³. The right of access in the event of maritime distress overrides these normal powers of the coastal state. Even states that have in general adopted restrictive policies regarding access to their ports, recognize the right of access in the event of maritime distress¹⁴.

Foreign ships in distress have the right to seek and obtain shelter in ports, and also to take such shelter in the territorial sea, in roadsteads, straits, bays, rivermouths, lakes, rivers, canals, even in ports closed to foreign commerce and military ports, until the state of distress is over. The cause of, or the responsibility for, the state of distress is irrelevant: a ship cannot be lawfully refused shelter and help even if her captain or crew have brought about the danger by their own negligence; it is the objective situation that is important¹⁵. The causes of a state of necessity can be various: storms, faulty navigation, mutiny, an absolute necessity for provisions, the need for vital repairs, etc.¹⁶. Damage to the ship thus is a valid ground to invoke distress¹⁷. As Nelissen pointed out, the distress concept covers situations of deficient manoeuvrability or similar situations whereby assistance or repairs are needed¹⁸. Nor has the type of the ship any relevance: entry can be claimed by

191; Ipsen, K., *Völkerrecht*, Munich, C.H. Beck'sche Verlagsbuchhandlung, 1999, 722, no. 8; Lowe, V., "The United Kingdom and the Law of the Sea", in Treves, T. (Ed.), *The Law of the Sea. The European Union and its Member States*, The Hague/Boston/London, Martinus Nijhoff Publishers, 1997, (521), 524; Malanczuk, P., *Akehurst's Modern Introduction to International Law*, London/New York, Routledge, 1999, 175; Nguyen, Q.D., Daillier, P. and Pellet, A., *Droit international public*, Paris, L.G.D.J., 2002, 1156, no. 669; Schermers, H.G. and van Houtte, H., *Internationaal en Europees recht*, Antwerp, Kluwer, 1987, 131; Shearer, I.A., *Starke's International Law*, London, Butterworths, 1994, 185; Sinkondo, M., *Droit international public*, Paris, Ellipses, 1999, 255; see also Verdross, A. and Simma, B., *Universelles Völkerrecht*, Berlin, Duncker & Humblot, 1984, 653, § 1036 (mentioning the controversy over the right to refuse ships posing a threat to the coastal state).

¹² See Van Hooydonk, E., *Beginselen van havenbestuursrecht*, o.c., 501-505, no. 178, and the accompanying references.

¹³ Compare Pamborides, G.P., *International Shipping Law. Legislation and Enforcement*, Athens/The Hague/London/Boston, Ant. N. Sakkoulas Publishers/Kluwer Law International, 1999, 30, where it is stated "that the right of the coastal state to deny access to foreign merchant vessels which would or could constitute a threat to that state is today fully recognised and indeed practised by all the major maritime nations of the world". However, the author does not examine the special legal position of ships in distress.

¹⁴ Lucchini, L. and Voelckel, M., *Droit de la mer*, II.2, Paris, Pedone, 1996, 296, no. 903.

¹⁵ Degan, V.D., o.c., 11.

¹⁶ Degan, V.D., *ibid.*, 11.

¹⁷ For the latter aspect, see also Hydeman, L.M. and Berman, W.H., o.c., 155, footnote 104.

¹⁸ Nelissen, F.A., o.c., 14.

Places of Refuge

all kinds of ships and boats, including merchantmen, men-of-war, fishing and pleasure craft, hovercraft, etc. – even by boats propelled by oars, and windsurfers¹⁹. Of course the right of access in the event of maritime distress may not be abused²⁰. On the other hand, the mere fact that a ship is engaged in an illicit activity cannot be a reason for denying the right of entry²¹. As Blanco-Bazan stated, coastal States cannot excuse themselves from fulfilling their obligations on grounds that the ship ignored basic safety provisions, is not insured, or fraudulently has put itself in a distress situation in order to obtain admission into internal waters or in ports. Coastal States should first remove distress, then deal with any other matter²².

The right of access is reinforced by the fact that the ship in distress is regarded as either wholly or partly immune to the application of local law, and either wholly or partly exempt from local levies and taxes. The ship in distress has involuntarily entered the port and is therefore the beneficiary of exceptionally favourable arrangements²³. The rationale of international customary law is “that the local State shall not take advantage of the ship’s necessity”²⁴. The UN Law of the Sea Convention confirms this immunity by making the exercise of the authority to enforce environmental rules by coastal states and port states dependent on the condition that the ship must have

¹⁹ See esp. Degan, V.D., *o.c.*, 10-11; de Zayas, A.-M., *o.c.*, 287; with respect to the right of access of warships to the territorial sea see also de Vries Reilingh, O.G., “Warships in territorial waters, their right of innocent passage”, *Netherlands Yearbook of International Law*, vol. II, Leiden, A.W. Sijthoff, 1971, (29), 31; with respect to the access of these ships to ports, see Goy, R., “Le régime de l’accès au port des navires de guerre en temps de paix”, *Collection espaces et ressources maritimes*, 1994, N° 8, Paris, A. Pedone, (115), 119; Hydeman, L.M. and Berman, W.H., *o.c.*, 256; Laun, R., *Le régime international des ports*, Paris, Hachette, 1928, 63.

²⁰ Whether there is truly maritime distress or otherwise depends on the actual circumstances of the incident. The maritime distress must be “real and irresistible” (as with “The Eleanor”: cf. Simmonds, K.R., *Cases on the Law of the Sea*, I, New York, Oceana Publications, 1976, (98), 123-124). When a ship at sea is confronted with a mechanical defect and has the choice of entering a shipyard in state A or yard in state B, where the choice for the one yard does not entail a significantly more dangerous or less secure approach, the invocation of maritime distress would appear to be unfounded. When the master comes to the reasonable conclusion that the ship must urgently enter a specific, particularly suitable yard, and there is no alternative, maritime distress may undoubtedly be invoked as a basis for the right of access.

²¹ Devine, D.J., *o.c.*, 230. Comp. art. 24 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), which provides under the heading “Distress”: “1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.

2. Paragraph 1 does not apply if:

(a) The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) The act in question is likely to create a comparable or greater peril”.

²² Blanco-Bazan, A., *o.c.*, 3.

²³ See Devine, D.J., *o.c.*, 230.

²⁴ Colombos, C.J., *The International Law of the Sea*, London, Longman, 1972, 330, quoting Jessup; also Degan, V.D., *o.c.*, 12.

voluntarily entered the port or off-shore terminal²⁵, which is not the case when a ship enters a port by reason of maritime distress²⁶. However when a ship intentionally brings about a distress situation, it is at fault and will lose its potential immunity²⁷.

The theory of the absolute right of access is confirmed by various international²⁸, European²⁹ and national legal rulings as well as by the texts

²⁵ Art. 218.1 LOSC provides: “*When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference*” (emphasis added).

Art. 218.3 provides: “*When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred*” (emphasis added).

Art. 220.1 provides: “*When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State*” (emphasis added).

²⁶ See Molenaar, E.J., *Coastal State Jurisdiction over Vessel-Source Pollution*, The Hague/Boston/London, Kluwer Law International, 1998, 187.

²⁷ Devine, D.J., *o.c.*, 232.

²⁸ The Rebecca Case: General Claims Commission United States and Mexico, 2 April 1929, Kate A. Hoff v. The United Mexican States, *The American Journal of International Law*, vol. 33, 1929, 860, where it was held that a ship foundering in distress, resulting either from the weather or from other causes affecting management of the vessel, need not be in such a condition that it is dashed helplessly on the shore or against rocks before a claim of distress can properly be invoked in its behalf, and that the fact that the vessel may be able to come into port under its own power can obviously not be cited as conclusive evidence that the plea of distress is unjustifiable. In the case of the May, the Canadian Supreme Court held that mere failure of a pump was not a valid basis for claiming distress, since failure of the pump did not make navigation dangerous (Hydeman, L.M. and Berman, W.H., *o.c.*, 154, footnote 103 and the accompanying references).

²⁹ Case C-286/90, *Poulsen* [1992] ECR I-6019, paras 35 et seq., where reference is made to public international law. The opinion of Advocate-General Tesouro emphatically stresses the right of access and immunity provided by international law: “Un bateau de pêche d’un pays tiers qui s’est réfugié dans un port communautaire en invoquant un état de nécessité jouit-il de l’immunité ? C’est-à-dire est-il possible qu’il garde à son bord une cargaison de saumon pêché dans une zone interdite par le règlement sur la conservation sans pour autant encourir des sanctions de la part de l’État du port ?”

Cette question part à l’évidence du principe que l’État côtier est habilité à inspecter un bateau de pêche d’un pays tiers qui est amarré dans son port et - surtout - qu’il peut poursuivre pénalement le capitaine de ce bateau de pêche pour avoir gardé à bord cette cargaison de saumon, même si l’intention de débarquer et de mettre en vente le saumon en question dans l’État membre intéressé n’est aucunement établie. Comme nous venons de le dire, à moins que des éléments en ce sens (intention de vendre ou, en tout cas, de débarquer le saumon) puissent être constatés, un État membre devrait, selon nous, s’abstenir d’intenter une action pénale contre le capitaine du bateau de pêche en question.

Places of Refuge

of various conventions. During the preparatory work on the Convention on the International Regime of Maritime Ports³⁰ the right of access was regarded as being so self-evident and absolute that the parties to the convention considered that it was not necessary to make specific mention of it in the convention itself³¹.

The French version of the Geneva Convention on the Territorial Sea and the Contiguous Zone recognized the right to “relâche forcée”, i.e. calling at a port of refuge³².

De toute façon, il est par ailleurs indéniable, en vertu du droit international, qu'un navire qui se trouve en état de nécessité peut trouver refuge dans un port, même lorsque l'admission dans ce port lui est normalement interdite, hypothèse qui est assurément à exclure dans le cas qui nous occupe, puisque le port de Hirtshals, où l'Onkel Sam a trouvé refuge, est également celui dans lequel le bateau en question fait normalement relâche.

Le droit international admet en outre l'état de nécessité comme un motif d'exclusion de l'illicéité d'un comportement non conforme à une obligation internationale; l'exemple qui revient est précisément celui de la disposition qui permet aux navires de se réfugier dans les eaux territoriales et/ou dans les ports d'un État étranger en cas d'avarie et d'autres situations de détresse. Une telle hypothèse est expressément envisagée à l'article 14, paragraphe 3, de la convention de Genève sur la mer territoriale et la zone contiguë (qui a été repris, pour ce qui nous intéresse, à l'article 18, paragraphe 2, de la convention de Montego Bay), en vertu duquel on admet que, dans l'exercice du passage inoffensif, les navires étrangers jouissent du droit d'arrêt et de mouillage seulement dans la mesure où cela rentre dans l'exercice normal de la navigation ou s'impose aux navires “en état de relâche forcée ou de détresse”.

En pareil cas, la doctrine est presque unanime à considérer que le navire en question ne peut pas être soumis aux lois de l'État du port en raison du simple fait qu'il est entré dans le port, à moins, évidemment, que les activités litigieuses aient eu lieu dans le territoire relevant de la souveraineté de l'État en question.

En définitive, il appartient au juge national de vérifier si en l'espèce il y a eu état de nécessité, c'est-à-dire si l'Onkel Sam a été contraint ou non d'entrer dans le port danois en raison de l'état des moteurs et/ou des conditions météorologiques. Comme le droit communautaire ne précise pas la portée de la notion d'état de nécessité, qui revêt de l'importance en l'espèce, le juge national devra se référer à la pratique internationale, qui n'est certainement pas négligeable”.

³⁰ Gidel, G., *Le droit international public de la mer*, II, Vaduz/Paris, Topos Verlag/Librairie Edouard Duchemin, 1981 (reprint), 51. During the preparation of the Convention the Belgian representative Stievenard declared, “que le droit de refuge d'un navire en détresse est absolu, quel que soit son pavillon, et sans qu'il puisse y être apporté de restriction, même en cas de guerre” (Société des Nations - Deuxième Conférence Générale des Communications et du Transit, *Comptes rendus et textes relatifs à la Convention et au Statut sur le Régime International des Ports Maritimes*, Genève, 1924, 14). Mr van Eysinga of the Netherlands expressed the same view: “Le rapport de la Commission devra être rédigé de manière à ne pas laisser croire que la Commission admet la possibilité, pour un Etat, de refuser à un navire en détresse l'accès dans n'importe quel port” (*ibid.*, 12).

³¹ The International Statute of Maritime Ports itself applies to “ports of refuge specially constructed for that purpose” (art. 1 of the Protocol of signature of the Convention on the International Régime of Maritime Ports; see Hostie, J., “La convention générale des ports maritimes”, *Revue de droit international et de législation comparée*, 1924, (680), 684). As a consequence, ships using a port of refuge must be treated without discrimination and regulations and tariffs for such a port must be duly published.

³² Art. 14.3 of the Convention, which by way of exception accepts stopping and anchoring as the authorized exercise of the right of innocent passage, speaks of “[le] navire en état de relâche forcée ou de détresse”. In the equally authentic English text (see art. 32) “détresse” is equivalent to “distress”; the French “relâche forcée” becomes in English (!) equivalent to “force

Moreover, the same convention and the UN Law of the Sea Convention offer ships in distress an additional and express basis for stopping and anchoring in the territorial sea itself, where in practice usable and naturally protected anchorages are often to be found³³. Indeed, the UN Law of the Sea Convention expressly provides that passage includes stopping and anchoring in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress (for example caused by mist, storm or a mechanical failure³⁴) or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress³⁵. Riphagen quite correctly concludes that ships involved in an accident in the territorial sea remain in passage. This also applies to ships in or outside the territorial sea that come to render assistance³⁶. Moreover, the UN Law of the Sea Convention only requires that passage itself be continuous and expeditious³⁷. This does not mean that a ship must always

majeure". Therefore, English "*force majeure*" (where the italicization is specific to the English text) appears to be different to French or Belgian "*force majeure*" (in Dutch "overmacht"). "Relâche forcée" and "relâcher" are expressions unique to the language of the sea in France and have a specific meaning: "[u]n navire relâche quand par suite de mauvais temps, d'avaries subies, etc., il est forcé d'interrompre son voyage et d'entrer dans un port qui n'est pas son port de destination" (Gruss, R., *Petit dictionnaire de marine*, Paris, Challamel, 1945, 170; cf. Moors, J., *Dictionnaire juridique français-néerlandais*, Brussels, C.A.D., 1977, 399, v^o relâche). The *Van Dale* French-Dutch dictionary (ed. 1998) translates "relâche" as "oponthoud in een haven" (delay in a port), "onderbreking van de reis" (interruption of a voyage) or "(het) aandoen van een haven" (calling in a port) and "port de relâche" as "(nood)haven" (a port (of necessity)). The point is that when the Geneva Convention recognizes that a ship may validly stop and anchor during the course of her innocent passage of the territorial sea when she requires a port of necessity, this necessarily implies a recognition by treaty of the right to call in a port of refuge in the event of maritime distress. In other words the Geneva Convention implicitly, but indisputably, recognizes the existence of a right to call in a "port de relâche". In the UN Law of the Sea Convention English "*force majeure*" is made equivalent to the French "*force majeure*", while there is no longer any mention of "relâche forcée" (see art. 18.2). Apparently the intention was simply to bring the French text closer to the English, as the English one already used a notion derived from the French language. Any intention of excluding "relâche forcée" as a case covered by the provision concerned apparently did not exist. The conclusion must therefore be that the Geneva Convention, without being revoked in this respect at Montego Bay, implicitly but certainly acknowledged the existence of the right of access to a port of refuge in the event of maritime distress.

³³ After a collision with the wreck of the ro/ro vessel *Tricolor* on 1 January 2003, the oil tanker *Vicky* was sheltered in the Westhinder anchorage site off the Flemish coast.

³⁴ See Gidel, G., *Le droit international public de la mer*, III.I, Vaduz/Paris, Topos Verlag/Edouard Duchemin, 1981 (reprint), 210; Somers, E., *Inleiding tot het internationaal zeerecht*, Antwerp, Kluwer, 1997, 810, no. 65

³⁵ Art. 18.2 LOSC. Cavaré made the following commentary on the corresponding art. 14.3 of the Geneva Convention on the Territorial Sea: "C'est un incident technique qui le motive (réparation à une machine, p.e.), ou bien c'est une raison d'humanité qui le rend licite" (Cavaré, L., *Le droit international public positif*, II, Paris, Pedone, 1969, 757).

³⁶ Riphagen, W., "Le droit de passage inoffensif après la 3e convention", in *Perspectives du droit de la mer à l'issue de la 3e conférence des nations unies*, Paris, Pedone, 1984, (190), 207, no. 27.

³⁷ Art. 18.2 LOSC. Ships outside the territorial sea that intend to render assistance to persons, ships or aircraft within the territorial sea on the basis of art. 300 LOSC have themselves the right to enter the territorial sea (Center for Oceans Law and Policy (University of Virginia School of Law), *United Nations Convention on the Law of the Sea 1982. A Commentary*, II, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1993, 162).

navigate at “full speed ahead” through the territorial sea. According to learned commentators, ships are only expected “to proceed with due speed under the circumstances, having regard to safety and other relevant factors”³⁸. A damaged ship may be handicapped as to speed and manoeuvrability; this, however, does not mean that she would not be entitled to passage as defined by international law: as stated, one has to consider the specific circumstances under which the ship is proceeding. *A fortiori* one could argue that, where the UN Convention even tolerates *stopping* in distress, no objection can be made to decelerated navigation owing to the distress situation.

International treaties concerning rivers, such as that on the Scheldt³⁹ expressly provide that the right to interrupt the voyage is inherent in the freedom of navigation. The Institute of International Law has, without much preliminary discussion, in itself an indication of the self-evident nature of this point of view, confirmed the right of access to ports of refuge⁴⁰ in resolutions dating from 1898⁴¹, 1928⁴² and 1957⁴³. Further there is a clear analogy with the

³⁸ Center for Oceans Law and Policy (University of Virginia School of Law), *o.c.*, II, 163.

³⁹ At the request of Belgium the London Conference declared in a memorandum dated 18 April 1839 concerning the treaty separating Belgium and the Netherlands: “La libre navigation de l’Escaut renferme, sans aucun doute, la faculté, pour tout navire, de stationner librement dans toutes les eaux de ce fleuve et de ses embouchures, si les vents, les glaces ou d’autres circonstances l’exigent, et il n’est pas à prévoir qu’aucune contestation puisse s’élever sur cet objet, qui pourra au reste, être plus positivement déterminé par règlement” (*Moniteur belge*, 21 June 1839).

⁴⁰ See also Degan, V.D., *o.c.*, 11.

⁴¹ Art. 6 of the “Règlement sur le régime légal des navires et de leurs équipages dans les ports étrangers” of 23 August 1898 provides: “En cas de relâche forcée, l’entrée d’un port ne peut être refusée au navire en détresse, alors même que ce port serait fermé conformément à l’article 3 ou à l’article 4.

Le navire en relâche devra se conformer rigoureusement aux conditions qui lui seront imposées par l’autorité locale ; néanmoins ces conditions ne pourront pas être de nature à paralyser, par leur rigueur excessive, l’exercice du droit de relâche forcée.

Les autorités territoriales doivent aide et assistance aux navires étrangers naufragés sur leurs côtes ; elles doivent garantir le respect de la propriété privée, aviser le consulat des naufragés, assister les agents de ce consulat dans leur action dès qu’ils interviennent.

Il est à désirer que les Etats n’exigent que le remboursement des frais utilement exposés”.

⁴² Art. 5 of the “Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix” of 28 August 1928 provides: “En cas de relâche forcée, l’entrée d’un port ne peut être refusée au navire en détresse, alors même que ce port serait fermé par application des dispositions ci-dessus.

Le navire en relâche doit se conformer aux conditions qui lui sont imposées par l’autorité territoriale ; néanmoins, ces conditions ne peuvent pas être de nature à paralyser par leur rigueur excessive l’exercice du droit de relâche forcée”.

Art. 6 provides: “Les autorités territoriales doivent aide et assistance aux navires étrangers naufragés sur leurs côtes ; elles doivent assurer le respect de la propriété privée, aviser le consulat des naufragés, assister les agents de ce consulat dans leur action, dès qu’ils interviennent.

L’action des autorités consulaires de l’Etat du pavillon du navire naufragé ne peut s’exercer que dans la mesure où elle est compatible avec la législation en vigueur dans l’Etat territorial et, s’il y a lieu, conformément aux conventions.

Il est à désirer que les Etats n’exigent que le remboursement des frais utilement exposés”.

See *Annuaire de l’Institut de Droit International. Session de Stockholm 1928*, Brussels, Goemaere, (736), 737-738.

⁴³ Art. II of the resolution on “La distinction entre le régime de la mer territoriale et celui

International Health Regulations, which forbid the denial of access to ports of infected ships⁴⁴. The prohibition on repulsing infected ships was also to be found in many older treaties on sanitary police⁴⁵ when it was regarded as “un principe de droit international supérieur aux contingences de lieux et de nationalités et gravé dans la conscience commune”⁴⁶. Similarly, an analogy may be drawn with the duty to render assistance required by maritime law⁴⁷. The refusal of access to a ship in distress appears to be contrary to the spirit of the many conventions that require the state to duly equip itself so that it react adequately to shipping accidents. The SAR Convention⁴⁸ and related texts⁴⁹ oblige coastal states to organize efficient rescue services. In general there is an obligation on every state that disposes over suitable means to search for and to save persons in maritime distress, even when the ship is on the high seas⁵⁰. The

des eaux intérieures” of 24 September 1957 provides: “*Access and Passage*. In the territorial sea, foreign vessels have a right of innocent passage, including the right of stopping or anchoring to the extent that they are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

Subject to the rights of passage sanctioned either by usage or by treaty, a coastal State may deny access to its *internal waters* to foreign vessels except where they are in distress”.

See *Annuaire de l'Institut de Droit International. Session d'Amsterdam 1957*, II, Basel, Editions juridiques et sociologiques, (473), 474; see also Degan, V.D., *o.c.*, 11.

⁴⁴ Article 41 of the International Health Regulations of the World Health Organization provides to this day: “Subject to Article 73, a ship or an aircraft shall not be prevented for health reasons from calling at any port or airport. If the port or airport is not equipped for applying the health measures which are permitted by these Regulations and which in the opinion of the health authority for the port or airport are required, such ship or aircraft may be ordered to proceed at its own risk to the nearest suitable port or airport convenient to the ship or aircraft”. With respect to the regulations, see Bélanger, M., “Les actions de protection sanitaire en mer ou au port”, *Droit maritime français*, 1981, 579-589; Id., “A propos des dispositions sanitaires de la Convention de 1982 sur le droit de la mer”, *Droit maritime français*, 1984, 195-207. In this connection reference may be made to the m/v Aurora, a cruise liner. Following infection by the Norwalk virus the ship was in October/November 2003 forbidden to enter or discharge passengers in a number of ports in the Adriatic and Mediterranean seas.

⁴⁵ See Gidel, G., *o.c.*, II, 51-52; see also Bélanger, M., “Les actions de protection”, *o.c.*, 581; Hydeman, L.M. and Berman, W.H., *o.c.*, 134, esp. footnote 30, and 140.

⁴⁶ Grasso, G., “De l'interdiction des ports d'un Etat aux navires étrangers pour motifs sanitaires”, *Revue du droit public et de la science politique*, 1895 - 2, (32), 44.

⁴⁷ See i.a. art. 8 Collision Convention 1910, art. 11 Salvage Convention 1910, art. 12 Convention on the High Seas 1958, art. 98.1 LOSC, art. 10 Salvage Convention 1989, art. 255 and 265 Belgian Maritime Code, art. 62 and 63 Belgian Disciplinary and Criminal Code for Merchant Shipping and Offshore Fishing. Saving persons who have no right to enter the territory of the coastal state can nonetheless give rise to problems. For example, in 2001 Australia refused to grant access to the m/v Tampa following her rescue of the Afghan survivors of a shipwreck.

⁴⁸ International Convention on Maritime Search and Rescue, Hamburg, 27 April 1979; see Mankabady, S., *The International Maritime Organization*, I, London, Croom Helm, 1986, 281-287.

⁴⁹ Art. 98.2 LOSC. The view that a natural consequence of this obligation is to include, when necessary, the granting of access in cases of distress or *force majeure*, is supported by A. Blanco-Bazan (*o.c.*, 2). The SOLAS Convention of 1 November 1974 also contains special provisions relating to the organization of search and rescue services (see Regulation 15 in Chapter V of the Annex).

⁵⁰ Declerc, J.P., note under Tribunal administratif de Rennes, 14 May 1987, in Centre de droit maritime et aérien (Nantes), *Annuaire de droit maritime et aéro-spatial*, tome X, Paris, Pédone, 1989, (387), 394.

UN Law of the Sea Convention obliges states to protect and preserve the marine environment⁵¹. In case of pollution danger, states shall cooperate and to this end they shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment⁵². The Parties to the OPRC Convention undertake to take all appropriate measures to prepare for and respond to an oil pollution incident⁵³ and shall establish a national system for responding promptly and effectively to oil pollution incidents, including the designation of competent authorities and contact points as well as a national contingency plan for preparedness and response⁵⁴. States are requested to review the salvage capacity available to them and to report to the IMO⁵⁵. Public authorities shall facilitate the arrival and departure of ships engaged in disaster relief work, the combating or prevention of marine pollution, or other emergency operations necessary to ensure maritime safety, the safety of the population or the protection of the marine environment⁵⁶. The North Sea states must organize surveillance activities with a view to fighting oil pollution⁵⁷. The obligation to grant access to ships in distress may be regarded as a corollary to these specific treaty obligations.

2.2.2. Critical Assessment

The common assertion that the right of entry is merely a rule of unwritten customary law gives the wrong impression: this right clearly has deeper and firmer roots than such an assertion suggests. Even so the theory does have its defects. First of all it does not perfectly conform to the modern practice of states, with ships in distress frequently being denied entry, and moreover, the theory of absolute right of entry ignores the environmental risks that the entry of a damaged ship might entail. It is therefore hardly surprising that other views have been propounded in recent years.

2.3. Second Theory – The absolute right of refusal

2.3.1. Scope and legal basis

The theory that coastal states or port authorities have a clear-cut right to refuse ships in distress and that in consequence there is no right of access

⁵¹ Art. 192 LOSC. In the opinion of W. van der Velde, this duty cannot be fulfilled without offering a place of refuge to ships in distress (“The position of coastal states”, *o.c.*, 11).

⁵² Art. 199 LOSC.

⁵³ Art. 1 (1) of the International Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November 1990, *ILM*, vol. XXX, 1991, 733.

⁵⁴ Art. 6 (1) OPRC Convention.

⁵⁵ Item 1 of Resolution 8 of the OPRC Conference, attached to the OPRC Convention.

⁵⁶ See Standards 6.8-6.10 of the Facilitation Convention, London, 9 April 1965. Legal theory advances similar arguments (see Lucchini, L. and Voelckel, M., *o.c.*, 299, no. 904).

⁵⁷ Art. 6A of the Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances, Bonn, 13 September 1983 (as amended) provides: “Surveillance shall be carried out, as appropriate, by the Contracting Parties in their zone of responsibility or zones of joint responsibility referred to in Article 6 of this Agreement. The Contracting Parties may bilaterally or multilaterally conclude agreements on or make arrangements for co-operation in the organisation of surveillance in the whole or part of the zones of the Parties concerned”.

whatsoever is supported only by a very small minority of international law specialists⁵⁸.

They argue first of all that the state has sovereignty over its territorial and inland waters⁵⁹ and that this sovereignty is not restricted by any express treaty provision regarding an alleged right of access⁶⁰.

Second, reference is made to the basic right of self-protection of states under international law and to the law of necessity⁶¹.

Third, the provision of the International Statute of Maritime Ports is invoked that allows deviations from the Statute when the safety or vital interests of the state are imperilled⁶².

Fourth, it is possible to argue *a fortiori* that if a coastal state is allowed to intervene on the high seas to prevent environmental pollution – for example by towing a tanker away or setting it on fire – it may most certainly refuse a ship of this sort entry to its ports.

In addition an argument is derived from the contemporary attitude of states to the effect that the international custom of guaranteeing access no longer exists. This is because the repeated refusals mean that the general practice of states (*usus*) has changed and the conviction that there is a legal duty to grant access (*opinio juris*) has been abandoned by states. Some writers have cautiously concluded that “le droit coutumier “de refuge” n’est pas à l’abri des “fissures” auxquelles s’expose une pratique qui offre de nombreux

⁵⁸ See in this respect Somers, E., *o.c.*, 35, no. 26.

⁵⁹ See art. 2.1 LOSC.

⁶⁰ In the *m/v Attican Unity* decision of 7 February 1986 the Dutch Supreme Court assessed the legality of the prohibition to enter the territorial sea imposed on a ship that was on fire. The Supreme Court was of the opinion that as the state drew its authority to impose a prohibition from its sovereignty over Dutch territorial waters, and as this prohibition had been imposed by or in the name of officials who had been made responsible for the supervision and administration of these waters, the absence of any legal framework or other generally binding provision on which the authority of the officials who had in fact imposed the prohibition was specifically based, could not lead to the conclusion that the prohibition had been given without authority (*Hoge Raad*, 7 Februari 1986, *m/v Attican Unity*, *Schip en schade*, 1986, 159, no. 61, *Nederlandse Jurisprudentie*, 1986, 1825, no. 477, with decision *a quo*, concl. Adv.-Gen. Biegman-Hartogh, and note H. Meijers, *Netherlands Yearbook of International Law*, vol. XVIII, The Hague, Martinus Nijhoff, 1987, 402). In many other countries the public authority would have needed an explicit legal basis for refusing access to a ship (for Belgium, see e.g. art. 2, § 1 of the Law of 5 June 1972 on the safety of shipping and art. 5, 27 and 28 of the Royal Decree of 4 August 1981 laying down the police and shipping regulations for the Belgian territorial sea, the ports and beaches of the Belgian coast).

⁶¹ See with respect to the right of self-preservation and the right of necessity Nguyen, Q.D., Daillier, P. and Pellet, A., *Droit international public*, Paris, L.G.D.J., 2002, 786-787, no. 482; Van Bogaert, E.R.C., *Volkenrecht*, Antwerp, Kluwer rechtswetenschappen, 1991, 153, no. 51; for the principle of protection, see Korthals Altes, A., *Prijds der zee. Raakvlak van redding, strandrecht en wrakwetgeving*, Zwolle, W.E.J. Tjeenk Willink, 1973, 299-300; see also Nelissen, F.A., *o.c.*, 206-208.

⁶² Art. 16 reads: “Measures of a general or particular character which a Contracting State is obliged to take in case of an emergency affecting the safety of the State or the vital interests of the country may, in exceptional cases, and for as short a period as possible, involve a deviation from the provisions of Articles 2 to 7 inclusive; it being understood that the principles of the present Statute must be observed to the utmost possible extent”.

Places of Refuge

exemples de refus opposé à des navires cherchant refuge”⁶³; other authors have gone further and have concluded that the customary law right of access has entirely disappeared from the international law system⁶⁴.

Furthermore it has been asserted that the old customary law right of access was based solely in the desire to save lives and was therefore motivated by purely humanitarian considerations, which are irrelevant when it is a matter of protecting ships, cargoes, and commercial interests and when crews can usually be safely evacuated by helicopters, lifeboats and tugs⁶⁵.

Elsewhere it has been argued in some case law and legal theory that the right of access is a thing of the past because the right developed and won recognition in an era of relatively small sailing ships that did not constitute an environmental hazard. Nowadays there are enormous pollution risks that did not have to be considered in the 19th century. For this reason it is difficult to argue for a right of access in the modern context⁶⁶. On the other hand, it was expected that with modern marine technology distress situations should be fairly infrequent⁶⁷; consequently, customary law on ships in distress would lose weight in this respect as well.

Finally the right to refuse ships in distress is said to be recognized in the London Intervention Convention^{68,69}, the London Salvage Convention 1989⁷⁰,

⁶³ Lucchini, L. and Voelckel, M., *o.c.*, II.2, 298, no. 903, where it must also be immediately pointed out that neither of these authors question the existence of the right.

⁶⁴ For a highly critical opinion see Maes, F., *o.c.*, item 7.2.4.

⁶⁵ Cf. the subtle decision regarding the *m/v Toledo*, cited below, footnote 126. The Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) state that article 24 on distress is limited to cases where human life is at stake (p. 192).

⁶⁶ In the *m/v Toledo* case (cited below, footnote 126), the Irish High Court (Admiralty) took the view that the right of a foreign vessel in distress to a safe haven has been modified in modern times due to countervailing considerations such as oil pollution or the danger of a vessel sinking where it would block a port or hinder navigation.

⁶⁷ Hydeman, L.M. and Berman, W.H., *o.c.*, 155.

⁶⁸ On the basis of the London Intervention Convention of 29 November 1969, and probably also on the basis of international customary law (Birnie, P., “Protection of the Marine Environment: the Public International Law Approach”, in de la Rue, C., *Liability for Damage to the Marine Environment*, London, Lloyd’s of London Press, 1993, (1), 18) the coastal state may take all required measures on the high seas to prevent or combat pollution. In 1978 the British authorities used their authority to intervene beyond territorial waters to prevent salvors from towing the leaking “Christos Bitas” to Milford Haven. Under the heading “Measures to avoid pollution arising from maritime casualties”, art. 221 LOSC provides: “1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences. 2. For the purposes of this article, “maritime casualty” means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo” (for a comparison with the Intervention Convention, see i.a. Birnie, P., *o.c.*, 19). According to some the basis of the authority to intervene is the necessity situation in which the state finds itself (Treves, T., “La navigation”, in Dupuy, R.-J. and Vignès, D. (Ed.), *Traité du Nouveau Droit de la Mer*, Paris/Brussels, Economica/Bruylant,

the European Directives on Port State Control⁷¹ and Traffic Monitoring⁷², the Bonn Agreement Counter Pollution Manual⁷³ and the recent IMO Guidelines on Places of Refuge⁷⁴.

1985, (687), 716), while according to others it is the right of self-protection (Douay, C., "Le régime juridique de l'assistance en mer selon la Convention de Londres du 28 avril 1989", *Droit maritime français*, 1990, (211), 213; Korthals Altes, A., *o.c.*, 299). I. Nehlmeyer-Günzel has painstakingly and in the author's view convincingly demonstrated that the British intervention in the Torrey Canyon disaster in 1967 could be based neither on self-protection nor on self-defence, nor on the necessity situation, although the latter could in principle be considered as a possible justification (*Der maritime Umweltschutz dargestellt anhand von Tankerunfällen*, Inaugural-Dissertation, Münster, Westfälische Wilhelms - Universität, 1986, 104 et seq.).

⁶⁹ With respect to the Intervention Convention it has been argued that the fact that this convention only refers to interventions on the high seas is an *a fortiori* confirmation that the coastal state can intervene in its territorial and internal waters. Denying the power of the state to intervene in the latter areas could give rise to absurd situations: a coastal state could intervene on the high seas to deal with a drifting ship, but would lose this power if wind and tide were to push the ship towards its territorial sea, and the state would have stop its efforts (Jeanson, Ph., "Les mesures d'urgence et la coordination interministerielle", in *La protection du littoral. 2e colloque de la Société Française pour le Droit de l'Environnement*, Trevoix, Publications Périodiques Spécialisées, 1979, (321), 344-345; comp. also Lucchini, L. and Voelckel, M., *o.c.*, II.2, 265, no. 885; Mankabady, S., *o.c.*, I, 366; Riphagen, W., *o.c.*, 207, no. 27). As is explained below this position can be disputed.

⁷⁰ Art. 9 provides under the heading "Rights of coastal States": "Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations".

Although the 1989 Convention does not seek to define the rights to intervene, the fact that it made specific reference to the right of the coastal state to give directions in relation to salvage operations might indicate that such a right is now generally recognized (Gaskell, N.J.J., "The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990", *Tulane Maritime Law Journal*, 1991, (1), 20).

Art. 11 provides under the heading "Co-operation": "A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general".

This considers not only the problem of the maritime leper, which is discussed here, but also that of municipal legislation prohibiting foreign salvors from operating in national waters, while sending a local contractor might cause disastrous delays (Gaskell, N.J.J., *ibid.*, 20).

⁷¹ See in particular art. 11.6 of the Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control), OJ L 157, 7 July 1995, 1 (as amended), which provides under the heading "Follow-up to inspections and detention": "Notwithstanding the provisions of paragraph 4, access to a specific port may be permitted by the relevant authority of that port State in the event of *force majeure* or overriding safety considerations, or to reduce or minimize the risk of pollution or to have deficiencies rectified, provided adequate measures to the satisfaction of the competent authority of such Member State have been implemented by the owner, the operator or the master of the ship to ensure safe entry". Although this text is drafted in permissive terms, it emphasizes the possibility of admitting ships in distress and can hardly be interpreted as a basis for the driving away of such ship by port states.

Places of Refuge

With specific regard to the territorial sea, it is argued that the right of innocent passage can only be exercised for the purposes of normal navigation⁷⁵. Ships not engaged in such normal passage fall under the unlimited sovereignty of the coastal state⁷⁶ and may be driven off by the latter⁷⁷. Moreover the right of innocent passage applies only to ships and not to wrecks⁷⁸. Further, it is argued that the passage of ships posing a threat cannot be regarded as innocent and these ships could therefore be stopped by the coastal state⁷⁹. Passage through the territorial sea to a port to which access has been refused can *ipso facto* not be demanded. Whenever entry into a port is denied, this has a direct repercussion on the right of passage through the

⁷² Directive 2002/59/EC of the European Parliament and the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5 August 2002, 10. For more about the Traffic Monitoring Directive, see below, item 2.4.1.

⁷³ Interim Chapter 26, that contains i.a. the following passage: "However, at present there exists no binding obligation on the part of a Contracting Party to offer predefined places of refuge or safe havens".

⁷⁴ See below, footnotes 142 and 157. Footnote 1 in Appendix 1 to Annex 1 to the IMO Assembly Resolution on Guidelines on Places of Refuge states: "It is noted that there is at present no international requirement for a State to provide a place of refuge for vessels in need of assistance".

⁷⁵ In the Long Lin case (cited below, footnote 126), the notion of passage was understood by the Dutch Supreme Court as making use of a fast and uninterrupted navigational route through the territorial sea for the purpose of normal traffic; according to the Court the shipping company could not invoke the right of innocent passage because the ship had entered Dutch territorial and coastal waters in a damaged condition. In the *m/v Attican Unity* decision (cited above, footnote 59) the Dutch Supreme Court declared that causing the entry into the Dutch territorial sea of a burning ship by salvors with the consent of the captain with the mere object of running the ship onto the coast could not be accepted as a passage. The Supreme Court that such an entry had "another intention" than that described in the definitions of passage set out in the Convention. Advocate-General Biegman-Hartogh had argued before the Court that the purpose of the right of innocent passage was only "to open the shortest possible route for all ships through the seas and to and from ports, and not for example to offer refuge for ships in distress". Legal theory had similarly argued that a ship that had sustained an accident and which was in the territorial sea and was causing environmental pollution there or threatened to do so, was no longer making a passage and thus falls entirely under the sovereignty of the coastal state, which may take all measures that it sees fit, at least insofar the proportionality principle is respected (see Churchill, R.R. and Lowe, A.V., *The law of the sea*, Manchester, Manchester University Press, 1999, 353).

⁷⁶ See also Churchill, R.R. and Lowe, A.V., *o.c.*, 87; Nelissen, F.A., *o.c.*, 77-78.

⁷⁷ O'Connell, D.P., *o.c.*, I, 269-270; see also Treves, T., "Navigation", in Dupuy, R.-J. and Vignès, D. (Ed.), *A Handbook on the New Law of the Sea*, II, Dordrecht/Boston/Lancaster, Martinus Nijhoff Publishers, 1991, 911.

⁷⁸ See i.a. Lucchini, L. and Voelckel, M., *o.c.*, II.2, 223, no. 872.

⁷⁹ Art. 25.1 LOSC states: "The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent". Certain writers remarked that if the ship in distress constituted a threat to the peace, public order, or safety of the coastal state could under the Geneva Convention *ipso facto* be regarded as not innocent. "A logical outgrowth of this argument", they go on, "is that a vessel in distress could be excluded for the very reason that places it in distress. For instance, where a vessel is severely damaged, it may be unable to comply with local navigation or other types of safety regulations. Passage, therefore, would not appear to be "innocent" as this term is defined in the convention, and the coastal State could take action to prevent such passage" (Hydeman, L.M. and Berman, W.H., *o.c.*, 160 and 169).

territorial sea. Navigation to a port where entry is prohibited, is not to be considered a case of passage within the meaning of the treaty provisions governing innocent passage⁸⁰; the result is that no right to enter the territorial sea can be claimed either. Moreover the UN Law of the Sea Convention provides that, in the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal state has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject⁸¹. This implies that the coastal state may prevent ships that do not comply with the requirements for entering the internal waters (e.g. as to pollution prevention, manning and equipment) from passing through the territorial sea, or may even expel them from the territorial sea⁸². In general, foreign ships exercising the right of innocent passage through the territorial sea must comply with all laws and regulations adopted by the coastal state⁸³. The coastal state may adopt such laws and regulations in respect of i.a.⁸⁴ the safety of navigation and the regulation of maritime traffic, the protection of navigational aids and facilities and other facilities or installations, the conservation of the living resources of the sea, the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof⁸⁵. More in particular,

⁸⁰ Comp. Treves, T., "La navigation", *o.c.*, 754, footnote 9; Treves, T., "Navigation", *o.c.*, 910, footnote 208; see also Gidel, G., *o.c.*, III.I, 206: "Si le port n'est pas ouvert au commerce international, il n'y a pas lieu de considérer le navire comme étant juridiquement en "passage"; mais si le port est libre, le régime du passage doit s'appliquer au navire qui s'y rend"; also de Vries Reilingh, O.G., *o.c.*, 33-34; McDougal, M. and Burke, W.T., *The Public Order of the Oceans*, New Haven and London, Yale University Press, 1962, 237.

⁸¹ See art. 25.2 and also art. 211.3 LOSC. The foregoing principle can easily be illustrated from Belgian law, which no doubt is similar in this respect to that of many other nations. According to the police and shipping regulations for the Belgian territorial sea, the ports and beaches of the Belgian coast, no vessel may enter a harbour on the coast when, by reason of its size, draught or any other circumstance, it poses a threat or a risk to the safety of the vessel itself, or of navigation, to harbour and other works, or to the environment in general. Whenever special circumstances require so, the local authority in charge may grant however an exception, imposing certain conditions if needed (see art. 5, § 1 of the Royal Decree of 4 August 1981).

⁸² Somers, E., *o.c.*, 84, no. 67; comp. Gidel, G., *o.c.*, III.I, 215, footnote 1; see also art. VI of the resolution of the Institut de Droit International of 12 September 1969 concerning "Measures concerning accidental pollutions of the seas": "States have the right to prohibit any ship that does not conform to the standards set up in accordance with the preceding articles for the design and equipment of the ships, for the navigation instruments, and for the qualifications of the officers and members of the crews, from crossing their territorial seas and contiguous zones and from reaching their ports" (*Annuaire de l'Institut de Droit International. Session d'Edimbourg 1969*, II, Basel, Editions juridiques et sociologiques, (380), 382).

⁸³ Art. 21.4 LOSC.

⁸⁴ The list of matters which can be the subject of legislation contained in the text of the Convention is exhaustive (Treves, T., "La navigation", *o.c.*, 760-761).

⁸⁵ Art. 21.1 LOSC. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards (art. 24.2). Art. 211.4 LOSC adds: "Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels".

the UN Law of the Sea Convention confirms that states may establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals; they shall give due publicity to such requirements and shall communicate them to the competent international organization⁸⁶.

2.3.2. Critical Assessment

The above arguments appear to be more convincing than they really are. The theory of the absolute right of refusal ignores the virtually unanimous legal doctrine regarding international customary law as well as the various treaties and recent judgments that, as indicated above, do in fact confirm the right of access. An objection to this right on the basis of the mere sovereignty of the state over its internal and territorial waters, can therefore not be sufficient grounds for the refusal of access.

The arguments advanced by the opponents of the right of access based on the treaty status of the territorial sea are similarly irrelevant. The right of access in the event of maritime distress is a general and independent rule of law⁸⁷, which applies on the high seas, in territorial waters, internal waters, international rivers, lakes, canals and ports⁸⁸, and can therefore be invoked regardless of the right of innocent passage through the territorial sea⁸⁹. To the extent that the objections are based on the limitations of the right of innocent passage they are necessarily beside the point. It has moreover already been shown in the foregoing that pursuant to the treaty regime of innocent passage, ships in distress do effectively enjoy a right to innocent passage through the territorial sea⁹⁰ for as long as they do not become a wreck⁹¹. On the basis of

⁸⁶ Art. 211.3 LOSC.

⁸⁷ Meijers, H., *o.c.*, 1838.

⁸⁸ de Zayas, A.-M., *o.c.*, 287.

⁸⁹ The right of access in the event of maritime distress is much more absolute because the limitations on the right of innocent passage contained in the LOSC do not apply, it is more far-reaching because it even grants immunity from the application of the law of the coastal state and its scope of application *ratione loci* is broader because it grants not only right of access to the territorial sea, but also to internal waters and even to closed ports.

⁹⁰ Art. 17 LOSC, reflecting a rule of customary international law (Shaw, M.N., *International Law*, Cambridge, Cambridge University Press, 2003, 507). Passage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility (art. 18.1 LOSC). Undoubtedly it is possible to invoke the right of innocent passage to enter the territorial waters of another state with a view to reaching a shipyard on the inland waters of that state. The quoted article expressly provides that the passage also refers to sailing to a "port facility" (French: "installation portuaire"). A ship repair yard or dock is also a port facility of this kind. With respect to the notion of "port" in general, see i.a. Van Hooydonk, E., *Beginnselen*, *o.c.*, 10-11, no. 16; see also Gidel, G., *o.c.*, II, 19: "Les ports sont les lieux généralement disposés par la nature et aménagés en vue de permettre le stationnement des navires aux fins d'y procéder en sécurité aux opérations que comportent le commerce et les transports maritimes ou les besoins de la navigation". Ports of repair are thus clearly regarded as ports.

⁹¹ For a further discussion of the definitions of ship and wreck, see Van Hooydonk, E.,

the numerous available definitions of a ship, Schubert among others distinguishes an objective and a subjective criterion. In objective terms the ship must be suitable for navigation, it must in consequence have a minimum of manoeuvrability and buoyancy. It does not have to have its own means of propulsion; only a ship no longer capable of being navigated is a wreck. In addition there is the subjective criterion of the abandonment or the *animus derelinquendi*, i.e. a ship becomes a wreck when it is abandoned, voluntarily or otherwise, by its owners or crew. Abandonment is, however, not the same as leaving the ship. When persons remain at the scene of the casualty in order to recover the ship, there is no abandonment⁹². In most cases ships in distress will not meet the criteria for being regarded as a wreck. In general it may be assumed that the mere fact that a damaged ship wishes to continue the voyage under the command of the master, perhaps with the help of tugs or salvage vessels, with or without the use of its own engines, and even incapable of being independently steered, shows that the damaged ship is still a ship and not a wreck. As we have already seen a ship in distress may even stop and anchor in the territorial sea⁹³. It is generally accepted that the passage of the territorial sea may not be conditional on obtaining authorization or consent⁹⁴.

"Some remarks", *o.c.*, 121-123; see also i.a. Balmond, L., "L'Épave du navire", in Société française pour le droit international, *Le navire en droit international*, Paris, Pedone, 1992, 69-98. Even when the ship is drifting without control, it does not necessarily or immediately lose its right of innocent passage. If the ship requests and expects towing assistance, and is therefore only temporarily adrift, it continues to enjoy the right to innocent passage. However, when the ship is irreversibly adrift, it becomes a wreck and no longer has a right to passage.

⁹² Schubert, F., "La condition juridique des épaves maritimes: problèmes de droit international public", in *Espaces et ressources maritimes*, No. 5, Paris, Pedone, 1991, (125), 126-127; compare in this respect Lucchini, L. and Voelckel, M., *o.c.*, II.2, 41-42, no. 787.

⁹³ Sinking and then lying on the seabed of course no longer fall under the idea of "stopping and lying at anchor" (Nelissen, F.A., *o.c.*, 125, with reference to Münch). Nor does the notion of passage apply to the oil tanker that lies for several days at anchor in order to select a port of discharge, as this kind of anchoring serves only commercial interests (English view: see Lowe, V., "The United Kingdom and the Law of the Sea", in Treves, T. (Ed.), *The Law of the Sea. The European Union and its Member States*, The Hague/Boston/London, Martinus Nijhoff Publishers, (521), 528).

⁹⁴ For example European member states and the United States of America made a formal protest to Libya when that state decided to impose notification requirements for the passage of its territorial sea; the note of protest recorded that no international regulation at all provides for a system of authorization for admission to the territorial sea (see i.a. Treves, T., "Codification du droit international et pratique des Etats dans le droit de la mer", in Académie de Droit International, *Recueil des cours*, 1990, IV, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1991, 113). This principle applies even with respect to nuclear-powered ships (Wolfrum, R., "The emerging customary law of marine zones: state practice and the convention on the law of the sea", *Netherlands Yearbook of International Law*, vol. XVIII, 1987, Martinus Nijhoff Publishers, 131) and ships that carry radioactive, or other intrinsically dangerous or harmful substances (see art. 23 LOSC, that explicitly assumes the existence and the right of passage of these ships, and in this connection Treves, T., "La navigation", *o.c.*, 766-767; also Treves, T., "Navigation", *o.c.*, 926). According to the majority view even foreign warships enjoy a right of passage (see i.a. Brown, E.D., *The International Law of the Sea*, I, Aldershot, Dartmouth, 1994, 64-72). One of the arguments is that the treaties and conventions explicitly grant this right to "all ships" (see the headings of Subsection A of Section 3 of Part II of the UN Law of the Sea Convention). There are therefore no grounds for excluding ships on the way to a repair yard as a general category. In principle these ships too enjoy the right of passage.

If the authority has objections and wishes to prohibit the passage it must base its decision on clear grounds accepted by international law. The argument that the passage of ships at risk does not have the required innocent character is incorrect. Under the UN Law of the Sea Convention, passage can only lose its non-innocent character, when the active conduct of the ship falls under any of the non-innocent activities listed in the convention, such as “any act of *wilful* and serious pollution contrary to this Convention⁹⁵” and “any [...] activity not having a direct bearing on passage”⁹⁶; mere passive characteristics are not to be taken into account⁹⁷. For this reason a casualty ship navigating through the territorial sea cannot be said *ipso facto* to be non-innocent⁹⁸. Further, the UN Law of the Sea Convention expressly provides that the coastal state shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with the Convention. In particular, in the application of the Convention or of any laws or regulations adopted in conformity with it, the coastal state shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage⁹⁹. Without the protection afforded by this rule, it might be possible for laws and regulations promulgated under the guise of protecting the marine environment or the prevention of infringement of customs, fiscal, immigration or sanitary laws and regulations, to have the practical effect of denying or impairing innocent passage¹⁰⁰. The conclusion is that the theory of

⁹⁵ Art. 19.2, (h) LOSC.

⁹⁶ Art. 19.2, (l) LOSC. During the drafting of the UN Law of the Sea Convention there was even a proposal for expressly providing in the text of the convention that the listed activities of a non-innocent nature, including those activities that have no direct bearing on passage, are yet tolerated as being innocent if they are performed with the prior consent of the coastal state or if they are made necessary by reason of *force majeure* or with a view to rendering assistance to persons or ships in danger or in distress (see the successive text proposals in Center for Oceans Law and Policy, *o.c.*, II, 168-173).

⁹⁷ Brown, E.D., “Freedom of navigation: Progress Report on the Third United Nations Conference on the Law of the Sea”, in Glansdorp, C.C. (Ed.), *Marine traffic systems*, Delft, Delft University Press, 1976, (149), 154; Brown, E.D., *The International Law of the Sea*, *o.c.*, I, 57; Nelissen, F.A., *o.c.*, 74-75; Smith, B., “Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection”, *Columbia Journal of Transnational Law*, 1982, (49), 75.

⁹⁸ This is in fact confirmed in Smith’s criticism, which argues that the summary of “innocent” activities in the UN Sea Convention is far too limited, particularly where it determines that only intentional and severe pollution is regarded as being non-innocent. According to Smith, the LOSC is an encouragement to deny perhaps the most effective component of a state’s legal authority to prevent environmental damage: the right to prohibit entry into its territory of vessels possessing characteristics that render them a material threat (Smith, B., *o.c.*, 89-90). This critical analysis – which is shared by others (see for example Nelissen, F.A., *o.c.*, 121, with references) – merely confirms how much the UN Sea Convention really emphasizes the right of innocent passage. The fact that the passage of a burning ship can indeed be innocent, was confirmed by the Advocate-General in the Dutch Supreme Court in the ruling on the *m/v Attican Unity* (cited above, footnote 60). Even the infringement of national laws and regulations is not sufficient to disallow the innocent nature of the passage (see i.a. Brown, E.D., *The International Law of the Sea*, *o.c.*, I, 57).

⁹⁹ Art. 24.1 LOSC.

¹⁰⁰ Center for Oceans Law and Policy, *o.c.*, II, 226.

the absolute right of refusal of access for ships in distress cannot be based on the legal regime of passage through the territorial sea.

Nor can the Intervention Convention be invoked to restrict the right of innocent passage through the territorial sea, because the rules of the UN Law of the Sea Convention on innocent passage give the coastal state specific instruments for the protection of its interests¹⁰¹ and constitute a self-contained whole¹⁰². Next, the Intervention Convention is directed towards the adoption of specific measures of a physical nature, such as the towing, running aground, setting on fire or destruction of leaking tankers¹⁰³. Under the

¹⁰¹ Cf. art. 25 LOSC entitled "Rights of protection of the coastal State".

¹⁰² The powers of the coastal state in respect of the protection of its interests are exhaustively described and regulated in the treaty regulations concerning the right of innocent passage. In the author's view Nelissen responds rightly to the question of what powers of intervention the coastal state has in its territorial sea by observing that the drafters of the UN Law of the Sea Convention wished, in the absence of any specific provisions, to refer to the arrangements for innocent passage (Nelissen, F.A., *o.c.*, 118).

¹⁰³ Annex III to the European Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods defined the "Measures available to Member States under international law" under Article 6 (3) of the Directive as follows: "Where, following upon an incident or circumstance of the type described under Article 6 (1) and (2) in regard to a vessel falling within the scope of this Directive, the competent authority of the Member State concerned considers, in the framework of international law, that it is necessary to prevent, mitigate or eliminate a serious and imminent danger to its coastline or related interests, the safety of other ships, the safety of crews, passengers or people ashore or to protect the marine environment such public authority may, in particular:

- restrict the movement of the vessel or direct it to follow a certain course. This requirement shall not override the master's responsibility for the safe conduct of his vessel,

- request the master to provide the relevant information from the check list in Annex II of this Directive and confirm that a copy of the list or manifest or appropriate loading plan referred to under paragraph 9 of Annex I is available on board".

The right to refuse ships in distress access to ports or places of refuge is not mentioned here.

Annex IV to the new EU Traffic Monitoring Directive (cited hereunder at 2.4.1), which supersedes Directive 93/75/EEC, reads:

"Measures available to Member States in the event of a threat to maritime safety and the protection of the environment
(pursuant to Article 19(1))

Where, following an incident or circumstance of the type described in Article 17 affecting a ship, the competent authority of the Member State concerned deems, within the framework of international law, that it is necessary to avert, lessen or remove a serious and imminent threat to its coastline or related interests, the safety of other ships and their crews and passengers or of persons on shore or to protect the marine environment, that authority may, inter alia:

- (a) restrict the movement of the ship or direct it to follow a specific course. This requirement does not affect the master's responsibility for the safe handling of his ship;

- (b) give official notice to the master of the ship to put an end to the threat to the environment or maritime safety;

- (c) send an evaluation team aboard the ship to assess the degree of risk, help the master to remedy the situation and keep the competent coastal station informed thereof;

- (d) *instruct the master to put in at a place of refuge in the event of imminent peril, or cause the ship to be piloted or towed*" (emphasis added).

This text does not deny the right of entry for ships in distress either.

Places of Refuge

Intervention Convention, states “may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate *grave and imminent danger* to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, *which may reasonably be expected to result in major harmful consequences*” (emphasis added)¹⁰⁴. The risks associated with the approach of a ship in distress must be exceptionally specific and serious before the state may intervene on the high seas. Concluding *a fortiori* from the power of the state to take measures in respect of ships at risk on the high seas that the state can always refuse such ships to proceed to a port of refuge is incorrect, because the drafters of the convention express no opinion either way about the right of access. It can therefore not be argued that the Intervention Convention provides a general legal basis for denying access to ships in distress.

Necessity within the meaning of general international law may only be invoked by a state when there is no other way of maintaining its existence: the breach of the law must be the last possible resort for defending the state’s essential interests against severe and immediate dangers. The right of necessity must be limited to strictly authorized applications; it is subject to very stringent conditions of application¹⁰⁵. Its use will always remain “*tout à fait exceptionnelle*”¹⁰⁶. A classic example of an intervention, whereby a foreign ship was destroyed on the high seas in order to limit the consequences of marine pollution¹⁰⁷, is the case of the *Torrey Canyon*¹⁰⁸, where the effective

¹⁰⁴ Art. I.1; see also art. I.1 of the 1973 Protocol to the Intervention Convention.

¹⁰⁵ Article 25 of the Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) provides under the heading “Necessity”: “1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity”.

The Commentaries to the draft articles explain that stringent conditions are imposed before any necessity plea is allowed, and emphasize the exceptional nature of necessity (p. 202).

¹⁰⁶ Nguyen Q.D., Daillier, P. and Pellet, A., *o.c.*, 787, no. 482.

¹⁰⁷ Nguyen Q.D., Daillier, P. and Pellet, A., *ibid.*, 787, no. 482.

¹⁰⁸ The Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) expressly refer to this incident as an example of a necessity situation: “In March 1967 the Liberian oil tanker *Torrey Canyon* went aground on submerged rocks off the coast of Cornwall outside British territorial waters, spilling large amounts of oil which threatened the English coastline. After various remedial attempts had failed, the British Government decided to bomb the ship to burn the remaining oil. This operation was carried out successfully. The British Government did not advance any legal justification for its conduct, but stressed the existence of

existence of a necessity situation was disputed by some legal theorists¹⁰⁹. In any case this incident resulted in the drafting of the aforementioned Intervention Convention, which consequently is regarded as the legal articulation of the right to intervene in a necessity situation¹¹⁰. If any parallels at all can be drawn between intervention on the basis of necessity and the refusal of access to a ship in distress because of the danger to the coastal state, one must logically conclude that the latter is only possible as *ultimum remedium*, and that every refusal of access must comply with the strict conditions on invoking the necessity situation. The fact that coastal states are often prepared to admit ships in distress after financial guarantees have been provided, shows in the author's view that the right to refuse ships of this kind can usually not be based on a necessity situation. Mere financial or economic concerns by the state cannot be regarded as vital interests the protection whereof justifies invoking necessity¹¹¹.

The International Statute of Maritime Ports is also incorrectly used by the defenders of the absolute right of refusal, precisely because the drafters of the statute assumed that the right of access was something self-evident and absolute¹¹².

The change in practice of some states might not simply indicate the disappearance of a rule of international customary law, but could equally be viewed, or perhaps should be viewed, as breaches of this rule¹¹³. The fact that a state may in certain circumstances refuse access, does not necessarily imply that this right of access does not exist, but may also be due to the relative nature of the right¹¹⁴. Recent state practice does in fact include various

a situation of extreme danger and claimed that the decision to bomb the ship had been taken only after all other means had failed. No international protest resulted. A convention was subsequently concluded to cover future cases where intervention might prove necessary to avert serious oil pollution" (p. 199).

¹⁰⁹ Nehlmeyer-Günzel, I., *o.c.*, 122 et seq.

¹¹⁰ See above, footnote 68.

¹¹¹ See Nehlmeyer-Günzel, I., *o.c.*, 128, where it is stated in connection with the threat of economic loss in the Torrey Canyon case: "Diese rein materiellen Verluste und Aspekte nehmen jedoch kein existenzbedrohendes Ausmaß an und rechtfertigen aus diesem Grunde nicht die Berufung auf den Notstand".

¹¹² See above, footnotes 30 and 31.

¹¹³ According to the International Court of Justice there is no requirement that, in order to establish a rule of customary law, state practices should be in rigorous conformity with that rule. If a state acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the state's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule (ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, [1986] ICJ Rep 14, 97, no. 186). It is therefore a matter of examining the cases where access has been refused in further detail in order to see whether the refusal was based on the denial of the right of access and nothing else, or on exceptions to the rule invoked by the state. To the extent the latter is the case, the principle of the right of access would tend to be confirmed rather than undermined. Here the exception does indeed "prove" the rule.

¹¹⁴ The opinion of the Irish High Court (Admiralty) in the *m/v Toledo* case (cited below, footnote 127) was that the right of access in the event of maritime distress still applied, but that it was not an absolute right; for a similar opinion see Devine, D.J., *o.c.*, 230; Kasoulides, G.C., *o.c.*, 184.

examples of the reaffirmation of the right of access¹¹⁵. The practice of states reveals new and additional applications of the right: for example ships in distress have now been given the right to enter, by way of exception, the safety zones around artificial installations on the British continental shelf¹¹⁶.

The suggestion that the right of access would lose importance due to the improvement of marine technology and the fall in incidents of maritime distress is clearly contradicted by practical experience. The objection that the right of access is an anachronism because of the associated environmental risks is patently false. The recent incidents with the Erika, the Castor and the Prestige clearly demonstrate that in the light of modern environmental problems the right of access should be encouraged. Recent initiatives by the IMO, CMI and EU have in fact been directed towards restoring the right of access albeit as part of a step-by-step process. The interests of the environment are in most cases better served by granting access rather than sending the ship in distress back out to sea. The argument that the right of access is an anachronism in the modern shipping context is therefore invalid as well.

The position that the old right of access served only humanitarian objectives is contradicted by the fact that assistance must also be given to the ships themselves¹¹⁷ and that ships are traditionally exempt from levies and taxes¹¹⁸. If the maritime distress theory were to have only humanitarian objectives, it is difficult to understand why favourable financial arrangements should be granted to ships in distress – and their owners and/or operators. In the author's view the maritime distress theory does have humanitarian underpinnings but cannot be reduced to the merely humanitarian dimension: as expressed by French case law, there is a system of general generosity in respect of the ship in distress¹¹⁹. For these reasons, the position that the right

¹¹⁵ The internet page about places of refuge of the United Kingdom's Maritime and Coastguard Agency starts with the following statement: "Providing shelter for a casualty is in fact part of every port state's obligations. Thus the requirement to offer a place of refuge is not by any means a new burden on maritime states" (http://www.mcga.gov.uk/c4mca/mcga-dops_environmental/mcga-dops_cp_environmental-counter-pollution/mcga-dops_cp_sosrep_role/mcga-dops_cp_ncp_uk_response_to_salvage/mcga-dops_cp_places_of_refuge.htm) (consulted on 8 February 2004). This view was explicitly confirmed by R. Middleton, the competent representative of the Secretary of State (SOSREP), during the aforementioned international workshop held at Antwerp on 11 December 2003.

¹¹⁶ Lowe, V., "The United Kingdom", *o.c.*, 540-541; for other applications, see Bangert, K., "Denmark and the Law of the Sea", in Treves, T. (Ed.), *The Law of the Sea, o.c.*, (97), 103 (exception to the restrictions of the duration of access to internal waters for foreign vessels during wartime); Roucouas, E., "Greece and the Law of the Sea", *ibid.*, (225), 238 (exception to prior notification and authorization for foreign warships); art. 3 of the Spanish declaration upon signature of the LOSC, *ibid.*, (567), 568.

¹¹⁷ Art. 98.1 (c) LOSC obliges every state to require masters, after a collision, to render assistance "to the other ship, its crew and its passengers"; see also art. 8 Collision Convention 1910 and art. 11 Salvage Convention 1989, cited above, footnote 70.

¹¹⁸ See above, item 2.2.1.

¹¹⁹ A ship in distress is placed among civilized nations under the protection of good faith, humanity, and generosity (French case law: see Hydeman, L.M. and Berman, W.H., *o.c.*, 157).

of access cannot be claimed when the financial interests of the owner or the operator of the ship are at risk, appears to be incorrect.

The 1989 Salvage Convention was not intended to confirm the right of access, but neither was it intended to deny it, even though various special interest groups (including a rare alliance between ship owners and environmentalists) did make a vain attempt during the preparatory works to have the Convention include a clear obligation on states to admit damaged ships, open ports of refuge and prepare disaster plans. The preparatory work of the Salvage Convention shows no intentions whatsoever aimed at influencing or denying the right of entry in distress, although it was clear that parties did not wish to confirm the existence of this right in the convention either. One considered that the Convention had in the main to be a private law convention, and that it was not the proper instrument for establishing far-reaching duties of states¹²⁰. Whatever the case, the provisions of the Salvage Convention are clearly an advance on the merely contractual obligation resting on the owners of the salvaged property to co-operate with the salvors in order to obtain entry to a place of safety, which could not impose obligations on a third party such as a port authority¹²¹. Nonetheless the vagueness of the Salvage Convention is regrettable. Darling and Smith take the view that it is a matter for the national law whether a salvor is allowed to take legal action against a port authority in order to require it to permit entry to a port¹²². Like Gaskell one must conclude that the Convention only contains “a rather empty exhortation” regarding the admission of casualty ships¹²³. Nonetheless it is in no way possible to distil an absolute right to refuse ships in distress from the Convention¹²⁴.

The reference to EU law provisions that allegedly deny a right of access appears upon closer examination not to be particularly convincing either:

¹²⁰ See Gaskell, N.J.J., *o.c.*, 18; see also Douay, C., “Le régime juridique de l’assistance en mer selon la Convention de Londres du 28 avril 1989”, *Droit maritime français*, 1990, (211), 214.

¹²¹ Darling, G. and Smith, C., *LOF 90 and the new Salvage Convention*, London, Lloyd’s of London Press, 1991, 62.

¹²² Darling, G. and Smith, C., *ibid.*, 63.

¹²³ Gaskell, N.J.J., *o.c.*, 20. Recently, P. Bonassies commented on art. 11 of the Salvage Convention as follows: “Le texte témoigne certes de la bonne volonté du législateur international, mais l’imprécision qui l’entache lui enlève toute portée. Encore une disposition sans doute inoffensive, mais aussi bien inutile penseront à tout le moins les juristes français” (“La Convention de 1989 sur l’assistance”, *Droit maritime français*, 2003, (239), 247).

¹²⁴ Apparently, the customary right to enter a place of refuge was not even mentioned during the preparatory discussions. The emphasis was on the inclusion of an obligation to establish and pre-designate ports of refuge which would be open to ships in distress (see *The travaux préparatoires of the convention on salvage, 1989*, Antwerp, CMI, 2003, esp. 283-285, 680-681 and 701-702). An additional argument against the view that the 1989 Salvage Convention supports a general right to refuse access to ships in distress, is that the confirmation of the coastal state’s specific powers with respect to pollution threats contained in art. 9 would be totally irrelevant to refusals not based on environmental hazards but on the risk of the ship blocking the access routes to the port.

none of the quoted texts denies that such a right exists. On the contrary the general drift of these texts is to encourage the admission of ships in distress. The Bonn Agreement Counter-Pollution Manual referred to above merely denies the obligation to designate places of refuge in advance, but apparently it does not question the customary right of access.

A final objection to the theory of the absolute right of refusal is political rather than legal in nature and argues that the theory of an absolute right to refuse ships in distress leads to what can be termed a “not in my front pond syndrome”, analogous to the “not in my backyard syndrome”, with states all too easily driving ships in distress away, without having adequate regard for the interests of neighbouring states and coasts. A negative approach of this type leads to dangerous situations, incidents, and environmental disasters.

2.4. Third Theory – Balancing Interests

2.4.1. Scope and legal basis

A third view of the problem takes the line that there must always be a process of weighing the various elements against one another followed by an ad hoc decision. There is no question of an absolute right of access, nor of an absolute right of refusal, but rather one of a balance between the interests, rights, and/or risks concerned¹²⁵. When the interests or rights of the coastal state or the risks to which it is exposed are greater than those of the ship, access may be refused. This view has been applied in various recent judicial decisions (including the *Long Lin*¹²⁶ and the *Toledo*¹²⁷) and is supported by some legal writers¹²⁸. Hydeman and Berman contended that entry could be refused if the coastal state has reasonable grounds for concluding that the potential hazard to the safety of the coastal state outweighs the risk to life and property if entry is refused. The legal basis of this right of the coastal state was

¹²⁵ The literature, case law and administrative practice do not always make a clear distinction between interests, rights and risks.

¹²⁶ *Raad van State* (the Netherlands), 10 April 1995, m/v *Long Lin*, *Schip en schade*, 1995, 391, no. 95; see also *Raad van State* (the Netherlands), 10 April 1995, m/v *Long Lin*, *Schip en schade*, 1995, 394, no. 96.

¹²⁷ High Court (Admiralty) (Ireland), 7 February 1995, m/v *Toledo*, *ILRM*, 1995, 30. Barr J held: “[...] I am satisfied that the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent state is primarily humanitarian rather than economic. It is not an absolute right. If safety of life is not a factor, then there is a widely recognised practice among maritime states to have proper regard to their own interests and those of their citizens in deciding whether or not to accede to any such request. Where in a particular case, such as the ‘Toledo’, there was no risk to life as the crew had abandoned the casualty before a request for refuge had been made, it seems to me that there can be no doubt that the coastal state, in the interest of defending its own interests and those of its citizens, may lawfully refuse refuge to such a casualty if there are reasonable grounds for believing that there is a significant risk of substantial harm to the state or its citizens if the casualty is given refuge and that such harm is potentially greater than that which would result if the vessel in distress and/or her cargo were lost through refusal of shelter in the waters of the coastal state”.

¹²⁸ See i.a. Hydeman, L.M. and Berman, W.H., *o.c.*, 157 et seq.

sought in an obligation of the vessel to protect the interests of that state to the extent feasible, which would balance with the state's obligation to assist in the protection of persons and property aboard a vessel¹²⁹. A similar view was propounded by McDougal and Burke, who pointed out that coastal competence to exclude is not completely overridden by distress: "if the entry of a vessel in distress would threaten the health and safety also of the port and its populace, exclusion may still be permissible"¹³⁰. A similar weighing off of the needs of the ship and its company, and the threat it poses to the coastal state is defended by Meijers¹³¹.

In the view of the author this approach is also reflected in the demand for proportionality contained in the Intervention Convention¹³², in the IMO Guidelines on Places of Refuge¹³³ and in Article 20 of the European Traffic Monitoring Directive¹³⁴, which under the heading "Places of Refuge" provides:

"Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorization by the competent authority. Where the Member State considers it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.

Plans for accommodating ships in distress shall be made available upon

¹²⁹ Hydeman, L.M. and Berman, W.H., *o.c.*, 157.

¹³⁰ McDougal, M.S. and Burke, W.T., *o.c.*, 110, apparently agreed with by Nelissen, F.A., *o.c.*, 61.

¹³¹ Meijers, H., *o.c.*, 1838.

¹³² Art. V provides: "1. Measures taken by the coastal State in accordance with Article I shall be proportionate to the damage actual or threatened to it.

2. Such measures shall not go beyond what is reasonably necessary to achieve the end mentioned in Article I and shall cease as soon as that end has been achieved; they shall not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.

3. In considering whether the measures are proportionate to the damage, account shall be taken of-

(a) the extent and probability of imminent damage if those measures are not taken; and
(b) the likelihood of those measures being effective; and
(c) the extent of the damage which may be caused by such measures".

Indeed there was little discussion between the parties to the convention about the proportionality condition, because reasonableness and proportionality are standards already imposed by existing international law (see M'Gonigle, R.M. and Zacher, M.W., *Pollution, Politics, and International Law*, Berkeley/Los Angeles/London, University of California Press, 1979, 164).

¹³³ See below, footnote 155.

¹³⁴ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, OJ L 208, 5 August 2002, 10.

demand. Member States shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph”¹³⁵.

2.4.2. Critical Assessment

A balanced approach is, as such, much to be preferred. The theory has the advantage that it recognizes the old right of access *and* takes into account modern environmental concerns and other relevant interests. Nonetheless, it shows a number of defects. First of all the legal basis is not at all clear. No basis can, for example, be found for the position adopted by Hydeman and Berman to the effect that the ship is required to protect, insofar possible, the interests of the coastal state. Nor does the IMO Convention on Oil Pollution Preparedness, Response and Co-operation (the OPRC Convention)¹³⁶ impose any such general obligation on ships. The only valid basis for this theory is the right arising from the necessity situation referred to above, but as we have seen this can only be invoked as the *ultimum remedium*. The mere fact that certain interests of the coastal state could be imperilled is insufficient¹³⁷. Long ago Grasso remarked with respect to the precautions applicable to ships infected with disease: “repousser tout court les navires infestés, ce n’est pas prendre

¹³⁵ Article 18 of the Directive on “Measures in the event of exceptionally bad weather” provides:

“1. Where the competent authorities designated by Member States consider, in the event of exceptionally bad weather or sea conditions, that there is a serious threat of pollution of their shipping areas or coastal zones, or of the shipping areas or coastal zones of other States, or that the safety of human life is in danger:

(a) they should, where possible, fully inform the master of a ship which is in the port area concerned, and intends to enter or leave that port, of the sea state and weather conditions and, when relevant and possible, of the danger they may present to his/her ship, the cargo, the crew and the passengers;

(b) *they may take, without prejudice to the duty of assistance to ships in distress and in accordance with Article 20, any other appropriate measures, which may include a recommendation or a prohibition either for a particular ship or for ships in general to enter or leave the port in the areas affected, until it has been established that there is no longer a risk to human life and/or to the environment;*

(c) they shall take appropriate measures to limit as much as possible or, if necessary, prohibit the bunkering of ships in their territorial waters.

2. The master shall inform the company of the appropriate measures or recommendations referred to under paragraph 1. These do not however prejudice the decision of the master on the basis of his/her professional judgement corresponding to the SOLAS Convention. Where the decision taken by the master of the ship is not in accordance with the measures referred to under paragraph 1, he/she shall inform the competent authorities of the reasons for his/her decision.

3. The appropriate measures or recommendations, referred to under paragraph 1, shall be based upon a sea state and weather forecast provided by a qualified meteorological information service recognised by the Member State” (emphasis added).

¹³⁶ Cited above, footnote 53. For a discussion of the Convention see i.a. White, M.W.D., *Marine Pollution Laws of the Australasian Region*, Leichhardt (NSW), Federation Press, 1994, 70-72.

¹³⁷ Cf. Nehlmeyer-Günzel, I., o.c., 130: “Eine solche Einführung eines Güterabwägungsprinzips hätte zur Folge, dass durch eine solche Abwägung, die ja nur subjektiv durch den handelnden Staat erfolgen kann, eine Absenkung der Wertschwelle stattfindet und das Notstandsrecht zu einem Allheilmittel für lediglich interessenbezogene Völkerrechtsverletzungen wird”.

des précautions, c'est recourir au moyen le plus violent et le plus sauvage de se dispenser d'en prendre"¹³⁸. Indeed, the approach discussed here is not entirely free of risk. In the author's opinion the risk-balancing theory offers too many opportunities for abuse. It could even be said that the arrival of an ordinary, undamaged ships could threaten the health and safety of the port and the local population: *something* can always go wrong. Hydeman and Berman acknowledge that the balancing of risks is often a delicate matter to put into practice: "For instance, exclusion might not be justified if the risk presented is only slightly greater than what the shore state would deem to be a normally acceptable risk. Illustrative of this kind of circumstance is a case of a nuclear vessel with a reliable reactor system, but with something less than entirely adequate containment. On the other hand, if the reactor has been damaged and the probability of a serious nuclear accident and damage to the shore State is high, exclusion might be reasonable. In weighing the alternatives, consideration must be given to the practicability of evacuating persons from a ship in distress. Of course, in the first instance the decision would be one for the coastal State, subject to later adjustment of claims"¹³⁹. It may be concluded from these arguments that the coastal state must always accept a certain degree of risk and that not every increase in risk gives the state the right to close its ports. Hydeman and Berman conclude that the threat to the interests of the coastal state must be "quite compelling" to justify the exclusion of a ship in distress¹⁴⁰. Indeed the exclusion of a ship in distress should be a highly unusual measure. It must be the ultimate recourse for diverting an immediate and particularly severe danger to the essential interests of the state. This follows directly from the basis of the authority of the state in this respect, namely the right to intervene in a necessity situation. One must be extremely careful when accepting the possibility of an exception. As Grasso noted in connection with a Brazilian regulation that permitted the "exceptional" refusal of ships infected with disease, the exception opens the doors to administrative whim and not infrequently leads to the invalidation of the rule itself¹⁴¹. The closing suggestion by Hydeman and Berman that it should be the authorities who take the final decision, and remedies would be only available subsequently in the form of claims for damages, of course does not comply with modern laws on the legal protection of the governed applicable in many states, and which give the citizen possibilities for action to immediately suspend the effect of an unlawful decision by the authorities.

In practice, therefore, the third approach often differs little from the second, because when the weighing off of rights, interests and risks is done by the authorities of the coastal state, the coastal state can hardly be regarded as

¹³⁸ Grasso, G., *o.c.*, 43 (also quoted in Bélanger, M., "Les actions de protection sanitaire", *o.c.*, 587). Grasso even went so far as to continue: "La première charité commence par soi-même, dit un proverbe connu, mais sacrifier les droits d'autrui à la conception de sa propre convenance, c'est la négation de toute loi morale et juridique".

¹³⁹ Hydeman, L.M. and Berman, W.H., *o.c.*, 157-158.

¹⁴⁰ Hydeman, L.M. and Berman, W.H., *o.c.*, 162.

¹⁴¹ Grasso, G., *o.c.*, 46.

being neutral in the matter. As long as there is no neutral decision-making body, there is a great temptation to allow the distressed ship to drift on. Moreover, there is a real danger that the decision maker will lack the necessary nautical expertise, be subject to political pressure, fail to give grounds for his decision and neglect to take account of regional and international interests. The third approach, therefore, is also likely to lead to further incidents and disasters.

2.5. Fourth theory – Good management on the basis of the right of access

2.5.1. Scope and legal basis

The author takes the view that a preferable approach would be based on a more sophisticated version of the third theory, entailing the addition of two components: the assumption that access exists and the principles of good decision-making.

Indeed the right of access must still be the point of departure. In effect there is widespread agreement that in technical terms the best way of preventing environmental pollution is to allow the distressed ship to enter a place of refuge¹⁴². Second there is the possibility that if states have too extensive powers to refuse ships, salvors will be discouraged. For example if the salvor is fairly sure that he will not be able to bring a leaking tanker into a place of refuge, he may well not be very interested in accepting the salvage contract. This would delay efficient salvage, with all the potential consequences this entails¹⁴³. A third aspect is that opponents of the right of access have not convincingly demonstrated that this right no longer exists. Even though it only has relative significance, it is in the author's view still part of the international legal system. In principle this right prevents the coastal state from refusing access¹⁴⁴. Finally a fourth aspect is clear from an analysis of the legal basis of the power to refuse, namely that refusal is an *ultimum remedium*, and that the state can only invoke the necessity situation subject to strict conditions¹⁴⁵. For these four reasons access must be the norm, and refusal the exception¹⁴⁶. The authorities should only be authorized to refuse a request for access when it has been shown that there are insuperable

¹⁴² The IMO Guidelines on places of refuge for ships in need of assistance state: "When a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge" (item 1.3).

¹⁴³ Abecassis, D.W., "Some topical considerations in the event of a casualty to an oil tanker", *Lloyd's Maritime and Commercial Law Quarterly*, 1979, (449), 454.

¹⁴⁴ Nguyen, Q.D., Daillier, P. and Pellet, A., *o.c.*, 1156, no. 669.

¹⁴⁵ The view that the right of innocent passage is subordinate to the sovereignty of the coastal state and that there is a supposition in favour of the coastal state, has no foundation in law and denies that the right of innocent passage is an essential limitation on the sovereignty of the state (nonetheless see in this sense Hydeman, L.M. and Berman, W.H., *o.c.*, 175-176).

¹⁴⁶ In the *m/v Toledo* case (cited above, footnote 126) the Irish High Court (Admiralty) ruled that customary international law recognizes that foreign commercial vessels in serious distress have a *prima facie* right to the benefit of a port or anchorage of refuge in the nearest maritime state in which such facilities are available.

objections. Here the burden of proof must be borne by the authorities themselves, so that the right of every ship to access may be presumed. Indeed certain specific treaties confirm that states must take all necessary steps to help ships in distress¹⁴⁷, and this may be regarded as an expression of a general rule. Mere threat is therefore insufficient. In the first place the authority must do everything possible to facilitate the arrival of the ship in distress, using all the necessary safety measures and subject to the application of any special nautical instructions that may be imposed by the authority. The denial of access to a ship in distress simply because there is a possible danger to the coastal state is a wrongful act. Such an approach would undermine the right of access of ships in distress to an unacceptable degree¹⁴⁸. The 1981 case of the *m/v Stanislaw Dubois* is an interesting example. This ship was involved in a collision, leaving a large hole in the hull. The ship wished to enter the port of Rotterdam, although the water entering the hull could come into contact with drums containing carbide, which would result in an explosion. The shipping company vainly attempted to obtain an injunction ordering the municipal port authorities to grant access to the ship¹⁴⁹. The President of the Rotterdam court in summary proceedings examined whether the harbourmaster could reasonably decide in the known state of affairs that the ship had to be denied access. He observed that such refusal was possible, but must be justified in view of the important interests at stake, including those of the shipping company. “Ports”, the President rightly observed, “must make a certain effort to facilitate the repair of damaged ships, whenever this is possible. In doing so not every risk can be avoided”¹⁵⁰. Consequently there is or at least should be a requirement incumbent on coastal states to offer ships in distress a place of refuge. This would merely be the further articulation of the relevant provisions of the 1989 Salvage Convention. Moreover, it would

¹⁴⁷ See for example art. 9 of the Agreement on Waterway Transportation signed in Hanoi on 13 December 1998 by Cambodia and Vietnam, and art. 18 of the Agreement on Commercial Navigation on Lancang-Mekong River signed in Tachileik (Myanmar) on 20 April 2000 by China, Lao PDR, Myanmar and Thailand.

¹⁴⁸ Legal theory even goes so far as to remark in connection with the right of access in the event of maritime distress that the maritime distress makes the protection of the environment a matter of lesser priority and that it justifies the harming of same (Nguyen, Q.D., Daillier, P. en Pellet, A., *o.c.*, 786, no. 482). In this view maritime distress would thus have priority over environmental protection. This is merely a contemporary application of the old principle that has already been referred to above, namely that maritime distress entails immunity and justifies the infringement of the local law (including environmental law).

¹⁴⁹ President Arrondissementsrechtbank (District Court – 1st Instance in civil cases) Rotterdam, 5 April 1981, *m/v Stanislaw Dubois*, *Schip en schade*, 1981, 266, no. 94.

¹⁵⁰ Less self-evident was the consideration that the port authority may adopt a slightly greater margin when the ship was neither bound for the port concerned nor had it sailed from same, and that the disaster had not occurred in the immediate surroundings of the port. What the latter specification is based on is unclear. Whether the ship was normally a “customer” of the port, and where the accident occurred are irrelevant factors: the safety issues must in the author’s view be weighed purely in objective terms. Undoubtedly this is also the general thrust of the right of access in the event of maritime distress established in international law, to which no reference was apparently made in the aforementioned case.

only be the logical consequence of the existing international obligations of coastal and port states to organize services and properly equip themselves in order to be able to respond to maritime casualties and distress situations¹⁵¹. It may even be expected of the coastal state that it provides suitable supervision of the passage of casualty ships at risk and if necessary facilitate this passage by taking special technical-nautical measures¹⁵². The obligation of the coastal States to help removing the situation of distress persists even in cases where, on account of paramount coastal interests, the coastal State is unable to offer a place of refuge¹⁵³.

Furthermore it would be preferable for only a single decision-maker to have the power and ultimate responsibility for deciding on the reception of ships in distress¹⁵⁴. Moreover the decision-maker must be a neutral person, have the necessary expertise and obtain neutral expert advice, consult with port authorities, salvors, vessel traffic services, rescue services, ship repairers and pilots. He must make his decision on the basis of a specific contingency plan, and take regional and international interests into consideration (not just local interests). The latter may be based on the international legal principle of good neighbourliness (*bon voisinage*) and the principle of international solidarity. The decision-maker must also always state the reasons for his decision.

2.5.2. Critical assessment

The trouble with this approach is that it is still very much an ideal. The proposed guarantees for a correct weighing of interests have yet to be recorded in a general instrument of international law. Nonetheless the 1969 Intervention Convention does formulate similar principles relating to measures of intervention on the high seas when oil pollution is threatening¹⁵⁵. The European Traffic Monitoring Directive¹⁵⁶ and the recent IMO Guidelines

¹⁵¹ See above, item 2.2.1.

¹⁵² In 1999, the container vessel m/v Ever Decent was damaged after collision with the cruise liner Norwegian Dream 17 miles off the coast of Margate in Kent. M/v Ever Decent was allowed entry into the Belgian coastal port of Zeebrugge for repairs and unloading of cargo. Specific conditions were imposed, such as the disembarkation of pilots by helicopter, a tug escort, a speed limit and the obligation to report to the traffic center.

¹⁵³ Blanco-Bazan, A., *o.c.*, 3.

¹⁵⁴ Cf. *Command and Control: Report of Lord Donaldson's Review of Salvage and Intervention and Their Command and Control*, 1999, and the SOSREP structure based on same in the United Kingdom.

¹⁵⁵ Art. III of the Intervention Convention reads:

"When a coastal State is exercising the right to take measures in accordance with Article I, the following provisions shall apply-

(a) before taking any measures, a coastal State shall proceed to consultations with other States affected by the maritime casualty, particularly with the flag State or States;

(b) the coastal State shall notify without delay the proposed measures to any persons physical or corporate known to the coastal State, or made known to it during the consultations, to have interests which can reasonably be expected to be affected by those measures. The coastal State shall take into account any views they may submit;

(c) before any measure is taken, the coastal State may proceed to a consultation with independent experts, whose names shall be chosen from a list maintained by the Organization;

on Places of Refuge¹⁵⁷ also take a line similar to these suggestions and are therefore a step in the right direction. The ideal solution would be an international convention on ports of refuge and ships in distress.

2.6. Conclusions

Controversy continues to exist about the right of access to places of refuge for ships in distress. The old right of access, based on customary law, can no longer be regarded as absolute. However the absolute right to refuse ships in distress cannot be defended either. The view that the interests of the ship and the state and the risks to which they are exposed must be weighed off against one another, is defensible, but does entail a risk that the state will be inclined to refuse the ship, because it is both judge and interested party. When a ship is successively refused access by neighbouring coastal states, very dangerous situations often arise for both ship and environment. The best

(d) in cases of extreme urgency requiring measures to be taken immediately, the coastal State may take measures rendered necessary by the urgency of the situation, without prior notification or consultation or without continuing consultations already begun;

(e) a coastal State shall, before taking such measures and during their course, use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance of which they may stand in need, and in appropriate cases to facilitate the repatriation of ships' crews, and to raise no obstacle thereto;

(f) measures which have been taken in application of Article I shall be notified without delay to the States and to the known physical or corporate persons concerned, as well as to the SecretaryGeneral of the Organization".

Art. IV reads:

"1. Under the supervision of the Organization, there shall be set up and maintained the list of experts contemplated by Article III of the present Convention, and the Organization shall make necessary and appropriate regulations in connexion therewith, including the determination of the required qualification.

2. Nominations to the list may be made by Member States of the Organization and by Parties to this Convention. The experts shall be paid on the basis of services rendered by the States utilizing those services".

¹⁵⁶ See item 2.4.1 above.

¹⁵⁷ The IMO Guidelines on Places of Refuge quoted above provide i.a.:

"Decision-making process for the use of a place of refuge

3.12 When permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balanced manner and give shelter whenever reasonably possible.

3.13 In the light of the outcome of the assessment provided for above, the coastal State should decide to allow or refuse admittance, coupled, where necessary, with practical requirements.

3.14 The action of the coastal State does not prevent the company or its representative from being called upon to take steps with a view to arranging for the ship in need of assistance to proceed to a place of refuge. As a general rule, if the place of refuge is a port, a security in favour of the port will be required to guarantee payment of all expenses which may be incurred in connection with its operations, such as: measures to safeguard the operation, port dues, pilotage, towage, mooring operations, miscellaneous expenses, etc."

The Guidelines also recommend i.a. to assess places of refuge in the form of contingency plans and to seek expert analysis, including a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment.

approach is to base the weighing off of interests and risks on an assumption of access and certain basic principles of due decision-making. In this way the old right to seek and obtain shelter can be reconciled with the interests of the coastal state and ships in distress can be assured of a maximum of acceptance in places of refuge.

3. Liability of port and other authorities

The question of to what extent port and other authorities are liable for incorrect decisions to grant or refuse access, was recently examined by the CMI by means of a questionnaire sent to national maritime law associations. At present there are no international arrangements in this respect. Moreover there is usually no specific national legislation either. National tort law appears to lead to highly divergent solutions. In Belgium for example, the authorities will be fully liable for a proven negligent decision that has been a contributing factor to a loss sustained by third parties¹⁵⁸ although this appears not to be the case in some other countries. The negligence may lie in a completely erroneous or all too superficial assessment of the relevant facts and the risks involved, an unreasonable refusal against the substantiated advice from neutral experts, or clear deficiencies in the coordination and communication set-up. The loss suffered may comprise the worsening of the damage to the ship, the increase of the harmful impact on the environment, greater assistance and salvage costs, and in extreme cases the loss of the ship, its cargo and the lives of the crew. Recourse actions by the shipowner against the authorities concerned are a possibility as well. International liability of states vis-à-vis neighbouring states suffering from oil pollution or the blocking of fairways to ports is not to be excluded either¹⁵⁹. The obligation on states to make an effort to provide ships in distress with a place of refuge that the author regards as essential should logically be sanctioned by internationally harmonized rules of liability.

Recently, it was suggested that officials too should be made criminally

¹⁵⁸ Cf. Van Hooydonk, E., "Overheidsaansprakelijkheid voor gebreken van de scheepvaartwegen", *A.J.T.-Dossier*, 1995-96, no. 9-10, (117), 128-129, no. 8.

¹⁵⁹ See art. 235 LOSC on responsibility and liability, reading:

"1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds".

liable for the consequences of certain incorrect decisions¹⁶⁰. Such a provision would be analogous to the duty provided by international and national maritime law to help persons and ships in distress on the seas¹⁶¹ as well as with the national criminal law of countries such as Belgium¹⁶² that punishes the neglect of the duty to assist persons in peril. Nonetheless any additional provision of international law that makes government officials or port operators criminally liable must be very carefully weighed and may certainly not result in any counterproductive witch hunt. Only cases of manifestly reckless conduct and gross neglect of duty should fall under the application of criminal law.

If the access to ports of ships in distress is to be encouraged, it would most certainly be counter-productive to hold port authorities or their officials such as harbourmasters civilly or criminally liable for the pollution that may arise when the ship is admitted. When the port is required to admit a ship by a higher authority this would be even more pointless. In many criminal law systems an order from a higher authority is regarded as justifying the action¹⁶³.

To sum it up, it is clear that an international convention on ports of refuge

¹⁶⁰ Art. 6.1 of a proposal for a European Parliament and Council directive on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences (COM(2003) 92, as amended by the European Parliament in first reading in January 2004) reads: "Member States shall ensure that the illegal discharge of polluting substances, the participation in, even by omission, and instigation of such discharge as well as technical manipulations of vessels to facilitate illegal discharges are regarded as criminal offences, when committed intentionally or by gross negligence". Art. 6.2 provides: "Any person (i.e. not only the shipowner but also the owner of the cargo, the classification society, the competent (port) authority or any other person involved), who has been found by a court of law responsible within the meaning of paragraph 1, shall be subject to sanctions, including, where appropriate, criminal sanctions".

¹⁶¹ See above, footnote 47; see among others le Hardÿ de Beaulieu, L., *Le droit belge de la mer*, Namur, Faculté de droit, 1990, 92-93, nos. 97-98.

¹⁶² Art. 422*bis* of the Belgian Criminal Code reads: "Sera puni d'un emprisonnement de huit jours à un an et d'une amende de cinquante à cinq cents francs ou d'une de ces peines seulement, celui qui s'abstient de venir en aide ou de procurer une aide à une personne exposée à un péril grave, soit qu'il ait constaté par lui-même la situation de cette personne, soit que cette situation lui soit décrite par ceux qui sollicitent son intervention.

Le délit requiert que l'absténant pouvait intervenir sans danger sérieux pour lui-même ou pour autrui. Lorsqu'il n'a pas constaté personnellement le péril auquel se trouvait exposée la personne à assister, l'absténant ne pourra être puni lorsque les circonstances dans lesquelles il a été invité à intervenir pouvaient lui faire croire au manque de sérieux de l'appel ou à l'existence de risques.

La peine prévue à l'alinéa 1er est portée à deux ans lorsque la personne exposée à un péril grave est mineure d'âge".

Art. 422*ter* reads: "Sera puni des peines prévues à l'article précédent celui qui, le pouvant sans danger sérieux pour lui-même ou pour autrui, refuse ou néglige de porter à une personne en péril le secours dont il est légalement requis; celui qui le pouvant, refuse ou néglige de faire les travaux, le service, ou de prêter le secours dont il aura été requis dans les circonstances d'accidents, tumultes, *nauffrage*, inondation, incendie ou autres calamités, ainsi que dans les cas de brigandages, pillages, flagrant délit, clameur publique ou d'exécution judiciaire" (author's italics).

¹⁶³ For Belgium, see art. 70 of the Criminal Code.

could articulate clear principles about liability questions of this kind as well.

4. Compensation for port and other authorities

If ships in distress are to gain easier access to places of refuge, port authorities and all the other authorities concerned must be able to count on receiving specific, reasonable and justifiable compensation. Here it is a matter of liability arrangements, financial securities and insurance considerations.

First of all the authority will have to take account of the liability conventions (LLMC, CLC, Fund, HNS, Bunker). Several of these instruments are not yet (or at least in their most recent versions) in effect. Moreover there is the question of whether all the potential damage that could be sustained by ports and other authorities could be compensated under these conventions. Given the restricted scope of application of the international conventions and the liability limits, there is a risk that certain losses will be compensated only partly or not at all. This question needs to be resolved by further legal research. All too often the authority will have to pursue extended and costly legal proceedings. Liability rules are a necessary element of satisfactory legal arrangements for places of refuge, but as such do not offer sufficient incentive to encourage ports to admit ships in distress¹⁶⁴.

The policy adopted by certain states of making admission contingent on (often extremely high) financial securities must also be questioned. At first sight such a policy might appear justifiable. However, the problem is that there is often no legal basis for demanding such securities in the national law of the state concerned¹⁶⁵. In some cases the policy of demanding financial securities is in formal conflict with right to the free use of the channel

¹⁶⁴ Mention should be made of the proposed European Directive on environmental liability with regard to the prevention and remedying of environmental damage, which is going through the co-decision procedure (see Common Position of the Council (EC) No 58/2003 of 18 September 2003, OJ C 277 E, 18 November 2003, 10).

¹⁶⁵ The right to demand a bond was provided for in the first draft of the European Directive on Port State Control, but was left out in the final version. As for the United States reference may be made to the arrangements regarding Certificates of Financial Responsibility set out in the Oil Pollution Act. The Belgian Marine Environment Protection Act, 1999 contains provisions on financial securities to be demanded by federal authorities but it is unclear to what extent these sums would be available to local port authorities. The relevant provisions of Chapter 5, Section 2 of the Act read as follows:

“Section 2. - Les accidents de navigation, la prévention de la pollution et l'intervention de l'autorité ayant compétence en mer

Art. 21. § 1^{er}. Le capitaine d'un navire qui est impliqué dans un accident de navigation dans les espaces marins doit, dans le plus bref délai, en informer l'instance désignée par le Roi, conformément aux modalités prévues en vertu de l'article 11 de la loi du 6 avril 1995 concernant la prévention de la pollution de la mer par des navires.

§ 2. Le capitaine est tenu de fournir sur le champ toutes les informations concernant l'accident et, sur demande, toutes les informations concernant les mesures en rapport avec l'accident qui ont déjà été prises par le navire.

§ 3. L'obligation d'information ne s'applique pas aux navires de guerre, aux navires utilisés comme navires auxiliaires et aux autres navires appartenant à un Etat ou exploité par cet Etat, qui

Eric van Hooydonk, The Obligation to Offer a Place of Refuge to a Ship in Distress

les utilise exclusivement à des fins non commerciales. Pour ces navires, la réglementation interne reste d'application.

Art. 22. § 1^{er}. Si l'autorité ayant compétence en mer est d'avis, lors d'un accident de navigation, que les mesures prises par le capitaine ou le propriétaire du navire n'évitent pas, ne réduisent que de façon insuffisante ou n'arrêtent pas la pollution ou le risque de pollution, elle peut donner des instructions au capitaine, au propriétaire du navire ou à ceux qui prêtent assistance, afin de prévenir, de réduire ou d'arrêter la pollution ou le risque de pollution causé par l'accident.

§ 2. Les instructions données au capitaine ou propriétaire du navire peuvent avoir trait :

(i) à la présence du navire et des biens qui sont à son bord à un endroit déterminé ou dans une zone déterminée;

(ii) au déplacement du navire et des biens qui sont à son bord;

(iii) à la prestation d'assistance au navire.

§ 3. Les instructions à ceux qui prêtent assistance au navire ne peuvent impliquer l'interdiction de la mise en oeuvre de l'assistance convenue ou de la continuation de l'assistance entamée.

Art. 23. § 1^{er}. Si les instructions données en exécution de l'article 22 de la présente loi ne réussissent pas à prévenir, à réduire à un degré suffisant ou à arrêter la pollution causée par l'accident, l'autorité peut prendre d'office toute mesure nécessaire afin de prévenir, de réduire ou d'arrêter les conséquences dommageables de l'accident.

Ces mesures peuvent notamment avoir pour objet :

(i) de faire une enquête sur la situation à bord du navire et sur la nature et l'état des biens qui se trouvent à son bord;

(ii) *de ramener le navire dans un port, si par cette mesure les conséquences dommageables peuvent être mieux prévenues, réduites ou arrêtées.*

§ 2. Les mesures doivent être proportionnelles aux conséquences dommageables ou potentiellement dommageables de l'accident de navigation et ne peuvent excéder ce qui est raisonnablement nécessaire pour éviter, réduire ou arrêter ces conséquences dommageables.

Art. 24. § 1^{er}. *L'autorité peut exiger que le propriétaire d'un navire, qui est impliqué dans un accident de navigation comportant des risques de pollution des espaces marins, verse un cautionnement à la Caisse de Dépôts et Consignations, à concurrence du maximum des limites de responsabilité éventuelles, conformément aux conventions internationales et à la loi belge.*

§ 2. *La consignation de cette somme peut, sans occasionner de frais à l'Etat, être remplacée par la constitution d'une garantie bancaire accordée par une banque établie en Belgique ou d'une garantie signée par un « Protection and Indemnity Club » et déclarée recevable par l'autorité.*

§ 3. *L'autorité peut retenir le navire en cas de refus de cautionnement ou de constitution d'une garantie bancaire.*

§ 4. *Si le navire a coulé, le tribunal compétent peut être requis de saisir d'autres navires du propriétaire dans les ports belges pour contraindre au cautionnement ou à la constitution de la garantie bancaire jusqu'à ce qu'il soit satisfait au cautionnement ou à la garantie" (emphasis added).*

In the absence of an express legal foundation, the authorities in countries such as Belgium and the Netherlands apparently may not invoke private law to demand a financial security from incoming ships in distress. An extra-contractual demand by the public authority based on tort law will usually encounter difficulties by reason of the absence of any fault on the part of the ship and in addition the lack of causal relationship. The latter problem also arises in connection with recovery of costs incurred on the basis of *negotiorum gestio* or unjustified enrichment. In the *m/v Rize K* ruling, which concerned a claim by the municipality of Flushing for the repayment of costs of fighting a fire on board a ship lying in the port, the Hoge Raad (Supreme Court) determined that the Dutch Brandweerwet (Firefighting Act) contained no public law provisions for the recovery of costs. Examination of the history of the law showed that such recourse was contrary to the intentions of the legislature. Once the public law recovery of the costs proved to be excluded for reasons of public policy, the recovery of the costs via the private law route would represent an unacceptable transgression of the public law arrangements. Consequently the municipality could not recover the firefighting costs (*Hoge Raad*, 11 December 1992, *m/v Rize K*, *Schip en schade*, 1993, 131, no. 35). The Arrondissementsrechtbank (1st Instance for Civil Cases) at Rotterdam ruled that the mounting of a watch on a sunken ship by a state patrol boat fell under the public, unilaterally assumed (core) task of the state regarding the administration of the shipping lanes and the assurance of the safe and

Places of Refuge

established by treaty (territorial sea¹⁶⁶ or an international river or canal¹⁶⁷). Similarly bond requirements undermine the prohibition on making the passage of the territorial sea dependent on authorization¹⁶⁸. The right of access of ships in distress as well as the exemption of such ships from levies and taxes (both established by customary law)¹⁶⁹ and above all the right to a limitation of the ship owner's liability¹⁷⁰ are often overlooked as well when a policy that seeks financial securities is adopted. Over seventy years ago the *Institut de droit international* wanted states to seek only the reimbursement of the effectively incurred costs from ships in distress¹⁷¹. The practice of seeking bonds also diminishes the status of the compensation system set out in the CLC Convention and the Fund Convention, which only allows the authorities to seek the repayment of preventive measures and clean-up costs within certain limits¹⁷². By seeking a bond, the authority threatens to take possession of money that it would not normally have a right to after pursuing normal

smooth handling of waterborne traffic, comparable to the services provided by the police in the event of traffic accidents on the roads. For this reason there is no further room in this field for entering into private law contracts and private law based cost recovery (Arrondissementsrechtbank Rotterdam, 7 December 1995, number in the rolls 2194/94, Staat der Nederlanden t./ Van der Endt-Louwerse B.V. and Gebr. Sluyter B.V., m/v Eemshorn, unpublished). On appeal the Hoge Raad did grant the state the right to recover the costs of supervision and surveillance on the basis of private law (Hoge Raad, 15 January 1999, m/v Eemshorn, *Nederlandse Jurisprudentie*, 1999, 1673, no. 306, with note by ARB, *AB rechtspraak bestuursrecht*, 2000, 1003, no. 196, with note by ThGD).

¹⁶⁶ See art. 26 LOSC and also Van Hooydonk, E., "Some remarks", *o.c.*, 132-134.

¹⁶⁷ With respect to the Western Scheldt see Van Hooydonk, E., "De geoorlooftheid van de eenzijdige Nederlandse eis tot borgstelling voor bijzondere transporten over de Schelde", note to an injunction of the Arrondissementsrechtbank at The Hague (summary proceedings), 6 June 1994, *Algemeen Juridisch Tijdschrift*, 1995-96, 63-67.

¹⁶⁸ See above, item 2.3.2.

¹⁶⁹ See Van Hooydonk, E., "Some remarks", *o.c.*, 133-134; compare however Malanczuk, P., *Akehurst's, o.c.*, 176: "Ships in distress possess some degree of immunity; for instance, the coastal state cannot profit from their distress by imposing harbour duties and similar taxes which exceed the cost of services rendered".

¹⁷⁰ Art. 24, § 1 of the Belgian Marine Environment Protection Act, 1999 (cited above, footnote 163) limits the amount of bonds to the maximum of the liability limits as established under international conventions and Belgian municipal law.

¹⁷¹ See the 1928 resolution, cited above, footnote 42.

¹⁷² See the definition of (pollution) damage in art. I.6 CLC Convention, art. I.2 Fund Convention, art. I.6 HNS Convention and art. 1.9 Bunker Convention. For detailed discussions, see i.a. Carette, A., *Herstel van en vergoeding voor aantasting aan niet-toegeëigende milieubestanden*, Antwerp/Groningen, Intersentia, 1997, 242 et seq.; de la Rue, C. and Anderson, Ch.B., *Shipping and the Environment*, London, Lloyd's of London Press, 1998, 75 et seq.; Vanheule, B., "Oil Pollution: The International Liability and Compensation Regime", *European Transport Law*, 2003, 547-576; Wu, C., *La pollution du fait du transport maritime des hydrocarbures*, Monaco, Pedone, 1994, 529 p.; for a detailed description of the refundable costs of public authorities, see i.a. International Oil Pollution Compensation Fund 1992, *Claims Manual*, London, November 2002, 31 p.; CMI's Working Group on Environmental Damage Assessment, "CMI Colloquium on Environmental Damage Assessment: Discussion Paper", in de la Rue, C. (Ed.), *Liability for damage to the marine environment*, London, Lloyd's of London Press / CMI, 1993, (249), 252-253; Comité Maritime International, *Guidelines on Oil Pollution Damage approved by the XXXVth Conference of the Comité Maritime International*, Sydney, 8th October 1994, 8 p. (esp. art. 10).

legal proceedings¹⁷³. It takes the law into its own hands and avoids having its claims assessed by an independent judicial authority. To the extent that the intervention of the authority can be regarded as a form of assistance to a ship in distress, the state also avoids being excluded from the salvage reward when it acts under a pre-existing legal obligation or when it does not obtain a useful result. There is also the risk that the authority will seek compensation for those measures that it obliges the ship to accept but which in reality are unnecessary¹⁷⁴. In practice states often do not even justify or itemize the requested sum¹⁷⁵, or turn out to be prepared after details have been requested or objections have been formulated to enter into negotiations about the requested sum, which gives the impression of arbitrariness and unequal treatment. A systematic policy of seeking bonds in every casualty, whereby a failure to provide such is unfailingly sanctioned with exclusion, goes beyond the powers that a coastal state can claim on the basis of the right of necessity under international law and thus by way of *ultimum remedium* only. Nor is there any international uniformity in the respect of financial securities. Discussions about the amount of the security sometimes lead to a loss of valuable time and the cancellation of salvage and repair contracts. Ultimately a policy requiring the provision of a security could indeed have an inverse effect and itself lead to incidents and shipping disasters. The conclusion must be that such policies are not only legally controversial, but are also inherently dangerous. Such policies must be implemented with the greatest of care and an international legal framework is desirable. At the very least there should be a provision that a policy of seeking bonds must be based on clear provisions of municipal law, that the sums should be determined in accordance with transparent and objective criteria, and that furthermore no additional guarantees can be sought for those services to which general tariffs already apply (such as VTS or pilotage services).

On the other hand, the objective should be to provide additional encouragement for admitting ships in distress. It is not unthinkable that ports could be legally regarded as salvors. In essence a port is a vital link in every salvage operation. If there is no port to bring a ship in distress to, a salvor is not able to accomplish his task. Although the port is not the subcontractor of the salvage company in legal terms, it is in reality precisely that. Seen from this point of view, it appears to be justifiable to grant a port which has admitted a ship in distress – either voluntarily or under constraint – a salvage

¹⁷³ Thus preventive measures are only reimbursable if they have been reasonably incurred (see e.g. art. I.7 CLC Convention; further i.a. Jacobsson, M., “The International Conventions on Liability and Compensation for Oil Pollution Damage and the Activities of the International Oil Pollution Compensation Fund”, in de la Rue, C. (Ed.), *o.c.*, (39), 49).

¹⁷⁴ In France it was established that when the state imposed the use of salvage services (for example the use of deep-sea tugs working under contract from the state) that the shipping company deems unnecessary, the latter may refuse to pay for these imposed services (Douay, C., “Le régime juridique” *o.c.*, 213).

¹⁷⁵ Which the Dutch Hoge Raad (Supreme Court) ruled was unlawful in the aforementioned Long Lin case (judgment of 10 April 1995, cited above, footnote 126).

reward, or at least part of the normal salvage fee awarded to the salvors. This would encourage ports to make a more positive assessment of the requests of ships in distress or their salvors to obtain a place of refuge, and this in consequence could help reduce accidents and environmental catastrophes. Ports would thus not just have a right to receive compensation for the loss sustained on the basis of existing maritime law, but in addition could receive an attractive and relatively large fee. The relevant rules could be developed on the basis of existing principles of salvage law. The 1989 Salvage Convention leaves the matter of the participation of the authorities in salvage operations to be settled by national law, although in the author's view international uniformity would be preferable¹⁷⁶. An obvious example of a similar state of affairs are the tugs and other service providers who have a right to a salvage reward when they perform services that go beyond their normal duties¹⁷⁷. A port that receives a ship in distress does indeed act on the basis of an old rule of international law, but nonetheless supplies a service that goes beyond the normal routine of the daily shipping traffic using the port.

These advantages are apparently offset by a number of disadvantages. First of all the award of a salvage fee would to some extent run counter to the customary right to put in at a port of refuge free of charge¹⁷⁸. However this objection could be resolved in a convention on places of refuge, which would be able to codify and modernize international customary law. A second objection might be that authorities that have performed their statutory duties often have no right to a salvage fee under current salvage laws¹⁷⁹. A specific treaty provision could resolve this aspect as well. A third objection is that port

¹⁷⁶ Art. 5 provides under the heading "Salvage operations controlled by public authorities": "1. This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

2. Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

3. The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated". It may be noted that not all port authorities can be regarded as falling under the designation "public authorities" in the meaning of this provision. Private port operators, like those commonly found in the UK and private terminal operators do not qualify.

¹⁷⁷ Cf. art. 4 Salvage Convention 1910 and art. 17 Salvage Convention 1989.

¹⁷⁸ See above, item 2.2.

¹⁷⁹ Pursuant to the 1967 Protocol, the 1910 Salvage Convention also applies to assistance or salvage services rendered by or to a ship of war or any other ship owned, operated or chartered by a state or public authority; compare arts. 4 and 5 of the 1989 Salvage Convention. Some Belgian authors have argued that public vessels may claim salvage rewards and fees; the examples they have given include the (formerly) state-owned ferries on the Ostend-Dover route and the tugs belonging to the City of Antwerp (see De Smet, R., *Droit maritime et droit fluvial belges*, II, Brussels, Larcier, 1971, 635-636, no. 530; Smeesters, C. and Winkelmolen, G., *Droit Maritime et Droit Fluvial*, III, Brussels, Larcier, 1938, 427, no. 1232). According to J.P. Vanhooff, however, the ships of the navy and of the official rescue services, and the port authorities do not act "voluntarily" and for this reason they have no right to a salvage reward (Vanhooff, J.P.,

authorities have no business looking out for ways to collect salvage rewards. This is an unjustified criticism, as the purpose of granting an equitable salvage reward is of course not to encourage ports to view the attraction of ships in distress as a commercial venture. Rather the objective is to provide a reasonable incentive so that, should the case arise, the port will be more prepared to lend its cooperation. The granting of a salvage reward to the port is indeed yet another reason for leaving the final decision on the admission of ships to a neutral authority superior to the port which has no entitlement to a salvage reward. This would avoid any commercial intentions on the part of the decision-maker.

5. Towards an international convention on places of refuge and ships in distress?

The question of whether it is appropriate to put in place an international regime for ships in distress is certainly not new. As indicated above the subject was raised during the preparation of the 1923 Convention on the International Regime of Maritime Ports. In 1980 the matter was again raised within the framework of the Bonn Agreement, while in 1989 the discussion gave rise to the half-hearted arrangements of the Salvage Convention, which merely encourage authorities and salvors to cooperate but which leave the public law aspects of the problem untouched¹⁸⁰. The European legislature established provisions dealing with part of the problem in the Traffic Monitoring Directive, and the IMO recently adopted Guidelines on Places of Refuge. The question of whether an additional international legal instrument is required is now under discussion in the CMI.

In the opinion of this author, an international convention on places of refuge and ships in distress is both essential and attainable¹⁸¹. A convention of this sort would among other things set out principles regarding the right of

Gebundelde werken. Maritiem recht en maritieme verzekeringen, Antwerp, J.P. Vanhooff, 1986, 94). Likewise in countries such as the Netherlands (see i.a. Cleton, R., *Hoofdlijnen van het vervoerrecht*, Zwolle, W.E.J. Tjeenk Willink, 1994, 266), England (Brice, G., *Maritime Law of Salvage*, London, Stevens & Son, 1983, 15, nr. 29; Hodges, S. and Hill, C., *Principles of Maritime Law*, London, Lloyd's of London Press, 2001, 192-195; Rose, F.D., *Kennedy and Rose on Salvage*, London, Sweet & Maxwell, 2002, 327-330, nos. 688-693), the United States (Schoenbaum, T.J., *Admiralty and Maritime Law*, St. Paul (Minn.), 1987, 506-507, § 15-3) and Germany (Puttfarken, H.-J., *Seehandelsrecht*, Heidelberg, Recht und Wirtschaft, 1997, 313, no. 733) it is a requirement of principle that the assistance is offered voluntarily, i.e. without any prior contractual or legal obligation. Long ago a claim for a salvage reward entered by the City of Antwerp for fighting a shipboard fire with its tugs was rejected because firefighting is an obligation incumbent on the City and moreover it was "gratuite de sa nature" (Commercial Court Antwerp, 30 December 1904, *Pand.Pér.*, 1904, 972, no. 1495, *Jur.Anv.*, 1905, I, 103, *R.I.D.M.*, XXI, 125, *J.T.*, 1905, 154; *contra* Commercial Court Antwerp, 23 september 1909, *Jur.Anv.*, 1909, I, 63). This solution is very similar to that chosen by the Dutch Hoge Raad in the circumstantially comparable Rize K case (see above, footnote 165).

¹⁸⁰ See above, item 2.3.2.

¹⁸¹ It could even be said that the drafting of such a convention is at least partly an obligation: art. 211.1 LOSC obliges states to establish international rules and standards to prevent, reduce and control pollution from vessels, and art. 211.7 adds: "The international rules

Places of Refuge

access, decision-making methods, the civil and criminal liability of authorities, the compensation of losses accruing to ports, the allocation of salvage rewards and requests for financial securities¹⁸². At present the political climate is in favour of establishing such regulations as European public opinion has been mobilized in the wake of the recent shipping disasters. Mere Guidelines and contingency plans are in the author's view inadequate. They lack mandatory force and all too often people in the field are even unaware of these soft law provisions. Anyway, while such non-binding rules may in theory be useful to guide operational decision-making, they are quite unsuitable for regulating questions of liability and compensation. The latter aspects must regulated on a global basis, as maritime law should by preference be harmonized throughout the world. The authority to make decisions about admitting ships is by contrast better regulated on a regional basis, for example by continent, by maritime basin, or coastal strip, as this is the scale on which the interests, dangers and risks must be assessed. Nevertheless, the latter principle itself could also be taken up in an international convention.

The traditional reluctance of national states to curtail their sovereignty in matters of this kind could be overcome by granting certain benefits, including coherent provisions for compensation and salvage rewards for ports. An international convention on places of refuge could indeed lead to a win-win situation for all concerned. Ship owners, P & I Clubs, salvors and ship repairers would gain from the explicit confirmation of the right of access as a basic point of departure, the formulation of guarantees for good decision-making by the authorities, and clear and uniform rules regarding government liability. The advantages for coastal states would include legal certainty regarding their own liability and that of ship owners, in addition to clarity about the organization of decision-making, which would alleviate local political influences and political responsibility, and a reduction of the risk of environmental disasters as a result of the improvement of the legal framework. Port authorities would also benefit from a convention that clearly assigns decision-making authority to a higher national or (if desirable) international authority, so that their own responsibility would more clearly demarcated. More legal certainty will also reduce the risks for ports and ultimately the convention would provide ports with a guaranteed right to

and standards referred to in this article should include *inter alia* those relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges". It may therefore be concluded that LOSC assumes that international regulations regarding shipping accidents must be established. In any case others have already argued the case for the establishment of a convention on places of refuge (see i.a. Abecassis, D.W., *o.c.*, 454; Gaskell, N.J.J., *o.c.*, 20-21; Kasoulides, G.C., *o.c.*, 195). Recently, the European Parliament called on the European Commission and on Member States to make their best efforts to reach an agreement within the IMO on an international public law convention on places of refuge (see above, footnote 5).

¹⁸² The IUMI too recently argued for a convention on places of refuge (see further Browne, B., *o.c.*, 14 et seq.).

compensation as well as a salvage reward on top. As for the environmental movement it could move a step closer to the realization of the “nunca mais” ideal that it has pursued ever since Prestige. The enormous impact of such disasters should in itself be considered to constitute a “compelling need” which is a precondition to start work on a new maritime law convention¹⁸³.

6. Conclusions

The legal arrangements governing places of refuge and ships in distress have been much improved by the adoption of the European Traffic Monitoring Directive and the IMO Guidelines on Places of Refuge. Nonetheless numerous defects are still evident. At present there is still no entirely unambiguous reply to the question of whether ships in distress have the right to enter a place of refuge. The liability rules applicable to coastal states and ports are uncertain and lack any international uniformity. Ports have no reasonable incentive to admit ships in distress. The matter is dominated by legal uncertainty and this increases the risk of disasters occurring with “maritime lepers”. In view of the widespread public interest in the subject, the author considers that an attempt should be made to arrive at an international convention that does justice to the concerns of all interested parties and encourages them to take a more positive view of new cases of ships requiring assistance. It would be unforgivable if the endeavour to arrive at an effective convention on places of refuges and ships in distress were to be delayed and that in the meantime yet another tanker were to break in two.

Antwerp, 14 February 2004

¹⁸³ See P. Griggs, “Obstacles to uniformity of maritime law. The Nicholas J. Healy lecture”, *CMI Yearbook 2002*, (Antwerp, 2003), (158), 164-166.

DESIGNATION OF PLACES OF REFUGE AND MECHANISM OF DECISION MAKING

RICHARD SHAW

Designation of Places of Refuge

(a) *Should Places of Refuge be designated in advance or not?*

The answer to this question is not as obvious as it might at first seem. Clearly as a matter of ordinary prudence every coastal state should have some contingency plans to deal with the threat of a marine disaster, particularly one involving a threat of pollution by oil, or, probably worse, by hazardous and noxious substances which may threaten the health of the civilian population. The OPRC Convention (document 6-11 in the CMI Handbook) requires every State Party to establish a national system for responding promptly and effectively to oil pollution incidents (Article 6), but there is no equivalent obligation with respect to pollution by substances other than oil.

An assessment of the suitability of ports and other sheltered havens for the admission of distressed vessels will necessarily involve a wide range of criteria, many of which are now set out in the IMO Guidelines (see especially paragraph 3 - Guidelines for action expected of Coastal States). No two marine casualties are, however the same, and while factors such as depth of water, suitable anchorage, shelter, and availability of shore facilities with be common matters for consideration in every case, the requirements of the particular vessel and the nature of her distress will always be different.

The European Traffic Monitoring Directive states at Article 20 under the heading of Places of Refuge

“Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority”.

There appears therefore to be no general obligation in International Law on coastal states to designate places of refuge in their waters, but specific provisions in the European regional regime and international rules relating to oil pollution do contain general obligations which would necessarily involve such a requirement.

(b) *If not, should there exist any criteria in the contingency plans of the coastal state for determining the place of refuge in a specific case?*

It will always be necessary for Coastguards and Maritime Safety Officers to balance conflicting interests in deciding whether or not to allow a

distressed vessel to enter the waters under their control. The IMO Guidelines adopted by the IMO Assembly in November 2003 recognise the difficulties. It is to be hoped that these Guidelines will help in ensuring that decisions are taken by Coastal States in a common-sense and consistent manner.

In doing so the officers concerned will be obliged to make a balanced assessment of the prospects of a successful outcome to the salvage operation. Only if there is a reasonable chance of success will the risks of pollution damage to the immediate vicinity of the place of refuge be justified. It must also be recognised that the salvor working on a “no cure – no pay” basis has a substantial financial interest in a successful outcome to the salvage operation, and that there is a risk that the salvor’s own reports as to the chances of success may be coloured by this. Arguments in this vein were advanced in the press at the time of the “PRESTIGE” incident.

There are more popular misconceptions in the field of salvage than in any other field of maritime law, and the complexity of salvage law will make it even more difficult for the Coastal State to make the balanced judgment required. Apart from the IMO Guidelines, probably the best analysis of the problems in this field is the Report of Lord Donaldson’s Review of Salvage and Intervention and their Command and Control published by the UK Government in 1999. This report was principally concerned with the interaction between Government agencies responsible for safety at sea and the protection of the marine environment with the owners and salvors of a distressed vessel. The various government agencies have their own areas of responsibility and conflicts of interest between them can arise. The representation of “the public interest” by a set of officers representing different areas of responsibility, however honest and well meaning they all may be, has the potential to create increased confusion and conflicting decisions, particularly in the highly charged atmosphere of a major casualty. Lord Donaldson recommended, *inter alia*, the appointment of a single individual, to be known as the Secretary of State’s Representative or “SOSREP”, to be the focal point for all government agencies, and to be an interface with the owners and salvors. See further comments at section 4 below.

(c) *If places of refuge are determined in advance, should such places of refuge be publicised or not?*

This is probably the most contentious issue in this field. The initial publicity on the European Traffic Monitoring Directive mentioned above indicated that publication of the location of such places of refuge to the world at large was a necessary element. However it quickly became apparent that there were differing views among the member governments of the European Union on this issue. The Scandinavian countries tended to favour a published list, while the United Kingdom and Eire were concerned that such publicity might attract the “maritime lepers” of the world to their ports, and would also probably provoke hostile reactions from local interests in the places listed.

The difference is, on mature consideration, more apparent than real, since the physical and economic characteristics of most potential places of

refuge are published in considerable detail in pilot books and sailing directions, which are an essential part of the navigation equipment of every ship. The competent mariner therefore has at their disposal enough information to make a reasoned choice as to the most suitable place of refuge, given the position of their ship and the nature of the casualty.

Only factors such as the readiness of pollution combat equipment and the attitude of local authorities will remain unknown. This latter is likely to be a significant element, and probably tips the balance in favour of keeping confidential the location of government-designated places of refuge.

Mechanism of decision making

Should Coastal States establish in advance a mechanism for objective decision-making about:

- (a) allowing or refusing entry to a distressed ship;
- (b) determining a specific place of refuge; and
- (c) the measures to be taken generally concerning salvage, protection, etc?

The collective answer to these questions must be “yes”, but of course the more difficult answer is as to how these decisions should be made and implemented.

The essential thrust of the IMO Guidelines, set out in paragraph 3.2, is that the assessment should be an objective one, weighing all the factors and risks in the balance, and that the coastal state should give shelter whenever reasonably possible. The relevant factors to be taken into consideration are listed at length in Appendix 1 to the Guidelines.

Communication with a ship in distress in a storm may well be difficult, and it may be simply impracticable to put an inspector on board to conduct a survey of the ship's condition. Misconceptions as to salvage law, and as to salvage techniques, may put in question the acceptance of reports received from salvors. Different government departments may have differing agendas, and each may wish to put their own man on the casualty to conduct a survey. This led, in the case of the “SEA EMPRESS” in 1996 to an army of nearly 30 outside personnel finding themselves on board the ship when a decision was made on safety grounds to evacuate her.

The UK Government, concerned that this should not happen again, commissioned an enquiry led by Lord Donaldson, who recommended the appointment of one individual who should represent the Public Interest in such a situation, and who was sufficiently trained and informed on all relevant issues to be able to make rapid informed objective decisions. The officer concerned is called the Secretary of State's Representative or by the acronym “SOSREP”. The powers exercised by SOSREP derive from the Merchant Shipping Act 1995, itself a codification of legislation going back to the Merchant Shipping Act of 1894, and no special legislation was necessary to make this appointment. However the Marine Safety Act 2003 re-enacted, with some minor modifications, the relevant legislative provisions, and a copy of the material part of that act is annexed to this report. The powers of the Secretary of State, which are of course delegated to SOSREP, are set out in a new Schedule 3A to the 1995 Merchant Shipping Act entitled “Safety

Directions”, which also contains details of the criminal sanctions imposed on those who do not comply with the reasonable directions of the Secretary of State, or of his representative SOSREP.

It is now some three years since the present SOSREP have been in post, and the common view is that the system is working well. He has, during the quiet times between casualties, got to know the major players in the field of casualty management and pollution control, including the major professional salvors, and a relationship of confidence has been built up. He will be a hard act to follow.

A comparable appointment has been made in South Africa, and in the United States the US Coastguard appoints three area commanders with similar powers respectively covering the Atlantic, Gulf and Pacific coasts. France has its *Prefets Maritimes*. Other states are known to be studying the role and its relevance to their coastlines. Geography is bound to be a major factor. States as large as Australia and the USA are simply not going to be able to cover their entire coastline with one person. However the case for one individual, or a limited number of individuals, who can make informed decisions to protect the Public Interest on the basis of an objective assessment of all relevant factors and of the relative risks involved, is a compelling one.

SCHEDULE 1

NEW SCHEDULE 3A TO THE MERCHANT SHIPPING ACT 1995 - SAFETY
DIRECTIONS

“SCHEDULE 3A

SAFETY DIRECTIONS

Direction following accident: person in control of ship

1. (1) The Secretary of State may give a direction under this paragraph in respect of a ship if in his opinion-
 - (a) an accident has occurred to or in the ship,
 - (b) the accident has created a risk to safety or a risk of pollution by a hazardous substance, and
 - (c) the direction is necessary to remove or reduce the risk.
- (2) The direction may be given to-
 - (a) the owner of the ship,
 - (b) a person in possession of the ship,
 - (c) the master of the ship,
 - (d) a pilot of the ship,
 - (e) a salvor in possession of the ship,
 - (f) a person who is the servant or agent of a salvor in possession of the ship and who is in charge of the salvage operation, or
 - (g) where the ship is in, or has been directed to move into, waters which are regulated or managed by a harbour authority, the harbour authority or the harbour master.
- (3) The direction may require the person to whom it is given to take or refrain from taking any specified action in relation to-
 - (a) the ship;
 - (b) anything which is or was in the ship;
 - (c) anything which forms or formed part of the ship;
 - (d) anything which is or was being towed by the ship;
 - (e) a person on the ship.
- (4) In particular, the direction may require a person to ensure-
 - (a) that a ship or other thing is moved or not moved;
 - (b) that a ship or other thing is moved or not moved to or from a specified place or area or over a specified route;
 - (c) that cargo is or is not unloaded or discharged;
 - (d) that a substance is or is not unloaded or discharged;
 - (e) that specified salvage measures are taken or not taken;
 - (f) that a person is put ashore or on board a ship.

Direction following accident: person in control of land

2. (1) The Secretary of State may give a direction under this paragraph in respect of a ship if in his opinion-

- (a) an accident has occurred to or in the ship,
- (b) the accident has created a risk to safety or a risk of pollution by a hazardous substance, and
- (c) the direction is necessary to remove or reduce the risk.
- (2) The direction may be given to a person in charge of coastal land or premises.
- (3) For the purposes of this paragraph-
 - (a) a person is in charge of land or premises if he is wholly or partly able to control the use made of the land or premises, and
 - (b) “coastal” means adjacent to or accessible from United Kingdom waters over which the public are permitted to navigate.
- (4) The direction may require the person to whom it is given to grant access or facilities to or in relation to the ship or any person or thing which is or was on the ship.
- (5) In particular, a direction may require a person-
 - (a) to permit persons to land;
 - (b) to make facilities available for the undertaking of repairs or other works;
 - (c) to make facilities available for the landing, storage and disposal of cargo or of other things.
- (6) A direction under this paragraph-
 - (a) must be given in writing, or
 - (b) where it is not reasonably practicable to give it in writing, must be confirmed in writing as soon as is reasonably practicable.

Other direction

- 3. (1) The Secretary of State may give a direction in respect of a ship under this paragraph if in his opinion it is necessary for the purpose of-
 - (a) securing the safety of the ship or of other ships;
 - (b) securing the safety of persons or property;
 - (c) preventing or reducing pollution.
- (2) The direction may be given to-
 - (a) the owner of the ship;
 - (b) a person in possession of the ship;
 - (c) the master of the ship.
- (3) The direction may require the person to whom it is given to ensure that-
 - (a) the ship is moved or not moved from a specified place or area in United Kingdom waters;
 - (b) the ship is moved or not moved to a specified place or area in United Kingdom waters;
 - (c) the ship is moved or not moved over a specified route in United Kingdom waters;
 - (d) the ship is removed from United Kingdom waters.

Places of Refuge

Action in lieu of direction

4. (1) This paragraph applies where the Secretary of State thinks-
- (a) that circumstances exist which would entitle him to give a direction under this Schedule, but
 - (b) that the giving of a direction would not be likely to achieve a sufficient result.
- (2) This paragraph also applies where-
- (a) the Secretary of State has given a direction under this Schedule, but
 - (b) in his opinion the direction has not achieved a sufficient result.
- (3) The Secretary of State may take such action as appears to him necessary or expedient for the purpose for which the direction could have been given or was given.
- (4) In particular, the Secretary of State may-
- (a) authorise a person to enter land or make use of facilities;
 - (b) do or authorise a person to do anything which the Secretary of State could require a person to do by a direction;
 - (c) authorise a person to assume control of a ship;
 - (d) make arrangements or authorise the making of arrangements for the sinking or destruction of a ship.

Enforcement

5. A person to whom a direction is given under this Schedule-
- (a) must comply with the direction, and
 - (b) must try to comply with the direction in a manner which avoids risk to human life.
6. (1) A person commits an offence if he contravenes paragraph 5(a).
- (2) It is a defence for a person charged with an offence under sub-paragraph (1) to prove-
- (a) that he tried as hard as he could to comply with the relevant direction, or
 - (b) that he reasonably believed that compliance with the direction would involve a serious risk to human life.
7. A person commits an offence if he intentionally obstructs a person who is-
- (a) acting on behalf of the Secretary of State in connection with the giving of a direction under this Schedule,
 - (b) complying with a direction under this Schedule, or
 - (c) acting by virtue of paragraph 4.
8. A person guilty of an offence under paragraph 6 or 7 shall be liable-
- (a) on summary conviction, to a fine not exceeding £50,000, or
 - (b) on conviction on indictment, to a fine.

9. (1) Proceedings for an offence under paragraph 6 or 7 may be brought in England and Wales only-
- (a) by or with the consent of the Attorney General, or
 - (b) by or with the authority of the Secretary of State.
- (2) Proceedings for an offence under paragraph 6 or 7 may be brought in Northern Ireland only-
- (a) by or with the consent of the Attorney General for Northern Ireland, or
 - (b) by or with the authority of the Secretary of State.

Variation and revocation

10. (1) A direction under this Schedule may be varied or revoked by a further direction.
- (2) If the Secretary of State thinks that a direction under this Schedule is wholly or partly no longer necessary for the purpose for which it was given, he shall vary or revoke the direction as soon as is reasonably practicable.
- (3) Where the Secretary of State has given a direction to a person under this Schedule he shall consider any representations about varying or revoking the direction which are made to him by that person.

Procedure

11. (1) This paragraph applies where the Secretary of State-
- (a) proposes to give a direction under this Schedule to a company or other body, and
 - (b) thinks that neither of sections 695 and 725 of the Companies Act 1985 (c. 6) (service) apply.
- (2) The Secretary of State may serve the direction in such manner as he thinks most suitable.
- (3) In the application of this paragraph to Northern Ireland the reference to sections 695 and 725 of the Companies Act 1985 shall be taken as a reference to Articles 645 and 673 of the Companies (Northern Ireland) Order 1986 (S.I. 1986/1032 (N.I. 6)).
12. A person acting on behalf of the Secretary of State may-
- (a) board a ship for the purpose of serving a direction under this Schedule;
 - (b) enter land or premises for that purpose.
13. Before giving a direction under paragraph 2 in respect of land or premises the Secretary of State shall, unless he thinks that it is not reasonably practicable-
- (a) give the person to whom he proposes to give the direction an opportunity to make representations, and
 - (b) consider any representations made.

Places of Refuge

Unreasonable loss and damage

14. (1) This paragraph applies where action taken in accordance with a direction under this Schedule or by virtue of paragraph 4 ("remedial action")-
- (a) was not reasonably necessary for the purpose for which the direction was given, or
 - (b) caused loss or damage which could not be justified by reference to that purpose.
- (2) The Secretary of State shall pay compensation to any person who-
- (a) suffered loss or damage as a result of the remedial action (whether it was taken by him or someone else), and
 - (b) applies to the Secretary of State for compensation.
- (3) In considering what is reasonably necessary or justifiable for the purpose of sub-paragraph (1) account shall be taken of-
- (a) the extent of the risk to safety or threat of pollution which the direction was intended to address,
 - (b) the likelihood of the remedial action being effective, and
 - (c) the extent of the loss or damage caused by the remedial action.

Expenses

15. (1) This paragraph applies where-
- (a) a direction is given to a person in respect of a ship under paragraph 2, or
 - (b) the Secretary of State relies on paragraph 4 to take or authorise action in respect of a ship in lieu of a direction under paragraph 2.
- (2) The person to whom a direction is given shall be entitled to recover the costs of his compliance with the direction from the owner of the ship.
- (3) A person in charge of coastal land or premises shall be entitled to recover from the owner of the ship costs incurred by him as a result of action taken by virtue of paragraph 4 in relation to that land or premises.
- (4) The Secretary of State may make payments to a person on account of sums recoverable by that person under sub-paragraph (2) or (3).
- (5) The Secretary of State shall be entitled to recover from the owner of the ship-
- (a) costs incurred in connection with the giving of a direction;
 - (b) costs incurred in connection with action taken under paragraph 4;
 - (c) costs incurred under sub-paragraph (4).
- (6) A right under sub-paragraph (2), (3) or (5) permits the recovery of costs only in so far as they are not recoverable-
- (a) under another enactment,
 - (b) by virtue of an agreement, or
 - (c) under the law relating to salvage.

Jurisdiction

16. The Admiralty jurisdiction of the High Court and of the Court of Session shall include jurisdiction to hear and determine any claim arising under paragraph 14 or 15.

Ships to which Schedule applies

17. A direction under paragraph 1 or 2, in so far as it relates to a risk of pollution, may have effect in respect of a ship only if it-

- (a) is a United Kingdom ship, or
- (b) is in United Kingdom waters or an area of the sea specified under section 129(2)(b).

18. (1) Her Majesty may by Order in Council provide that a direction under paragraph 1 or 2, in so far as it relates to a risk of pollution, may have effect in respect of a ship which-

- (a) is not a United Kingdom ship, and
- (b) is not in United Kingdom waters or an area of the sea specified under section 129(2)(b).

(2) An Order in Council under this paragraph-

- (a) may be expressed to apply generally or only in specified circumstances;
- (b) may make different provision for different circumstances;
- (c) may provide for this Schedule to have effect in cases to which the Order in Council applies with specified modifications;
- (d) may contain transitional or consequential provision (including provision amending an enactment).

19. A direction under paragraph 1 or 2, in so far as it relates to a risk to safety, may have effect in respect of a ship only if it is in United Kingdom waters and-

- (a) it is not a qualifying foreign ship, or
- (b) it is a qualifying foreign ship which in the Secretary of State's opinion is exercising neither the right of innocent passage nor the right of transit passage through straits used for international navigation.

20. (1) A direction under paragraph 3 may have effect in respect of a ship only if it is in United Kingdom waters and-

- (a) it is not a qualifying foreign ship, or
- (b) it is a qualifying foreign ship which in the Secretary of State's opinion is exercising neither the right of innocent passage nor the right of transit passage through straits used for international navigation.

(2) A direction may not be given under paragraph 3(3)(d) in respect of a United Kingdom ship.

21. A direction may not be given under paragraph 1(2)(a) to (d) or 3 in respect of-

- (a) a ship of Her Majesty's Navy, or
- (b) a Government ship.

Interpretation

22. (1) In this Schedule-

“accident” means a collision of ships, a stranding, another incident

Places of Refuge

of navigation or another event (whether on board a ship or not) which results in material damage to a ship or its cargo or in an imminent threat of material damage to a ship or its cargo,

“action” includes omission,

“enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament,

“harbour authority” has the meaning given by section 151(1),

“harbour master” includes a dock master or pier master, and any person specially appointed by a harbour authority for the purpose of enforcing the provisions of this Schedule in relation to the harbour,

“hazardous substance” has the meaning given by sub-paragraph (2),

“owner”, in relation to the ship to or in which an accident has occurred, includes its owner at the time of the accident,

“pilot” means a person who does not belong to a ship but who has the conduct of it,

“pollution” means significant pollution in the United Kingdom, United Kingdom waters or an area of the sea specified under section 129(2)(b), and

“risk to safety” means a risk to the safety of persons, property or anything navigating in or using United Kingdom waters.

(2) In this Schedule “hazardous substance” means-

(a) oil (within the meaning given by section 151(1)),

(b) any other substance which creates a hazard to human health, harms living resources or marine life, damages amenities or interferes with lawful use of the sea, and

(c) any substance prescribed by order of the Secretary of State.

Savings

23. Nothing in this Schedule shall be taken to prejudice any right or power of Her Majesty's Government.

24. (1) This paragraph applies where action is taken-

(a) in respect of a ship which is under arrest or in respect of anything in a ship which is under arrest, and

(b) in accordance with a direction under this Schedule or by virtue of paragraph 4.

(2) The action shall not-

(a) be treated as a contempt of court, or

(b) give rise to civil liability on the part of the Admiralty Marshal (including the Admiralty Marshal of the Supreme Court in Northern Ireland)."

CIVIL LIABILITY AND MONETARY INCENTIVES FOR ACCEPTING SHIPS IN DISTRESS

STUART HETHERINGTON

Civil Liability

Who has the liability for damage caused by a pollution incident after a place of refuge has been granted or refused?

- (a) Will the ship in distress be responsible for pollution damage caused, and under what conditions, once a place of refuge has been granted?
- (b) Will the State allowing entry to a vessel in distress have any liability?
- (c) Will the State denying a place of refuge to a distressed ship have any liability?
- (d) What are the responsibilities of salvors?

Related issues: Conditions of liability, potential claimants, channelling of liability, limitation of liability, insurance, (general or specifically granted) immunity of State accepting a distressed ship vis-à-vis the ship).

This topic was examined in the paper which I presented for the Bordeaux Colloquium in June 2003 under the title "Can the Law Assist?" The questions posed in the second questionnaire to National Associations also raised these issues.

In answer to questions (a) and (b) the consensus of responses received from National Associations was that States would not have a liability for granting a Place of Refuge when damage ensues, whether within their own jurisdiction or in that of a neighbouring country, although some responders to the questionnaire considered that where the State acted negligently it could face a liability provided any damage suffered was directly attributable to the decision to grant a Place of Refuge.

Of particular significance in determining the answer to that question is Article III of the Civil Liability Convention ("CLC"), as amended by the 1992 Protocol. (All references which I make in this paper to Article 111 of the CLC are intended to refer to that article as amended by the Protocol). It provides as follows:-

Article III paragraph 1

"Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident."

"'Incident' is itself defined in Article I as meaning 'any occurrence, or series of occurrences, having the same origin, which causes pollution damage or creates a grave and immediate threat of causing such damage.'"

Article III paragraph 2

"No liability for pollution damage shall attach to the owner if he proves that the damage:

Places of Refuge

- (a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable, and irresistible character, or
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party, or
- (c) was wholly caused by the negligence or other wrongful act of any Government or Authority responsible for the maintenance of lights or other navigational aids in the exercise of that function”.

Article III paragraph 3

“If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage, or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person.”

Article III paragraph 4

“No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention, or otherwise may be made against:

- (a) the servants or agents of the owner or the members of the crew;
- (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
- (c) any charterer, howsoever described (including a bareboat charterer), manager or operator of the ship;
- (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
- (e) any person taking preventive measures;
- (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);

unless the damage resulted from their personal act or omission committed with the intent to cause such damage or recklessly and with knowledge that such damage would probably result.”

Article III paragraph 5

“Nothing in this Convention shall prejudice any right of recourse of the owner against third parties.”

Whilst it is likely therefore that the ship owner will continue to have a liability for any pollution which ensues once a Place of Refuge has been granted to it, where the CLC is applicable, I went on in the paper, which I gave at Bordeaux, to identify certain situations in which that might not be the case. I said as follows:

“When States permit vessels into their ports as places of refuge and damage then occurs, both to the interests of the States and to third parties, they are likely to be entitled to compensation under the CLC and Fund Conventions against the shipowner, (assuming the Conventions are applicable) unless the shipowner can bring itself within the exceptions contained in Article III paragraph 2, or where the claimant has itself been negligent within Article III paragraph 3.

I went on to point out that if an exception is available to the shipowner, or where the CLC and Fund Conventions apply and the Fund is insufficient to meet all claims, or the Conventions do not apply or there are limitation issues involved there may be claimants who will seek to bring claims against the State if they want compensation. This could give rise to difficult questions of causation such as: was the admission, simpliciter, of the stricken vessel into the port negligent and did it cause the ensuing damage, or was it the initial damage sustained by the vessel which caused it to be a stricken vessel, which is responsible for the ensuing damage? Under Article 111 paragraph 3 of the CLC, as we have seen, it is only necessary for the ship owner to prove that the pollution damage arose partially from an act or omission done with intent to cause damage or from negligence of the person suffering the damage to achieve some amelioration in the extent of its liability. Questions of contributory negligence, inevitable accident / agony of the moment and causation will arise.

Thus there is a possibility that States could have a liability under the present international regime in certain circumstances.

Turning next to the third issue which is raised in the title of this paper the answers to the second questionnaire from National Associations were largely the same whether a State granted or refused a Place of Refuge. Most responders suggested that the State would not have any liability where pollution damage ensues in such a situation, although many responders anticipated that there could be a liability where the State acted negligently in declining a Place of Refuge provided there is a sufficient degree of causative connection between the refusal and the ensuing damage. As was pointed out by some responses the immunity provisions in the CLC could apply if the State concerned sought to suggest that its actions were taken as preventive measures. (Article 111 paragraph 4(e)). An issue as to whether the actions taken were done recklessly would then arise.

In the paper which I gave at Bordeaux I suggested that where a State had acted negligently it would not only fail to recover all the damage which it sustains by reason of any ensuing pollution or other damage but may be liable to compensate third parties who suffer damage. I also pointed out however that once again difficult questions of causation will arise.

It is of particular note in that regard that certain provisions of the United Nations Convention on the Law of the Sea ("UNCLOS") may have a role to play. Article 192 for example provides:

"States have the obligation to protect and preserve the marine environment."

Article 194(2) of UNCLOS (headed "Measures to Prevent, Reduce and Control Pollution of the Marine Environment") is also relevant in this regard. It provides:

"States shall take all measures necessary to ensure that activities under their jurisdictional control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention."

Places of Refuge

Article 194(3) of UNCLOS, provides as follows:

“The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, inter alia, those designed to minimise to the fullest possible extent:....

- (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges and regulating the design, construction, equipment, operation and manning of vessels;...

Article 195 of UNCLOS (headed “Duty not to transfer damage or hazards or transform one type of pollution into another”) provides as follows:

“In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution to another.”

Finally, I pointed out in the paper at Bordeaux that the contents of Article 235 of UNCLOS are also relevant. It provides as follows:

“1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation such as compulsory insurance or compensation funds.”

Question 4 of the second questionnaire dealt with the liability of persons other than ship owners to provide assistance to a ship in distress. By their responses most National Associations identified the channelling provisions in the CLC which grant responder immunity (Article 111 paragraph 4 (d)) and confirm that the ship owner would have the responsibility unless third parties have acted with intent to cause damage or with knowledge that the damage would probably result. They also pointed out, as has been seen earlier, that recourse actions may lie at the suit of the ship owner where there has been negligence by a third party.

Possible Remedies

Dr. Eric Van Hooydonk argues, persuasively, that an International Convention is needed in order to remove the ambiguity which he discerns in International law as to whether there is a right in a shipowner to be granted a place of refuge and the liability rules are uncertain and lack any international

homogeneity. One solution would be to prepare an International Convention. In a paper given by W. van der Velde in November 2003 it was suggested that International law needed a provision to the following effect:

"States are obliged to offer ships in need a Place of Refuge when this is necessary and proportionate to the damage. A State shall be liable for the damages caused by an unjust refusal to offer a Place of Refuge."

Such a provision was sought by what Nicholas Gaskell, in his paper "The 1989 Salvage Convention and Lloyds Open Form Salvage Agreement" (Volume 16) *Tulane Maritime Law Journal* (1991), described as "an unlikely combination of environmental organisations and ship owners," but did not find support with the international community. The International Union of Marine Insurers (IUMI) has also called for a Convention.

An alternative to a new Convention would be to make amendments to UNCLOS, the OPRC Convention, the Intervention Convention or some other Convention(s), or produce a Code, Guidelines or a Model Law. Consideration needs to be given to the procedures contained within the relevant Instruments for changes to be made to them. Some have simplified procedures for amendment (eg Marpol.) Others, better qualified than me, could comment on the likelihood of the international community agreeing to an amendment to UNCLOS pursuant to its simplified procedure in Article 313, but my own view is that a provision dealing explicitly with legal liability matters in what is otherwise a more generalised Instrument would be unlikely to find favour with States. Disadvantages of the OPRC and Intervention Conventions are that they only deal, respectively, with oil pollution and the high seas.

An alternative to having an explicit provision is to have a more general provision, (either as part of a new Convention or as an addition to a current Convention) such as that contained in Article 20 of the EEC Directive 2002/59/EC of 27 June 2002, which provides as follows:

"Member States, having consulted the parties concerned, shall draw up, taking into account relevant guidelines by IMO, plans to accommodate, in the waters under their jurisdiction, ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account operational and environmental constraints, to ensure that ships in distress may immediately go to a place of refuge subject to authorisation by the competent authority. Where the Member State considers it necessary and feasible, the plans must contain arrangements for the provision of adequate means and facilities for assistance, salvage and pollution response.

Plans for accommodating ships in distress shall be made available upon demand. Member States shall inform the Commission by 5 February 2004 of the measures taken in application of the first paragraph."

As has been noted elsewhere States may be reluctant to give effect to a Convention which explicitly requires them to admit vessels to a Place of Refuge and the EEC Directive clearly does not go so far as impose an obligation on States to accept vessels in distress, nor does it create a liability where there is an unjustified refusal. Such a provision could be accommodated within the current OPRC Convention. Article 6 contains the following:

“National and regional systems for preparedness and response

1. Each Party shall establish a national system for responding promptly and effectively to oil pollution incidents. This system shall include as a minimum:

- (a) the designation of:
 - (i) the competent national authority or authorities with responsibility for oil pollution preparedness and response;
 - (ii) the national operational contact point or points, which shall be responsible for the receipt and transmission of oil pollution reports as referred to in Article 4; and
 - (iii) an authority which is entitled to act on behalf of the State to request assistance or to decide to render the assistance requested;
- (b) a national contingency plan for preparedness and response which includes the organisational relationship of the various bodies involved, whether public or private, taking into account guidelines developed by the Organisation.”

4. In addition, each Party, within its capabilities either individually or through bilateral or multilateral co-operation and, as appropriate, in co-operation with the oil and shipping industries, port authorities and other relevant entities, shall establish:

- (a) a minimum level of pre-positioned oil spill combating equipment, commensurate with the risk involved, and programmes for its use;
- (b) a programme of exercises for oil pollution response organisations and training of relevant personnel;
- (c) detailed plans and communication capabilities for responding to an oil pollution incident. Such capabilities should be continuously available; and
- (d) a mechanism or arrangement to co-ordinate the response to an oil pollution incident with, if appropriate, the capabilities to mobilise the necessary resources.

5. Each Party shall ensure that current information is provided to the Organisation, directly or through the relevant regional organisation or arrangements, concerning:

- (a) the location, telecommunication data and, if applicable, areas of responsibility of authorities and entities referred to in paragraph (1)(a);
- (b) information concerning pollution response equipment and expertise in disciplines related to oil pollution response and marine salvage which may be made available to other States, upon request; and
- (c) its national contingency plan.”

A provision, which is based on the EEC Directive, along the following lines could be added to Article 6 of the OPRC Convention:

“Article 6(1)(c)

a national contingency plan for preparedness and response which includes plans to accommodate ships in distress. Such plans shall contain the necessary arrangements and procedures taking into account

operational and environmental constraints to ensure that ships in distress may immediately go to a Place of Refuge."

I also make the following suggestions for consideration in relation to the liability situation as to changes which could be made to already existing Conventions or Protocols without wishing to suggest that an International Convention is not appropriate. These suggestions could be reworked into any proposed International Convention.

If it is thought necessary to encourage States to grant a Place of Refuge and confirm that they do not have any liability for oil pollution damage which ensues one remedy may be to amend Article 111 of the CLC by adding a further sub-paragraph (g) to make it clear that States, port authorities and other persons granting a Place of Refuge within a territory should also be immune from claims for compensation. It could, for example, read:

"(g) any State, port authority, all their servants and agents and any other person or corporate entity granting a place of refuge to a vessel."

The above suggestion only applies to loss or damage covered by the CLC. The Bunker Convention, whilst incorporating, in Article 3 an equivalent provision to paragraph 1 of Article III of the CLC does not incorporate an equivalent provision to paragraph 4 of Article III of the CLC. There would seem to be good sense in incorporating a similar provision, with the additional paragraph (g) to which reference has been made above.

Under Article 7 of the Hazardous and Noxious Substances Convention ("HNS Convention") an identical provision to Article III paragraph 4 of the CLC is included. Thus if the suggestion which has been made above to the effect that paragraph (g) be inserted in the CLC is favoured then it would be appropriate to have a similar provision in the HNS Convention.

Monetary Incentives

Are there monetary incentives which can be offered by way of compensation schemes for Ports accepting ships in distress?

(a) Insurance/security?

(b) Establishment of a fund/or even a voluntary fund

There is already a scheme for reimbursement of costs of assistance under the International Convention on Oil Pollution Preparedness, Response and Cooperation ("OPRC Convention") in certain circumstances.

It may be recalled that Article 7 in that Convention provides as follows: "Article 7

International Cooperation in Pollution Response

(1) Parties agree that, subject to their capabilities and the availability of relevant resources, they will co-operate and provide advisory services, technical support and equipment for the purpose of responding to an oil pollution incident, when the severity of such incident so justifies, upon the request of any Party affected or likely to be affected. The financing of the costs for such a system shall be based on the provisions set out in the Annex to this Convention.

(2) A Party which has requested assistance may ask the Organisation to

assist in identifying sources of provisional financing of the costs referred to in paragraph (1).

- (3) In accordance with applicable international agreements, each Party shall take necessary legal or administrative measures to facilitate:
- (a) the arrival and utilisation in and departure from its territory of ships, aircraft and other modes of transport engaged in responding to an oil pollution incident or transporting personnel, cargoes, materials and equipment required to deal with such an incident; and
 - (b) the expeditious movement into, through and out of its territory of personnel, cargoes, materials and equipment referred to in sub-paragraph (a)."

The Annex to that Convention also provides as follows:

"Reimbursement of Costs of Assistance

1. (a) Unless an agreement concerning the financial arrangements governing actions of Parties to deal with oil pollution incidents has been concluded on a bilateral or multilateral basis prior to the oil pollution incident, parties shall bear the costs of their respective actions in dealing with pollution in accordance with sub-paragraph (i) or sub-paragraph (ii).
- (i) If the action was taken by one Party at the express request of another Party, the requesting Party shall reimburse to the assisting Party the cost of its action. The requesting Party may cancel this request at any time, but in that case it shall bear the costs already incurred or committed by the assisting Party.
- (ii) If the action was taken by a Party on its own initiative, this Party shall bear the costs of its action."

If it is thought that in addition to clarifying the fact that States and/or Port Authorities and the like should not have a civil liability (unless they have acted negligently etc) in circumstances in which they grant a Place of Refuge to ships and should also be able to source compensation where such facilities have been granted it might be thought that Article 7 of the OPRC Convention is an appropriate place to develop such processes.

It is noteworthy that the current regime established in Article 7 does not provide a fund and merely contains the provision which has been quoted above in paragraph (2) to the effect that the IMO's assistance can be sought to identify "sources of provisional financing". If Article 7 is to be amended in order to provide a real incentive to port authorities to accept ships in distress it would seem to be necessary for a fund to be established, perhaps under the auspices of the IMO, to meet expenditure which is not otherwise recovered from the polluter, its insurers or the IOPC fund. Such a provision, and such a fund, would also, presumably need to be wider than mere oil pollution and to incorporate substances otherwise covered by the HNS Convention. (The OPRC Convention is of course limited to oil, but see the OPRC-HNS Protocol of 2000).

Dr. Eric Van Hooydonk also argues that port authorities and the like should be able to seek salvage rewards. He refers to Article 5 of the Salvage Convention and notes that private port authorities may not be covered by its

provisions. The common law would seem to eliminate such bodies from having an entitlement to salvage because they are not volunteers, having public duties, unless they, or their employees, were acting outside their statutory powers. (See Brandon J., as he was, in “The Gregerso” (1973) QB 274). If it is thought appropriate to give Port Authorities (public and private) a right to claim a salvage reward, especially since so many are these days privately operated, amendments to Article 5 of the Salvage Convention may be needed, or a model law for States to introduce in order to avail themselves of the rights contained in paragraph 3 of Article 5 of the Convention might be an alternative solution. That paragraph provides :” The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated.”

As is well known, under the CLC owners of oil tankers are required to maintain insurance or other financial security. (Article VII). A similar provision is now found in Article 7 of the Bunker Convention requiring registered owners of ships having a gross tonnage greater than 1,000 registered tonnes to maintain insurance or other financial security up to the limits of liability provided for in Article V, paragraph 1 of the CLC, but only up to the limits of that particular vessel under the 1976 Limitation Convention.

Also, under Article 12 of the HNS Convention, ship owners are required to maintain insurance or other financial security up to the limits of liability prescribed in Article 9 paragraph 1 of that Convention.

If it is thought appropriate and feasible to require a ship owners who seeks a place of refuge to be made exceptions to the provisions just referred to, so that they are required to offer insurance over and above the limits of liability that they might be entitled to rely upon, either under the specific Conventions or the 1976 Limitation Convention, there would need to be changes to the current regimes.

A more practical solution might be to seek letters of comfort or letters of undertaking from the ship owner’s P&I Club (or liability insurer) pursuant to which the Club undertakes to meet any costs or expenses sustained by reason of the State or Authority granting a Place of Refuge. It is understood that in some instances P. and I. Clubs do provide letters of guarantee. A form of wording which is currently in use for such purposes is as follows:

DRAFT
RE: STANDARD LETTER OF GUARANTEE TO BE GIVEN TO PORT
AUTHORITIES
IN RELATION TO VESSELS SEEKING ENTRY AS PLACES OF
REFUGE

To Port Authority

Dear Sirs

HEADING WITH DETAILS OF CASUALTY

In consideration of your agreeing to the entry into port of the (name of vessel) in order to take advantage of all available port facilities and in

Places of Refuge

consideration of your agreeing not to arrest or detain the (name of vessel) or any other ship or property in the same or associated ownership, management, possession or control we (name of Club) hereby undertake to pay to you on demand such sum or sums as are found due to you from the owners and/or bareboat charterers of the (name of the vessel), [name of owners/bareboat charterers], by the final unappealable judgement of a competent court or by agreement in writing between us in respect of any legal liability they may have towards you for wreck removal expenses and/or oil pollution clean up or prevention expenses, provided always that our guarantee hereunder:

- 1) Shall be without prejudice to any rights the owners and/or bareboat charterers of the (name of vessel), [name of owners/bareboat charterers], may have to limit liability in accordance with the applicable law;
- 2) Shall be limited in any event to \$.....

We hereby further undertake, when called upon to do so, to instruct solicitors in (name of city), to accept service of any proceedings issued on your behalf in connection with the above incident and hereby confirm that we have irrevocable instructions from the owners and/or bareboat charters of the (name of vessel), [name of owners/bareboat charterers], so to do and further to agree that any claim of each party against the other and all issues between the parties arising from this incident shall be exclusively determined by a competent court.

This guarantee shall be governed by and construed in accordance with law.

There would not seem to be any support, amongst the International Group of P. and I. Clubs, for a compulsory insurance or direct action regime to be introduced. It will be observed that the above wording preserves the shipowners (and Clubs) rights to limit liability and a Port Authority may not be fully compensated by the ship owner or any other fund (such as IOPC) by reason of the availability of some limitation of liability, even if it has the protection of such a guarantee. It might be expected therefore that there would be considerable opposition by the Clubs to any attempt to require that such letters of guarantee waive any reliance on any such limitation of liability or impose rights of direct action against an insurer in exchange for being granted a Place of Refuge, as some have suggested. Clearly these are matters for debate and depending on the decisions made a standard wording for such guarantees could be produced.

Some consider that States or Port Authorities and the like should not be entitled to require any financial security such as has been suggested in the previous paragraph as a condition to permitting the entry of the vessel to a Place of Refuge. The justification for that stance being that pursuant to customary law ships should not be refused access to a Place of Refuge. As was seen in *ACT Shipping (PTE) Ltd v The Minister for the Marine, Ireland and the Attorney General* (1995) 3IR 406, Barr J, whilst accepting that “the international custom in maritime law whereby a ship in distress is entitled to

a safe refuge is so long established as to be deemed to have been absorbed into Irish domestic law” was satisfied “that a modern practice of States was evolving whereby humanitarian and economic aspects of maritime distress are distinguished and that access to safe havens is frequently refused where safety of life is not involved.” The learned Judge also referred to Article 9 of the Salvage Convention, 1989, which provides:

“Nothing in this Convention shall affect the right of the coastal State concerned to take measures in accordance with generally recognised principles of international law to protect its coastline or related interests from pollution or the threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences, including the right of a coastal State to give directions in relation to salvage operations.”

If an International Convention (Code, Model Law or Guidelines) is to be prepared a provision, which excludes or limits the rights of States to demand security, or identifies a standard wording may be necessary.

At the ISC meeting in London some discussion took place as to whether a Fund could be established along the lines of the Tovalop Agreement for Tanker Owners. It was thought that the lack of homogeneity amongst the shipowners who might seek a place of refuge would make this suggestion unfeasible. It is of course an option which is available for discussion.

January 2004

PENAL LIABILITY

FRANK L. WISWALL, JR.*

The need for ‘guaranteed’ places of refuge for vessels in the throes of a maritime casualty is evident. Less evident has been the adverse effect of criminalization in those maritime casualty cases most likely to result in urgent need for refuge.

The increasing tendency of Coastal States to impose severe criminal penalties upon individual persons for release of polluting substances from ships suffering hull-breaching casualties is in conflict with the need to reduce possibilities of serious environmental damage, loss of life and loss of property by ensuring that distressed vessels will be offered places of refuge in which the worst effects of a casualty may be averted. Criminalization most often means that if the hull of a vessel is breached and the result is damage to the coastline, environment or related interests of a Coastal State, the ship’s Master (and perhaps other officers as well) will be subject to arrest and imprisonment upon entry into the territorial jurisdiction of that State, even when such entry is made involuntarily in the course of a rescue. The *Erika* and *Prestige* cases illustrate the point.

At worst, such criminalization may deter the Master of a distressed vessel from requesting refuge and thus aggravate or increase the chances of hull breach, thereby defeating the entire purpose of the effort to guarantee places of refuge. At best, the result is a manifest injustice to the Master, who in the jaws of crisis is forced to weigh his personal exposure to criminal liability against the safety of his ship, crew and cargo.

Where a distressed vessel is situated on the high seas there are legal issues of importance for those Coastal States whose national law imposes individual criminal liability in such cases, but are also States parties to the 1982 Law of the Sea Convention. Firstly, Article 97 applies to any collision or “other incident of navigation” occurring outside the territorial jurisdiction of a Coastal State, and 97(1) explicitly forbids criminal prosecution of individuals with regard to such casualty by any State except (i) the Flag State or (ii) the State of which the accused person is a national. This provision was taken from the 1952 CMI/Brussels Convention on Penal Jurisdiction, and the general understanding of the phrase “other incident of navigation” has been that it includes any type of hull or machinery casualty occurring in the course of navigation of a ship. One should then look to UNCLOS Article 221(2) to see what is meant by “casualty” in the context of pollution, and there the term “maritime casualty” is defined to include “a collision of vessels, stranding or

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other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.”

Secondly, UNCLOS by clear implication excludes the detention or imprisonment of *individual persons* in cases of pollution arising out of a maritime casualty suffered by a foreign-flag vessel. Article 230 limits punishment with respect to violations by foreign vessels of Coastal State national laws and regulations in pollution cases to “monetary penalties only”, whether the incident occurs on the high seas (paragraph (1)) or within the territorial sea (paragraph (2)). The sole exception to this restriction to monetary penalties is “in the case of a wilful and serious act of pollution in the territorial sea” and it seems extraordinarily unlikely that a maritime casualty can be held to be the result of a “wilful and serious act” by a Master acting in furtherance of his duty to the ship, crew and cargo. See UNCLOS Article 230.

The Vancouver Conference Committee on Places of Refuge may wish to address this conflict, and to make recommendations for its resolution.

RECEPTION FACILITIES FOR SHIPS IN DISTRESS

GREGORY TIMAGENIS*

1. Introduction

At its meeting in London on 17 November 2003 the International Sub-Committee ("ISC") of CMI on Places of Refuge¹ identified eight (8) issues relating to the subject and requiring consideration².

Places of Refuge is one of the subjects of the 38th CMI Conference to be held in Vancouver, Canada (31st May to 4th June 2004). The Conference will consider among others which of the above eight issues, which are not covered by the existing international conventions, are appropriate for new legislation (by a treaty, guidelines, a code or model law) and what form such new "legislation" should take (e.g. a new treaty or amendment to an existing one etc)³.

This paper intends to serve as a background paper and as a proposal for the consideration of the issue no 8 ("Reception Facilities for Ships in Distress") by the Vancouver Conference⁴.

2. The Issue

The issue of "Reception Facilities for Ships in Distress" was set by the ISC as follows:

- (a) *Should there be a requirement for the establishment of large (private or public) land or floating (salvage/environmental) docks to receive*

* LL.M, Ph.D.

¹ The ISC on Places of Refuge had been originally established as an International Working Group (IWG) in the context of CMI undertaking to assist the IMO Legal Committee in its consideration of the issues arising from the *Castor* and the *Prestige* casualties. Two questionnaires have been circulated already and two reports submitted to IMO. See the first report and replies to the first questionnaire in CMI Yearbook 2002 pp 117-146. The second report is published in the CMI Yearbook 2003 at p. 327-328.

² See the List of Issues as Annex B to the Minutes of the meeting of the Executive Council held in London on 18 November 2003 in CMI News Letter 2003 No.3 (at the CMI web site: www.comitemaritime.org).

³ See the comment at the bottom of the list of Issues (see note 2 above).

⁴ Other background material is to be found in CMI Yearbook 2002 pp. 117-146 (see note 1 above); in Richard Shaw, *Places of Refuge: International Law in the Making*, JIML [2003] 9 pp 159 et seq. (the history of the issue, recent casualties and the first stages of work) and in Aldo Chirco, *Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancient Regime?*, ODILA 33 (2002) pp 207 – 226 (considering under existing law the possibility of Coastal State to prohibit access of a ship in distress to its ports). Out of the material related to Places of Refuge expected to be included to the CMI Yearbook 2003 attention should be drawn to Prof. Dr. Eric Van Hooydonk, "Obligation to Offer a Place of Refuge to a Ship in Distress" (a useful discussion of the various views on the issue under the law), G. Timagenis, "Places of Refuge as a Legislative Problem" and S. Hetherington, *Discussion Paper* (with 3 Appendices) for ISC Meeting, London 17 November 2003.

a distressed ship for salvage purposes and for confining risks of pollution?

- (b) *Alternatively, should States designate areas within a place of refuge where a sinking or unstable casualty can be beached as part of salvage operations?*

(related issues: incentives for private docs and/or funding private/public docks, size limitation of tankers).

3. Why Reception Facilities

- (a) *They are necessary*

It has been suggested⁵ that no matter what preventive measures may be taken for reducing the number of accidents (e.g. navigational aids, training, traffic separation schemes, safety rules, proper inspection of the ships etc) or the environmental consequences of accidents (e.g. double hull ships), accidents and pollution incidents may not be eliminated completely. Salvage and operational procedures are not always sufficient to face the risk of pollution from a distressed ship. The dilemma of bringing the ship closer to the coast for combating pollution better or obliging her to stay far from the coasts thus reducing effectiveness of salvage measures is a real one and decision making at the time – often with insufficient information on the condition of the ship – is really difficult. Increased environmental awareness of local societies, increase of the number of areas declared specially protected or of special beauty make the choice of ports, areas or places of refuge – whether in advance or *ad hoc* at the time of the incident – an almost impossible task. The mere question whether such places – if selected in advance – should be publicized or not shows the difficulty of the problem, let alone the fact that it reminds periods of secret policies or diplomacy which can never be plausible.

All these difficulties are drastically reduced – if not eliminated – by the establishment of special reception facilities for distressed ships in the form of large docks, including floating docks, where the distressed ships may be directed and confined, thus confining at the same time leakages and risk of pollution. Usually the environmental damage from a distressed ship is not instantaneous. There is sufficient time both for tugs to approach – and why not an “environmental/salvage” floating dock – and/or to be towed to substantial distances.

The idea for reception facilities for ships in distress draws analogy from the oil reception facilities. Their essence is that certain pollutants cannot be eliminated. For this reason there must be a place where they should be confined and then processed or repaired.

- (b) *They will facilitate Decision Making*

On the other hand consideration both of customary and conventional international law has shown that the question whether a coastal state is

⁵ Timagenis, *Places of Refuge* (see note 4 above).

obliged to offer shelter to a distressed ship or not is not free of ambiguities⁶. The general rules and principles are in my view sufficiently clear: States have full sovereignty over their ports (internal waters) and they may deny entry or set conditions for such entry. It is widely accepted, however, that ships in distress are entitled to be granted a place of refuge. But this right is not unlimited. If a distressed ship creates risks to the coastal state and to its vital interests – to which marine environment as such is now included –, then entry may be denied. However, the application of these general rules in specific cases is not a simple matter and pure law and technical considerations are mixed with and affected by political pressure. In addition recent state practice has shown that regardless of the legally or technically correct solution, refusal of entry is more likely if the distressed ship poses real or perceived environmental risks and such risks have been publicized.

The solutions discussed to solve this problem are directed towards the creation of criteria for a proper decision making⁷, for better organizing assistance⁸ and the appointment of an independent (experienced and free from political influences) decision maker⁹.

All this decision making will be facilitated by the existence of Reception Facilities for Ships in Distress.

(c) *They will facilitate the Liability Problem*

Finally the complex issue of responsibility and liability for pollution damage caused as a result of a marine accident and the way it was managed will be considerably facilitated. Liability rules are secondary rules and presuppose the existence of certain primary rules which were violated. If any decision maker (e.g. the Port Authority or the Government of the Coastal State) has discretion to apply complex criteria under difficult circumstances, it will be in effect impossible to attribute to such decision maker any responsibility for any of its decisions (i.e. to accept or not accept the ship in distress). The solution of strict liability and insurance is not a satisfactory solution (it is a solution of necessity). It will end up to further burden imposed on the ship and its insurers and more importantly liability and compensation rules are the end of the story. They come at the end to compensate damage which already occurred and compensation can never be a complete satisfaction. For this reason the liability, compensation and insurance rules should not distract the attention from the main target which is to prevent the

⁶ Aldo Chircop, *Ships in Distress* and Eric Van Hooydonk, *Obligation to Offer a Place of Refuge* (see note 4 above). It is interesting that the two authors reach the opposite conclusion: The first that existing law is sufficient, if properly applied, and the second that a new treaty is required.

⁷ Cf IMO “*Guidelines on Places of Refuge for Ships in Need of Assistance*” adopted by the IMO Assembly in 2003 by IMO Resolution A.949 (23).

⁸ See IMO Resolution A. 950 (23) on “*Maritime Assistance Service*” (MAS) to be established by each Coastal State as the focal point (information and coordination) in case of a pollution incident.

⁹ This seems to be the approach of the UK by the appointment of “*the Secretary of State’s Representative*” (SOSREP) – See R. Shaw, *Places of Refuge*, JIML [2003] 9 at p 167.

pollution (i.e. to prevent the accident or at least the pollution from the accident). It is not a sound approach to set aside preventive measures and concentrate on compensatory remedies.

For this reason the Reception Facilities (as preventive measures) should have priority over the compensatory or punishment solutions.

4. What Reception Facilities Could Possibly Be?

The reception facilities for ships in distress may be:

- (a) Large land or floating docks (specially constructed and equipped) appropriate for receiving a ship in distress and to confine any leakage of pollutants. The land docks may have alternatively the form of well restricted areas or small ports where ships in distress could be docked or beached without risk of spreading pollution.
- (b) These reception facilities should be strategically located around the coasts (like the pollution combating stations in the context of contingency planning), thus enabling the entry of the ship in them within reasonable time.
- (c) Floating docks may present more difficulties in terms of their construction and capacity but definitely they will be more effective in that they may reduce the time for the entry of the ship in them (if both the ship and the dock move toward each other) and more importantly they will not necessitate the approach of the ship to the coast at all.
- (d) The docks may be private docks operated by tug or salvage companies or they may be public docks or even docks construed and/or operated in the context of international co-operation (e.g. European Union or regional organizations).

5. Related Issues

(a) Financial and Funding Aspects

Because the construction of docks to be used as reception facilities – and in fact a network of such docks – and their operation is a major project, it is questionable whether it can be commercially supported.

For this reason funding arrangements should be made at the international level and the relevant cost should be shared by the shipping industry, the oil industry – and their respective insurers – as well as coastal states and their societies. After all both the need for sea transport of oil on the one hand and the protection of the marine environment, including the coasts, on the other are to the common interest of the international community as a whole.

The IOPC Fund with appropriate broadening of its purposes and its own funding may well provide a useful tool for this purpose and the current (uncertain) discussions concerning the revision of the IOPC Fund Convention may be a good opportunity to include and they may be further enhanced by the inclusion of such a subject.

The funding of Reception Facilities for Ships in Distress may include – at least partial – subsidies for the construction, maintenance and readiness as well as for the operation of the docks. For private operators other incentives may be considered as well.

To fund a more or less predictable cost for these reception facilities may

be ultimately less than the cost of unpredictable damage in case of a pollution incident and it is definitely environmentally more efficient.

It will not be surprising that the proposal for reception facilities will meet objections mainly due to these financial aspects of the project. These objections are stronger when the proposal for the financial cost affects not only the shipping industry, which is the usual victim of the cost for the protection of the marine environment, but also coastal states themselves and/or the oil industry. Similar objections had been originally raised in connection with the oil reception facilities when they were proposed for the first time and even more with the double hull vessels when originally discussed in the context of the International Conference on Marine Pollution of 1973 which adopted the 1973 "International Convention for the Prevention of Pollution from Ships" (now MARPOL)¹⁰.

(b) Size Limitation of ships

As a result of the establishment of the reception facilities for ships in distress the need will arise to impose certain size specifications mainly on the size of new ships allowing their accommodation in the reception facilities. This will not affect Aframax or Suezmax sizes but it will affect ULCC and possibly VLCC sizes.

Size limitation of tankers may be environmentally commendable, however, regardless of the reception facilities. In case of a pollution incident smaller tankers, pose smaller and more easily manageable environmental risks. Again the economic advantages of very large ships against the risks posed to the environment should be balanced and a political decision should be taken.

Thirty years ago the idea of limitation of size of cargo tanks and the subdivision of tankers were introduced as a means of reduction and control of oil pollution in case of collision or stranding of a tanker¹¹. Recent developments have shown that limitation of size of tankers themselves should be now considered.

6. What kind of Action?

In case that it is decided that international action should be taken on the topic of Reception Facilities for Ships in Distress, the next question will be what form such action should take. The possible actions would be to prepare a treaty or amendments to an existing treaty, to prepare guidelines or a model law to be adopted by individual states.

In this connection it should be noted that guidelines are appropriate for operational matters. In this category part 2 of IMO guidelines fall (i.e. *guidelines for action required of masters and/or salvors in need of places of*

¹⁰ For the negotiations in the International Conference on Marine Pollution of 1973 regarding the oil reception facilities see G. Timagenis, *International Control of Marine Pollution*, Oceana/Sijthoff 1980 paras 415-422 pp 412-421 and for the proposals on double bottom and double skin ships *ibidem* paras 447-448 pp 437-439.

¹¹ MARPOL 73/78 Annex I, Regulations 24 and 25.

refuge, which include appraisal of the situation, identification of hazards and of required actions, reporting procedures etc).

Model laws are appropriate when their subject matter is to regulate the behavior of private citizens of various states.

In the case of Reception Facilities obligations need to be imposed on the states themselves. For this reason treaty obligations are required.

However reception facilities by themselves do not justify a separate treaty. For this reason if a treaty for the overall problem of the Places of Refuge is decided (something questionable by itself), then the provisions on the reception facilities for ships in distress may be included in this convention. Otherwise the obligation for reception facilities may be introduced through amendments to one of the existing relevant conventions.

8. What is the most Appropriate Treaty

(a) The Criteria

The criteria for choosing the most appropriate treaty may be summarized as follows:

- (i) The treaty should have a closely related subject where an amendment for reception facilities for ships in distress could fit;
- (ii) the treaty should have a relatively easy and quick amendment procedure; and
- (iii) the broader the participation in this treaty, the better and more effective the inclusion of an amendment will be.

(b) International Convention for the Prevention of Pollution from Ships 1973 as amended by the Protocol of 1978 (MARPOL 73/78)

This Convention relates to pollution of the marine environment by oil and other harmful substances from ships. It includes provisions concerning both operational pollution (i.e. pollution arising from the normal operation of ships) and accidental pollution (i.e. pollution arising from an accident relating to ships).

The Convention includes provisions concerning Reception Facilities¹² and provisions concerning the structure of tankers (double hulls) for the prevention of oil pollution in the event of collision or stranding¹³. The Convention also includes provisions concerning requirements for minimizing oil pollution from oil tankers due to side and bottom damages, including limitation of size and arrangements of cargo tanks, as well as subdivision and stability¹⁴. The Convention finally has provisions concerning regular surveys of ships¹⁵ and on board oil pollution emergency plan¹⁶.

On the basis of the objective and the structure of this Convention it appears to be the most appropriate treaty *ratione material* for the addition of

¹² Annex I, Regulation 12.

¹³ Annex I Regulations 13F and 13G.

¹⁴ Annex I, Regulations 22-25A.

¹⁵ Annex I Regulation 4.

¹⁶ Annex I Regulation 26.

one or more new Regulations (in a separate chapter or not) concerning the issue of Places of Refuge.

One Regulation might include certain more specific rules on the admission of distressed ships in a port or not and the conditions for such entry (including insurance cover).

Another Regulation might include the IMO guidelines and the provisions concerning the Maritime Assistance Service (MAS) adopted by the Assembly Resolutions A949(23) and A950(23) respectively, i.e. the provisions relating to the operational aspects concerning ships in distress.

A third new Regulation might concern the Reception Facilities. As in the case of oil reception facilities, this Regulation might include the basic obligation for coastal states to establish such reception facilities. The Regulation might also specify or set rules for specifying the number of facilities required depending on the length – and perhaps the nature – of the coasts. The Regulation should also include the basic specifications for such facilities, a period for their gradual deployment etc.

Finally the same or another Regulation might include the provisions for the size limitation of tankers.

On the other hand the Convention has a quick amendment procedure specified in Article 16 of the Convention (i.e. amendment without a conference but after consideration by IMO and tacit acceptance of the Annexes). This is a big advantage because environmental problems require quick and effective international solutions which discourage unilateral national or regional measures and often governments prefer to accept amendments by default (unless they specifically object) rather than to pass legislation through their Parliaments.

Finally MARPOL 73/78 has a very broad acceptance and this is another advantage since environmental issues require solutions with broad acceptance if such solutions are to be effective.

(c) *International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (OPRC Convention 1990)*

This is a second eligible Convention which could accommodate the provisions concerning ships in distress and the places of refuge, including the question of reception facilities.

The Convention concerns oil pollution incidents¹⁷ and provides for oil pollution emergency plans¹⁸, reporting procedures¹⁹ assessment and preparedness systems²⁰, international co-operation²¹ and has a relatively quick amendment procedure²² very similar to that of MARPOL 73/78.

¹⁷ Article 1(1).

¹⁸ Article 3.

¹⁹ Article 4.

²⁰ Articles 5 and 6.

²¹ Articles 7 and 10.

²² Article 14.

The incorporation of the Places of Refuge provisions could be achieved by the addition of Articles and/or Annexes with the contents mentioned above in connection with MARPOL 73/78.

This Convention, however, deals with operational aspects of pollution incidents rather than with construction requirements and although it is eligible it is definitely a second choice as compared to MARPOL 73/78.

(d) *The 1992 Civil Liability and Fund Conventions*

MARPOL 73/78 and the OPRC Convention do not include responsibility and liability provisions or institutional financial arrangements and consequently, it does not appear to be appropriate to include such provisions in an amendment of these Conventions.

Liability, compulsory insurance and funding arrangements might be included in the 1992 Conventions on the Civil Liability for Oil Pollution Damage (“1992 Civil Liability Convention”) and on the establishment of an International Fund for Compensation for Oil Pollution Damage (“1992 Fund Convention”). These conventions will need a more drastic amendment and especially the Fund Convention. It will require broadening of its scope and of its funding basis.

(e) *Other Conventions*

Other conventions relating to the subject do not seem to be appropriate for amendment for the purpose of inclusion of the treaty articles required in connection with the Places of Refuge generally and the Reception Facilities more specifically.

Thus the *United Nations Convention on the Law of the Sea 1982* (UNCLOS) includes a number of relevant provisions both in the Part II concerning territorial sea and innocent passage and mainly in the Part XII concerning the Protection and Preservation of the Marine Environment²³ including the general obligation to protect the environment²⁴, measures to “prevent, reduce and control pollution” including measures relating to “pollution from vessels, in particular measures for preventing accidents and dealing with emergencies”²⁵, a duty “not to transfer, directly or indirectly, damage or hazards from one area to another”²⁶, cooperation²⁷, notification of imminent damage²⁸, contingency planning²⁹, measures to avoid pollution from maritime casualties³⁰.

This Convention, however, is – at least so far as environmental protection is concerned – in the form of an umbrella convention of constitutional nature under which both existing and new specialized conventions may fit. Its

²³ Articles 192 et seq.

²⁴ Article 192.

²⁵ Article 194 para 3(b).

²⁶ Article 195.

²⁷ Article 197.

²⁸ Article 198.

²⁹ Article 199.

³⁰ Article 221.

provisions in their generality are sufficient and in any event – due to its broader political significance – its amendment is not an option at all.

The “*Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 1992*” (The London Dumping Convention) amended in 1978, 1980 and 1989 is also not appropriate for amendment for the purposes of Places of Refuge. The purpose of the Convention is to deal with wastes originally intended for disposal and the whole concept of the Convention is based on prohibitions and/or special or general permits. Although the definition of Dumping³¹ includes deliberate disposal of Vessels themselves, the licensing system does not apply in cases of force majeure etc.³²

9. Recommended Action of CMI

In view of the above CMI may adopt a Resolution at its 38th Conference in Vancouver recommending international action, especially through IMO and the amendment of relevant Conventions in connection with the Places of Refuge, including the Reception Facilities.

This recommendation may be forwarded to the appropriate international organizations and the national Governments for action. The contents of this recommendation may provide the basis for negotiations and the final formulation of the necessary treaty articles. For this reason the closer the language of this recommendation is to treaty language the bigger the help to the appropriate international organizations.

10. Summary

Reception Facilities for ships in Distress is an inevitable part of any comprehensive and effective system for preventing pollution from ships in distress. Such ships should be able to go somewhere safe without causing risk to the environment. The reception facilities will facilitate the decision making and the answer to the dilemma about granting a place of refuge to a ship in distress or not and the resolution of liability issues.

Reception Facilities for Ships in Distress may have the form of large public or private land or floating docks located around the coasts to receive the ship in distress and confine the risk of pollution.

A major related issue – and potential cause of objections – is the question of funding of this project. Funding may be achieved through an international fund based on contributions from the oil and the shipping industries and the states themselves. Another related issue may be the limitation of size of tankers.

This project to be achieved needs a treaty and this may be done through the amendment of one or more existing international conventions. The most appropriate conventions for amendment appear to be MARPOL 73/78 or the OPRC Convention 1990. The 1992 Civil Liability and Fund Conventions may host provisions concerning liability, insurance and funding aspect of the issue.

CMI may adopt a resolution recommending international action and providing the basis for the negotiations towards treaty provisions concerning the issue of the Places of Refuge.

³¹ Article III para 1(a)(ii).

³² Article V.

THE POSITION OF COASTAL STATES AND CASUALTY SHIPS IN INTERNATIONAL LAW*

WELMOED VAN DER VELDE**

1. Introduction

The sinking of the *Prestige* has revealed many unanswered questions about the rights and duties of a coastal State in respect of casualty ships. This essay will focus on current topics within this field: the legal elements of places of refuge for ships in need, the phasing out of single hull tankers and a ban on dangerous ships from the Exclusive Economic Zone (EEZ). When additional legislation appears to be necessary, a proposal for new rules of international law will be made.

2. Places of refuge

2.1 Does international law create a duty to offer ships a place of refuge?

2.1.1 Introduction

The fundamental regulation about the International Law of the Sea can be found in the United Nations Convention on the Law of the Sea (UNCLOS III)¹. However, in UNCLOS III no specific provision has been made for places of refuge. In the Official Records some references are made², but no direct answer to the question whether States are obliged to offer a place of refuge, can be found. An attempt will be made to clarify whether the existing international law creates a duty to offer a safe haven and if so, under which circumstances.

When a ship is requesting a place of refuge, access to the internal waters or a port in the internal waters of a State is meant. In most cases, the territorial sea will not give sufficient shelter to function as a place of refuge. When a

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¹ United Nations Convention on the Law of the Sea (UNCLOS III), Montego Bay, 10 December 1982. See for all maritime Conventions for instance: www.admiraltylawguide.com; consulted in November 2003.

² See for example the 7th meeting of the Second Committee, Third United Nations Conference on the Law of the Sea, Official Records, Vol. II, p. 120, in which Mr. Galindho Pohl (El Salvador) says: “None of the proposals submitted to the Conference questioned the principles adopted at the time (of the drafting of the 1958 Convention WY), according to which vessels exercising the right of innocent passage could navigate as close to shore as they wished and put into ports other than their ports of destination in cases of danger or when the circumstances required it.”

ship is requesting a safe place, various questions arise about the rights and duties of coastal States. The relation between those rights and duties determines whether a State is allowed to keep a casualty ship out of the territorial sea and in most cases out of the internal waters as well. In principle every State is sovereign in its territorial waters. Part of this right is the right to keep foreign persons or vessels out, especially when they endanger the good order or safety of the State. A leaking oil tanker close to the coast means a threat to the safety of the State. A duty to offer a place of refuge would therefore mean an exception to the principle of State sovereignty. In order to accept such an exception, a legal base is needed.

Possible reasons for limiting a State's sovereignty are the right of innocent passage, the duty to help ships in need and the duty to protect the world environment. The question is whether one or more of these reasons offers a valid base to accept the existence of a right to enter a place of refuge for ships in need and if so, under which circumstances.

2.1.2 Innocent Passage

When a ship in need wants to enter a place of refuge, this will mean in most cases the ship has to sail through the territorial sea into the internal waters of a State. In principle a coastal State can exercise its right of sovereignty over the internal waters as well as over the territorial sea. The unconditioned exercise of this right of sovereignty would mean that a ship is not allowed to use the territorial sea of a foreign State. This situation would make international trade impossible. For this reason the right of sovereignty over the territorial sea has been limited³. This limitation is called the right of innocent passage, as described in Articles 17, 18 and 19 UNCLOS III. An answer will be given to the question whether innocent passage offers a base for the recognition of a right to be offered a place of refuge within the territorial sea. Its important to note that the right of innocent passage can not be used as a legal base for the recognition of a right to a place of refuge in the internal waters of a State.

Two questions arise. First, whether the search for a place of refuge within the territorial sea can be seen as "passage". Second, whether a ship in distress is innocent or not.

UNCLOS III describes "passage" as⁴:

" (...) navigation through the territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility."

The Convention further states that⁵:

³ Article 2 sub 3 UNCLOS III: *"The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law."*

⁴ Article 18 - 1 UNCLOS III.

⁵ Article 18 - 2 UNCLOS III.

“Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.”

In the earlier Geneva Convention 1958⁶ “passage” was described as⁷

“(…) navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters” and “Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.”

The right of innocent passage has been created as an exception to the State’s sovereignty over the territorial sea, in order to make trade secure and economical⁸. The above mentioned provisions show that “passage” is about a temporary movement of a foreign ship through the territorial sea in order to get somewhere else⁹. The sovereignty over the territorial sea has been limited to enable ships to use the territorial sea as a medium, not as a destination. Access to a place of refuge within the territorial sea is not a temporary movement; the requested place is the place of destination. For this reason a duty to offer shelter within the territorial sea can not be based on the exception of innocent passage. There is even another reason for this conclusion. Article 19 UNCLOS III states:

*“Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.”*¹⁰

No discussion seems possible about the fact that a huge tanker threatening to loose or already leaking thousands of tons of crude oil can not be called innocent¹¹. UNCLOS III considers an act of wilful and serious pollution to be not innocent¹². This provision does not mean that unintentional pollution is innocent under all circumstances. The list of acts in Article 19 is unlimited so that serious pollution which is not wilful may be called not innocent as well.

A Dutch Administrative Court tried to clarify the meaning of “innocent passage” in the Long Lin case¹³. In 1992, the Long Lin, a vessel carrying

⁶ Convention on the Law of the Sea, Geneva, 29 April 1958. United Nations, *Treaty Series*, vol. 516, p. 205.

⁷ Article 14 - 2 and 3 Geneva Convention 1958.

⁸ O’Connell, *The International Law of the Sea Vol. I*, 1982, p. 259

⁹ See also: Hoge Raad 7 February 1986, *Nederlandse Jurisprudentie* 1986,477 (Attican Unity).

¹⁰ A similar definition to “innocent” was given in the Geneva Convention 1958.

¹¹ Innocent in this sense means “not harming” instead of “not guilty”.

¹² Article 19 – 2 sub h UNCLOS III.

¹³ Raad van State Afdeling Bestuursrechtspraak 10 April 1995, *Schip & Schade* 1995, 95 (Long Lin).

barrels of resin, collided in the North Sea. As a result of this, the damaged ship had to be brought to a repair yard at Flushing. In order to be able to reach this yard, the ship-owner asked permission to enter Dutch territorial waters. Authorisation would only be granted if special technical requirements were met and a bank guarantee by the P&I Club was provided. Because the insurers were only willing to give this guarantee if they would have the right to limit their liability, the entrance to Dutch territorial waters was denied by the Dutch government. The court had to decide whether the government had the right to refuse access to the territorial waters.

It was decided that bringing in a damaged vessel into port can not be seen as innocent passage because “passage” should be described as a quick and non-stop sailing through the territorial sea for normal purposes. The court stated too that Article 11 Salvage Convention 1989 is not applicable in this case because this Convention had not entered into force yet¹⁴. The Dutch State based its right to refuse access to a foreign ship on its right of sovereignty¹⁵. The court decided that international law does not create an absolute right for States in the way that this would prevent a ship in distress from looking for shelter in the territorial waters or a port of that State. In each case the gravity of the ship’s situation has to be weighed against the threat the ship poses to the coastal state. The Administrative Court reversed the State’s decision to refuse access, saying that the decision should have been given on better grounds. The Administrative Court indicated which factors the Dutch State is allowed to take into account by reconsidering its decision to refuse access. The State is allowed to take into account all possible setbacks that might occur during the ship’s voyage to the repair yard. However the State is not allowed to consider situations of which one practically knows they will not occur¹⁶.

The conclusion should be that the possible right of a place of refuge can not be based on the exception of innocent passage. The exception can not be used to create a right to enter the internal waters or a port of a State because the right of innocent passage does not apply in these areas. The exception can even not be used as the legal base for a right to a place of refuge within the territorial sea. A casualty ship looking for shelter is neither passing nor innocent.

The right to a place of refuge has to be based on other grounds. Whether the duty to help others who are in a situation of distress, is a valid basis will be examined in the next paragraph.

2.1.3 *Need for help*

In Article 98 UNCLOS III the duty on seafarers to assist a vessel in distress has been codified. Now that this provision does not focus on a duty

¹⁴ See paragraph 2.1.3 for Article 11 Salvage Convention 1989.

¹⁵ See also: Hoge Raad 7 February 1986, *Nederlandse Jurisprudentie* 1986, 477 and *Schip & Schade* 1986, 61 (Attican Unity).

¹⁶ In the end, the Long Lin had to be brought to a French repair yard. The Dutch repair yard tried to hold the Dutch State liable for the financial loss as a result of the refusal to grant the ship access to Dutch territorial waters. The Administrative Court decided that only the ship owner could have brought an appeal against the State’s decision. *Schip & Schade* 1995, 96.

on States it cannot be used as a legal base for the recognition of a duty to offer a place of refuge. In the Preamble of UNCLOS III is stated that “(...) *matters not regulated by this Convention continue to be governed by the rules and principles of general international law.*”

Do the rules and principles of international law regarding the duty to help others in need regulate the issue of places of refuge? The principle that one can be obliged to help persons in need under certain circumstances has been commonly recognized. The United States-Mexico General Claims Commission¹⁷, decided for example in 1929:

“The principles with respect to the status of a vessel in ‘distress’ find recognition both in domestic laws and in international law. (...) The enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws has been generally stated to apply to vessels forced into port by storm, or compelled to seek refuge for vital repairs...”

Some say the duty to render assistance to vessels and persons in distress at sea is an axiom of international maritime law¹⁸. They like to see the right of entry as a general principle with only very few and strict limitations thereto. Others say the right of a ship in distress to enter a port is not an absolute right¹⁹. Either way it is clear that the duty to help is too general to know what specific actions are expected under which circumstances. Article 11 of the Salvage Convention 1989²⁰ is more precise by stating:

“A State Party shall, whenever regulating or deciding upon matters relating to salvage operations such as admittance to ports of vessels in distress or the provision of facilities to salvors, take into account the need for co-operation between salvors, other interested parties and public authorities in order to ensure the efficient and successful performance of salvage operations for the purpose of saving life or property in danger as well as preventing damage to the environment in general.”

We can conclude that the duty to offer a place of refuge can indeed be based on this provision. However, two problems arise when the Salvage Convention 1989 would be used as the base for the recognition of the duty to offer a safe haven. The first difficulty consists of the limited applicability; not every coastal State is a member of the Salvage Convention 1989²¹. The second difficulty with this Convention became clear as a result of a

¹⁷ United States-Mexico General Claims Commission, 1929, 4 RIAA, p. 447 (Rebecca).

¹⁸ Van Hooydonk, “Some Remarks on Financial Securities Imposed by Public Authorities on Casualty Ships as a Condition for Entry into Ports”, *Marine Insurance at the Turn of the Millennium*, Volume 2, Antwerp 2000, p. 117-136.

¹⁹ Hetherington, “‘Prestige’. Can the Law Assist?”, CMI document. See also: H. Meijers in his comment on Hoge Raad 7 February 1986, *Nederlandse Jurisprudentie* 1985,477 (Attican Unity).

²⁰ International Convention on Salvage 1989, London 28 April 1989. See: www.admiraltylawguide.com; consulted in November 2003.

²¹ See www.imo.org; consulted in November 2003.

questionnaire²² of the Comité Maritime International (CMI). Almost none of the members appeared to have introduced any legislation which gives effect to Article 11. Only three countries, Germany, Norway and the UK, have designated any particular places of refuge as an effect of this Article²³. In the next paragraph an answer will be given to the question whether the duty to protect the environment offers a better base for limiting the right of sovereignty.

2.1.4 *Protection of the environment*

International law imposes on States an obligation to protect the marine environment. In the Preamble of UNCLOS III is stated that the State parties recognize:

“the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will (...) promote (...) the protection and preservation of the marine environment (...)”.

Besides the general remark in the Preamble about the promotion of the protection and preservation of the marine environment the obligation to prevent pollution can be found in Part XII of the Convention²⁴. Article 192 UNCLOS III literally states that States have the obligation to protect and preserve the marine environment. In the following provisions more is said about how to comply with this duty. In the Official Records of the Third United Nations Conference on the Law of the Sea nothing is said about whether the rather general obligation in Article 192 UNCLOS III embodies a duty to offer a place of refuge. However, the Convention does impose in the following articles more specific duties to take measures to prevent, reduce and control pollution of the marine environment²⁵, not to transfer damage or hazards or transform one type of pollution into another²⁶ and to draw contingency plans²⁷. The *Prestige* case has shown that in many cases these codified duties can not be fulfilled without offering a place of refuge. The duty to protect the environment can therefore offer a legal basis for an exception to the right of sovereignty of a State. The acceptance of such a broader interpretation of the UNCLOS III articles on the protection of the environment would mean an important increase in the protection of the marine environment. A problem is however that not many States will accept this new reading of the existing UNCLOS III articles because this would decrease the meaning of their right of Sovereignty. Although the duty to offer a place of refuge could theoretically be based on the existing environmental provisions of UNCLOS III, it would be recommendable to state this duty in a

²² CMI Yearbook 2002, p. 117-142.

²³ Attention to national plans about Places of Refuge will be given in paragraph 2.3.

²⁴ Official Records Third United Nations Conference on the Law of the Sea, Vol. II, p. 311-385.

²⁵ Article 194 UNCLOS III.

²⁶ Article 195 UNCLOS III.

²⁷ Article 199 UNCLOS III.

more explicit way in a new article. This additional provision should also make clear when exactly a duty to offer a place of refuge exists, now that the existing general UNCLOS III provisions fail to do so.

2.2 Existing legislation about the relation between the right of sovereignty and the duty to protect the environment

It is important to know under which circumstances States are obliged to offer a place of refuge. The answer to this question depends on the relation between the right of sovereignty and the duty to protect the environment. Which one prevails in a certain situation?

UNCLOS III nor any other international regulation gives a clear answer to this question. The MARPOL Convention²⁸ is the most important international convention about the prevention of pollution of the marine environment by ships from operational or accidental causes. Many States are member of this convention. Although the convention imposes various rights and duties on the member States, nothing is said about the duty to offer a place of refuge to ships in distress.

Many States have ratified the OPRC Convention too²⁹, most of them have adopted legislation to give effect to Article 3, 4 and 5 about oil pollution emergency plans, reporting procedures and action on receiving an oil pollution report and have adopted some kind of Oil Pollution Response Contingency Plan. However, only few of these contingency plans contain provisions dealing with the admission of a ship in distress³⁰.

Under certain circumstances the right of a coastal State to order a damaged ship to stay away from the coastline can be based on the Intervention Convention 1969³¹. Many States have become party to the Intervention Convention 1969. Under this Convention the coastal State is empowered to take only such action as is necessary and proportionate to the damage, and after consultations with appropriate interests. These are the owners of the ship and the cargo, the flag State and independent experts. Account shall be taken of (a) the extent and probability of imminent damage if those measures are not taken; (b) the likelihood of those measures being effective; and (c) the extent of the damage which may be caused by such measures³². Important is that a coastal State which takes measures beyond those permitted under the Convention is liable to pay compensation for the damage inflicted by that State³³.

²⁸ International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78). Entered into force on 2 October 1983 (Annexes I and II). See: www.admiraltylawguide.com; consulted in November 2003.

²⁹ International Convention on Oil Pollution Preparedness, Response and Co-Operation, 1990, London, 30 November 1990. See: www.admiraltylawguide.com; consulted in November 2003.

³⁰ CMI Yearbook 2002, p. 121. The contingency plans of Australia, Germany and New Zealand contain provisions dealing with the admission of ships in distress which threat to pollute.

³¹ International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969. Entered into force on 6 May 1975. The 1973 Protocol extended the Convention to cover substances other than oil. See: www.imo.org; consulted in November 2003.

³² Article V Intervention Convention.

³³ Article VI Intervention Convention.

Places of Refuge

For the EU Member States regulation about places of refuge is already along the way. The EU regulations could be used as an example for a wider application on a worldwide base. On 12 December 1999 the oil tanker Erika spilled 20,000 tonnes of oil on the French coast. That incident revealed serious gaps in the (European) maritime safety rules. Since then the EU has improved these rules. Two packages with measures were created, Erika I and Erika II³⁴. Part of Erika II is a traffic monitoring directive³⁵. In this directive was agreed that all member States shall develop plans on how to deal with these situations and inform the Commission. According to the directive:

“such plans shall contain the necessary arrangements and procedures to ensure that ships in distress can immediately go to a place of refuge subject to authorization of the authorities”.

The ‘Erika II’ package came into force August 2002. According to the European Directive for a monitoring and information system, the European Members should have presented their plans about places of refuge before the first of July 2003. Not every State fulfilled this duty so that the need for more detailed provisions on places of refuge still exists in Europe too.

Because existing legislation did not clarify the issue of places of refuge, the IMO adopted a set of guidelines in December 2003. After the Castor incident in December 2000 the IMO Sub-Committee on Safety of Navigation (NAV) was designated to co-ordinate the issue of places of refuge. The sub-committee created guidelines for the master (or salvor) of a ship in search for a safe haven and for the coastal States³⁶. The IMO Legal Committee is looking at the aspects of liability and compensation. The Comité Maritime International (CMI) conducts research into the issue of places of refuge and will report to the IMO³⁷. In November 2003 a CMI International Sub-Committee on Places of Refuge has pointed at various issues to be made clear³⁸. The subject will be debated at the International Conference of the CMI in June 2004 in Vancouver. The issues vary from the question whether an obligation to offer a place of refuge exists to financial security and civil and penal liability.

The question will be answered whether the IMO guidelines will sufficiently solve the need for regulation on places of refuge. The most important provisions in the guidelines can be found in paragraph 1.1.5:

“(...) granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis with consideration of the balance between the advantage for the affected ship

³⁴ See: http://europa.eu.int/comm/transport/maritime/safety/index_en.htm; consulted in November 2003.

³⁵ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system. Official Journal L 208, 5 August 2002, p. 10-27. See: <http://europa.eu.int/eur-lex>; consulted in November 2003.

³⁶ The text of the Guidelines can be found in the annex to R. Shaw's article: "Places of Refuge: International Law in the Making?", *JIML* 9 [2003] 2, p. 174-180.

³⁷ See: www.comitemaritime.org; consulted in November 2003.

³⁸ See: www.comitemaritime.org; consulted in December 2003.

and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast.”

And in paragraph 3.2.1 which says:

“When permission to access to place of refuge is requested, there is no obligation for the coastal State to grant it, but the coastal State should weigh all the factors and risks in a balance and give shelter whenever reasonable possible.”

In my opinion the wording “there is no obligation for the coastal State” could lead to the mistake that States are free to decide whether or not to grant access and that States cannot be held liable for that decision. It might be better to provide:

“When permission to access to place of refuge is requested, the coastal State should weigh all the factors and risks in a balance and give shelter whenever reasonable possible.”

It has been made clear that additional legislation about places of refuge is needed. In the first place a codified Rule of International Law on Places of Refuge is needed to confirm the existence of an obligation to offer a place of refuge under certain circumstances. This new Rule of International Law on Places of Refuge can be designated in various ways. One possibility is to design a special Convention on Places of Refuge. The other option is to add a new rule to an existing Convention such as UNCLOS III or the Salvage Convention. Because it is unattractive to have a special convention for each specific subject the latter option is to be preferred. Now that a worldwide application of this new Rule is needed, it is recommendable to add the new “rule to a Convention with a broad application and which can be amended on a relative short term.”. A proposal for a Rule of International Law on Places of Refuge will be made after an investigation of the necessary contents has been made in the next paragraph. Next to such a general Rule of International Law, guidelines are needed to know whether the obligation to offer a place of refuge exists in a certain situation and how to fulfil this obligation. The contents of the IMO guidelines will therefore be discussed and additional provisions will be proposed.

2.3 Proposal for legislation on places of refuge

2.3.1 Introduction

The new international legislation on places of refuge should at least give an answer to three important questions. First, who has the power to decide that a ship has to be offered a place of refuge? Second, what are the criteria to be applied by deciding whether a State’s sovereignty should be limited, i.e. whether a place of refuge should be granted? Third, what are the consequences of a wrong or right decision, i.e. who pays the damages? An attempt will now be made to give answers to these three questions.

2.3.2 The power to decide

The decision to grant or to refuse access should formally be with the national government. Only in that way a State can be held responsible for a

Places of Refuge

possibly unjust refusal or late reaction to grant access to a place of refuge. However it is of enormous importance to bring the decision-making process away from the political field. The danger exists that politicians have a lack of knowledge and have interests which depend more on coming elections than on environmental considerations. A person who knows how big the dangers are when a ship is brought close to the coast and what the chances are for saving a ship should decide. In the United States a US Coast Guard Marine Safety Manual has been written³⁹. The Coast Guard Captain of the Port (COTP) and the District Commander are authorised to verify a claim of force majeure and then accept or reject it. Once such a claim has been accepted, the Coast Guard is responsible for granting or denying a vessel a place of refuge. Norway has implemented most of the measures of the IMO Subcommittee on Safety of Navigation. Most important are the designation of places of refuge and the appointment of one agency responsible for the decision to grant or refuse such a place. This agency is called the Norwegian Coastal Directorate's Department for Emergency Response (DER). A similar system is used in the United Kingdom. The salvor in charge works together with a senior government official who serves the public interest and who has the power to intervene: the Secretary of State's Representative (SOSREP)⁴⁰. The international Salvage Union (ISU) has stated that every EU State should appoint a SOSREP with full authority to take decisions in a marine emergency on the government's behalf. I would suggest that this system should be applied worldwide. The IMO guideline already provides in the establishment of a Maritime Assistance Service (MAS), responsible for the communication between the shipmaster and the authorities of the coastal State in the event of an incident⁴¹. The guideline should be completed with a paragraph requiring States to appoint one person with the authority to decide whether to refuse or grant assistance to ships in need. This information should be kept in a database kept by an international organization. The guideline should also clearly indicate what the maximum period is for a State to make the decision.

When the decision has been made that a place of refuge needs to be given, the next question is which place suits best. The proposed guidelines for the evaluation of risks associated with the provision of places of refuge indicate which factors are of importance when deciding which place is offered. It is important that the guidelines indicate as well how many places of refuge are needed pro coast length.

2.3.3 The criteria to decide whether a place of refuge should be offered

Now that the right of a place of refuge is not an absolute one, the criteria to decide whether a place of refuge should be offered, have to be investigated.

³⁹ See: <http://www.uscg.mil/USCG.shtm>; consulted in November 2003.

⁴⁰ See for an overview of national legislation on places of refuge: CMI Yearbook 2002, p. 123-138.

⁴¹ Paragraph 1.4.3 and 3 Guidelines on Places of Refuge for Ships in Need of Assistance, NAV 48/19 Annex 12. See: R. Shaw, "Places of Refuge: International Law in the Making?", Annex 2, *JIML* 9 [2003] 2, p. 174-180.

In Spain Royal Decree 210/2004 has entered into force. This Decree provides that the Spanish Maritime Authority is not obliged to grant permission to access a place of refuge. The Authority will make decisions on a case-by-case basis by weighing up the damages that may result from the various possible types of assistance. Important is that when the ship endangers lives, the marine environment or natural resources, the permission becomes subject to the provision of financial security. Although the Spanish Decree gives clarity about the applicable criteria, it is to be preferred to create international uniform criteria. When the duty to protect the environment is used as the legal base for the duty to offer a place of refuge, the question to be answered is surprisingly simple. A duty to offer a place of refuge exists when the expected total damages as a result of a refusal exceed the expected total damages as a result of permission. I would suggest that in considering whether the measure of offering a place of refuge is appropriate to the expected damage, account shall be taken of factors analogous to Article V Intervention Convention:

- (a) the extent and probability of imminent damage if this measure is not taken;
- (b) the likelihood of the measure being effective; and
- (c) the extent of the damage which may be caused by the measure.

The Dutch Long Lin case⁴² can give an indication of what a State should take into account when considering factor c. The State should be allowed to take into account all possible setbacks that might happen. However the State should not be allowed to consider situations of which one practically knows they will not occur.

The simplicity of the above mentioned criteria offer too little hold for application in practice. The guidelines are best suited to offer more hold in each particular case. Australia has made a Provision of Safe Haven for Disabled or Damaged Vessels at Sea. The provision contains guidelines for responsible authorities. The operational criteria to be considered in selecting a safe haven are given. Apart from on practical and social factors, the decision has to be made on criteria based on environmental interests as well. The same counts for the IMO guidelines. To help a State in the decision making process a list of analysis factors is provided. Some of these factors concern insurance and the requirement of financial security. Some States, like the Netherlands and Hong Kong, ask financial security before granting access. This could mean a delay in the decision making process. I would therefore suggest not taking these factors into account when deciding on refusing or granting access⁴³. The guidelines for the evaluation of risks containing environmental and social factors, natural conditions, contingency planning and foreseeable consequences on the other hand will help States indeed in making the right decision.

⁴² Raad van State Afdeling Bestuursrechtspraak 10 April 1995, *Schip & Schade* 1995, 95 (Long Lin). See paragraph 2.1.2 of this article.

⁴³ See also: Van Hooydonk, "Some Remarks on Financial Securities Imposed by Public Authorities on Casualty Ships as a Condition for Entry into Ports", *Marine Insurance at the Turn of the Millennium*, Volume 2, Antwerp 2000, p.129-130.

2.3.4 *The financial consequences*

The International Maritime Organization (IMO) has adopted several treaties to give compensation to the victims of pollution damage by ships. These are the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969, and the 1992 Protocol thereto, the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund) 1971, and the 1992 Protocol thereto⁴⁴, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996 (HNS) (not yet in force) and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (not yet in force)⁴⁵. The CLC, HNS and Bunker Convention all create a system of strict liability for the ship-owner. When the damage is not the result of his "personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result", the ship-owner has the right to limit his liability⁴⁶. The Fund consists of contributions from oil importers. The Fund will pay additional compensation when the oil pollution damage exceeds the amount paid under CLC. It is important to note that the amount of money paid under this Fund Convention has been limited to a maximum as well. All existing Conventions consider national governments as possible victims of pollution damage and offer States therefore an opportunity to be compensated. However a State can very well have contributed to the damage as well. If a State refuses to give a place of refuge without having valid reasons for that, liability should be imposed. Without this a Rule of International Law on Places of Refuge can not be successful. There need to be consequences to a wrong as well as to an appropriate application of the guidelines. By making clear the consequences a quick reaction to casualties at sea is assured. This way the danger that a minor incident unnecessarily becomes a major disaster will be minimized.

The legal base for the liability of a State in case of an unlawful refusal to offer a place of refuge can be found in Article 235 UNCLOS III in which is stated:

"States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law (...)."

Article VI Intervention Convention indicates the same obligation:

"Any party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article I."

⁴⁴ In May 2003 the 2003 Protocol on the Establishment of a Supplementary Fund for Oil Pollution Damage has been adopted. This would be the third tier for oil pollution damage.

⁴⁵ See for all Conventions: www.admiraltylawguide.com and www.imo.org; both consulted in November 2003.

⁴⁶ Article V CLC.

The new Rule of International Law on Places of Refuge should state that States are liable for the damages inflicted by an unjust refusal to grant access. This liability should be limited and the money should be brought into a fund. The details should be regulated in additional paragraphs to the guidelines. The precise division of money can follow after an investigation of all parties who have suffered damages.

2.4 Conclusion and proposal regarding places of refuge

The duty to offer ships in distress a place of refuge means a limitation of the right of sovereignty of a State. The duty to protect the world environment is best suited to serve as the legal base for this limitation. Theoretically the duty to offer a place of refuge can be based on the existing UNCLOS III provisions. However it would be recommendable to confirm the existence of this duty in a more explicit way in a new article. The right of a ship in need to be offered a place of refuge is not an absolute one. A recent questionnaire by the Comité Maritime International shows that very few States have given effect to any legislation with respect to ships in distress and their right to seek shelter in a place of refuge. For this reason additional international regulation is needed to know under which circumstances this right exists. The ideal way to do this would be creating an additional article to an existing Convention with a broad application and which can be amended on a relative short term. This article would be the codification of the acceptance that the duty to protect the environment, as imposed by International Law, can consist of a duty to offer a place of refuge. This new Rule of International Law on places of refuge should state⁴⁷:

States are obliged to offer ships in need a place of refuge when this is necessary and proportionate to the damage. A State shall be liable for the damages caused by an unjust refusal to offer a place of refuge.

Unfortunately it is doubtful whether many States will indeed adopt such a Rule, which at first sight does not offer States direct advantages; it rather confirms the existence of an obligation they would preferably deny. Breach of such obligation may more explicitly give rise to a liability claim than the provisions in existing Conventions. However, the *Prestige* disaster might have the positive effect (and that is the only positive effect I can think of) that States become aware of the importance to adopt such a new Rule of International Law. Now that this Rule aims to protect the world environment, the adoption is also in the interest of separate States as the national territories are part of that larger entity. The *Prestige* case has shown that the existence of an International Rule of Law on Places of Refuge would not only have prevented or at least minimized the damages in Spain but also the damages in Portugal and France.

Next to an International Rule of Law it is also necessary to answer more detailed questions as who has the power to decide that a ship has to be offered a place of refuge, which criteria need to be applied and what the consequences are of a wrong or right decision. This more detailed regulation can be given in

⁴⁷ Inspired by the Intervention Convention 1969, See: www.imo.org; consulted in November 2003.

international uniform guidelines. My proposal is that the decision to grant or to refuse access should formally be with the national government. However the actual decision should be made by a person with knowledge in the field of salvage and with full authority to take decisions on the government's behalf. The guideline should indicate what kinds of places are suitable and how many places of refuge are needed. The criteria to decide whether to grant or refuse access can be summarized in one sentence. A duty to offer a place of refuge exists when the expected total damages as a result of a refusal exceed the expected total damages as a result of permission. The guideline has to offer more specific criteria like practical and social factors as well as factors based on environmental interests. Criteria based on financial security in the guidelines are not recommendable. The International Maritime Organization (IMO) has adopted several treaties to give compensation to the victims of pollution damage by ships. When a State suffers damages as a result of offering a place of refuge, he can be (partially) compensated. There need to be consequences to a wrong as well as to an appropriate application of the new guidelines. The new Rule of International Law on Places of Refuge clearly states that States are liable for the damage inflicted by the wrong application of the criteria to offer a place of refuge. This liability should be limited and the money should be brought into a fund, which can be regulated more detailed in the guidelines. The additional legislation in the proposed Rule of International Law on Places of Refuge and the guidelines will minimize the danger that a minor incident unnecessarily turns into a major disaster like the *Prestige* has become.

3. Preventive measures

3.1 Introduction

The *Prestige* disaster has lead to a realization of the importance of the designation of places of refuge. The oil pollution damage made governments also think about other ways to prevent future casualties near their coast. The phasing-out of single hull tankers and a ban on ships with dangerous cargo from the Exclusive Economic Zone (EEZ) are two of the proposed measures. An overview of the legal rules concerning these measures will be given as well as an answer to the question whether these measures are advisable.

3.2 Phasing-out of single hull tankers

At this moment approximately 2,000 crude and product tankers, of a world fleet of some 5,800 vessels, do not have a double hull⁴⁸. Various legislative initiatives have been made in an attempt to dispel these tankers. After the grounding of the Exxon Valdez in 1989, the United States introduced the Oil Pollution Act (OPA 90). This Act includes double hull requirements for new tankers and a phase-out scheme for existing single hull tankers. The final date for the phase-out of all single hull tankers under OPA 90 is 2015. The

⁴⁸ Sjöfartens Analys Institut, Göteborg 28 April 2003. See: <http://saiweb.sai.se/saisite2.nsf>; consulted in November 2003. The institute used as a source: <http://www.lrfairplay.com>.

particular phase-out date for a tanker is based on its age, tonnage and whether it has double bottoms or double sides. The IMO has established global rules for the design and operation of oil tankers in the MARPOL Convention (MARPOL 73/78)⁴⁹. The 1992 amendments⁵⁰ to MARPOL 73/78 required a double hull for new ships and certain existing ships in combination with a phase-out period for single hull ships and an increase of inspections. In 1994 a European Regulation⁵¹ implemented the IMO Resolution⁵². After the Erika incident in 1999 the need to create new rules on marine safety was felt worldwide. On a European as well as on a global level proposals were made to this end. On 27 April 2001 new amendments to IMO Regulation 13G of Annex I of MARPOL 73/78 were adopted⁵³. These amendments introduced an accelerated phasing-out scheme for single hull oil tankers, the requirement for certain tankers to comply with a Condition Assessment Scheme (CAS) and a possibility to deny entry of single hull tankers which were allowed to operate until their 25th anniversary to ports or offshore terminals. At first a European proposal included a time table according to which single hull tankers were phased out earlier than the schedule provided in MARPOL. However in the end the idea of separate rules for EU waters was abandoned. The EU Regulation⁵⁴ (No 417/2002) was applicable from 1 September 2002 till 21 October 2003 and reflected the changes made to MARPOL.

After the *Prestige* incident in 2002 the EU Members proposed to amend MARPOL 73/78 again. These amendments should lead to a further acceleration of the phasing-out of single hull tankers, an immediate ban on the carriage of heavy grades of oil in single hull tankers and an extended Condition Assessment Scheme (CAS). The IMO Marine Environment Protection Committee (MEPC) discussed about these European proposals in July 2003. The MEPC agreed on parts of these proposals but decided that further investigation was needed before a final decision about the amendments could be made⁵⁵.

⁴⁹ International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto. See: www.admiraltylawguide.com; consulted in November 2003.

⁵⁰ Amendments to the MARPOL 73/78 Convention adopted by the IMO on 6 March 1992, entered into force on 6 July 1993. See Regulation 13F for new-build tankers and Regulation 13G for existing tankers.

Rule 13 G is not applicable on U.S. flag tankers because the U.S. government reserved its position thereto.

⁵¹ Council Regulation (EC) No 2978/94 of 21 November 1994 on the implementation of IMO Resolution A.747(18) on the application of tonnage measurement of ballast spaces in segregated ballast oil tankers, *Official Journal L* 319, 12 December 1994, p. 1-6. See: <http://europa.eu.int/eur-lex>; consulted in November 2003.

⁵² IMO Resolution A.747(18).

⁵³ Resolution MEPC 95 (46), entered into force on 1 September 2002.

⁵⁴ Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94, *Official Journal L* 064, 7 July 2002, p. 1-5. See: <http://europa.eu.int/eur-lex>; consulted in November 2003.

⁵⁵ The MEPC agreed on an accelerated phase-out for Category 1 (pre MARPOL) tankers. This would bring the final phase-out date from 2007 to 2005 (see EU Regulation No 1726/2003).

However, the EU did not wait for the IMO to amend MARPOL. A new EU Regulation was adopted 22 July 2003⁵⁶. This Regulation is directly applicable in all Member States of the EU and entered into force on 21 October 2003. According to this EU Regulation the final phase-out for Category 1 tankers has become 2005 and for Category 2 and 3 tankers this has in principle become 2010. Apart from this phase-out schedule, the CAS should be applied to single hull tankers of 15 years old or older in 2005.

An other far-reaching measure in the EU Regulation is the immediate ban on the transport to or from ports of EU Member States of heavy grades of oil in single hull tankers⁵⁷.

IMO held an additional meeting of the Marine Environment Protection Committee (MEPC) in December 2003. The former Secretary-General of IMO has expressed serious concerns about the European Union Regulation on single hull oil tankers⁵⁸. He was especially critical about the unilateral character of the measures and the negative effects they would have on the shipping industry⁵⁹. Despite these concerns the MEPC has adopted in December 2003 a revised accelerated phase-out scheme, an extended application of the CAS and a new regulation about a ban on the carriage of heavy grades of oil in single-hull tankers. These amendments to MARPOL are expected to enter into force on 5 April 2005. Questions arise about the desirability of the contents of the new EU and IMO regulations.

The former Secretary-General of IMO has said that measures to be taken in result of the *Prestige* incident should be "realistic, pragmatic and well-balanced"⁶⁰. The measures should especially not lead to

- damage to the concept of universality in the regulation of shipping
- discrimination against other regions in the world
- negative effects on the supply of oil
- undermining of the authority of the IMO

The proposal to bring the phasing-out date for category 2 and 3 tankers (MARPOL tankers and smaller tankers) from 2015 to 2010 was discussed. MEPC supported the 2010 deadline, but felt that an exception should be made for tankers less than 20 years old in 2010 (see EU Regulation No 1726/2003). Suggested was further to extend the life of these tankers to 2015 or until they reach a certain age. MEPC agreed in principle that the CAS should be applied to single hull tankers of 15 years old or older.

⁵⁶ Regulation (EC) No 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull tankers. *Official Journal L* 249, 22 July 2003, p. 1-4. See: <http://europa.eu.int/eur-lex>; consulted in November 2003.

⁵⁷ Till 2008 an exception to this rule has been made for oil tankers with a deadweight of less than 5000 tonnes.

⁵⁸ Briefing from the IMO Secretary-General, Mr. W.A. O'Neill, 23 October 2003. See: www.imo.org; consulted in November 2003.

⁵⁹ The Secretary-General said that oil pollution should be dealt with on an international level because of its global character. He urged all IMO members and MARPOL parties to act in accordance with the MARPOL Convention and respect IMO as the prime forum for technical matters affecting international shipping.

⁶⁰ Secretary-General Mr. W.A. O'Neill in his speech at the Marine Environment Protection Committee (MEPC) - 49th session, 14 July 2003. See: www.imo.org; consulted in November 2003.

- confusion of the industries concerned
- permission for other regions to create their own regimes different from IMO regulations

This means the measures should preferably apply worldwide and should not have a negative effect on the economy. The ideal is a regulation with worldwide applicability serving both economical and environmental interests. Shipping has a global character and problems relating thereto are therefore fought best on an international level.

The answer to the question whether the accelerated phase-out is the best solution can only be given after an investigation of the positive and negative effects this phase-out will have on the environment and the economy. It is obvious that double hull tankers can offer a greater protection of the environment in case of certain types of accidents. A double hull is however no guarantee that a leak will never arise. After a serious collision it is very well possible that both hulls will be punctured. The requirement of a double hull should therefore not lead to a lack of attention for other solutions that might protect the environment better. One could think about providing up to date navigation data and intensifying inspections of all ships now that age and design are not the only factors that count.

Apart from this it seems that the European phase-out does not guarantee that a similar catastrophe as the *Prestige* will never occur again. The European Regulation only applies to oil tankers under EU flag and to other oil tankers entering or leaving a port or offshore terminal or anchoring in an area under the jurisdiction of an EU Member State. Substandard vessels already avoid ports in the EU in order to avoid inspections. Those vessels will therefore not be affected by the phase-out rules. As long as a single hull ship is only passing by Europe, instead of entering a port or similar place, the current EU Regulation does not apply. This is especially important for ships travelling between the Baltic States or the Russian Federation and other non-EU Member States. The effect of the EU Regulation would increase enormously if the Baltic States and the Russian Federation adopt similar rules⁶¹.

We can conclude that a phase-out of single hull tankers does have the positive effect of a decrease in threat of the marine environment. Whether this measure is also the best suitable is however doubtful and further investigation seems necessary.

Traders and tanker unions have pointed at various possibly negative effects of the new measures. They fear the oil supply will be endangered by the new rules and that the tanker rates will rise. Moreover they say some safe single hull tankers will be hit by the phase-out unnecessarily. It is also said that the phase-out will have negative effects instead of a positive effect on the

⁶¹ The ban will not come into force in acceding EU member states until May 2004, unless national rules for earlier implementation of EU measures exist. The ban will come into force a couple of months later in the Member States of the European Economic Agreement (Norway, Iceland and Liechtenstein). The Russian Federation might bring in an early ban on single hull tankers as well, *Lloyds List* November 19, 2003, p. 1.

environment. To get to know the truth about the effects of the new measures, a closer look has to be taken at the consequences of similar national measures that have been introduced before.

Italy already had national rules similar to the new rules. In February 2003 Italy decided to ban single hull tankers older than 15 years old and above 5000 tonnes dwt carrying potentially polluting loads from access to Italian ports, platforms and anchorages. Traders said freight rates have increased only marginally because of this change. Next to this, traders say that almost all tankers that were built 15 years ago are already double hull, so the EU rules will not have a big impact. On 13 December 2002, a Royal Decree-law was published by the Spanish government which bans all single hull tankers carrying heavy fuel, tar, asphaltic bitumen and heavy crude, entering Spanish ports, terminal or anchorages. The entry into force has been effective since 1 January 2003. The effects of the ban on single hull tankers on the rates for double hull tankers are not clear yet. The European Parliament and the Council of the European Union⁶² have stressed the importance to ensure that the provisions do not endanger the safety of crew or oil tankers in search of a safe haven or place of refuge. This problem already had been tried to overcome by a special provision in Article 8 of Regulation No. 417/2002. However the *Prestige* incident has made clear this is not a guarantee for ships in distress that they will be offered a place of refuge.

We can conclude that the phasing-out or ban on single hull tankers will have a positive effect on the protection of the marine environment. However much remains unclear about other consequences of these measures. Hopefully the new EU and IMO rules have not been created too hasty without having made a thorough examination of the real consequences.

3.3 National policies to expel dangerous ships from the EEZ

The States which were directly affected by the *Prestige* disaster did not want to wait for the EU to take measures to prevent similar accidents to happen in the future. Spain, France and Portugal have adopted a policy of expelling ships they expect to endanger the environment from their EEZ. This measure is not official EU policy. The question is whether States are allowed to expel ships from their EEZ. A closer look will be taken at UNCLOS III. In this Convention the EEZ has been described as:

*"(...) an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention".*⁶³

According to UNCLOS III, the coastal State has *inter alia* sovereign

⁶² See Regulation (EC) No 417/2002 of the European Parliament and of the Council of 18 February 2002 on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers and repealing Council Regulation (EC) No 2978/94. *Official Journal L* 064, 7 March 2002, p. 1-5. See: <http://europa.eu.int/eur-lex>; consulted in November 2003.

⁶³ Article 55 UNCLOS III.

rights for the purpose of conserving and managing the natural resources⁶⁴, and jurisdiction with regard to the protection and preservation of the marine environment⁶⁵ in the Exclusive Economic Zone. The question is whether the right to expel ships from the EEZ can be considered to be part of the rights of a coastal State. With regard to the territorial sea a State is allowed to design special lanes for tankers⁶⁶ and to suspend temporarily specified areas the innocent passage⁶⁷. One might think these rights offer a legal base for States to expel dangerous tankers from the EEZ as well. This is not the case. UNCLOS III does not provide the above mentioned rights of a coastal State regarding the EEZ. Next to this, the mentioned rights in relation to the territorial sea do not cover the right to expel ships totally. It is only about expelling from a certain part of an area (outside the specified lane) or for a certain period of time. Now that no other rule of international law⁶⁸ provides States with the right to expel ships from his EEZ, the national laws concerning these subjects seem to be in conflict with international law and will therefore not be enforceable.

4. Summary

The sinking of the *Prestige* has revealed many unanswered questions about the rights and duties of a coastal State in respect of casualty ships. In this article an attempt has been made to give a little more clarity about places of refuge, phasing-out single hull ships and a ban on dangerous ships from the EEZ. The duty to offer ships in distress a place of refuge means a limitation of the right of sovereignty of a State. The duty to protect the world environment is best suited to serve as the legal base for this limitation. The right of a ship to be offered a place of refuge when in need is not an absolute one. A recent questionnaire by the Comité Maritime International shows that very few States have given effect to any legislation with respect to ships in distress and their right to seek shelter in a place of refuge. Additional international regulation is needed to confirm the existence of an obligation to offer a place of refuge. Instead of creating a special Convention, this regulation on places of refuge should preferably be added to an existing Convention. A Rule of International Law on Places of Refuge should ideally confirm:

States are obliged to offer ships in need a place of refuge when this is necessary and proportionate to the damage. A State shall be liable for the damages caused by an unjust refusal to offer a place of refuge.

Unfortunately it is doubtful whether many States will indeed adopt such a Rule, which at first sight does not offer single States direct advantages. However, the *Prestige* disaster might have the positive effect that States

⁶⁴ Article 56 -1-a UNCLOS III.

⁶⁵ Article 56-1-b UNCLOS III.

⁶⁶ Article 22-2 UNCLOS III.

⁶⁷ Article 25-3 UNCLOS III.

⁶⁸ The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, adoption 29 November 1969 and entry into force 6 May 1975, and the Protocol 1973 thereto, adoption 2 November 1973, entry into force 30 arch 1983, are not applicable on the decision to expel ship from the EEZ now that these only covers measures to be taken on the high seas.

Places of Refuge

become aware of the importance for the world environment to adopt such a new Rule of International Law. Next to a new codified Rule of International Law, more detailed regulation is needed to know under which circumstances States have the obligation to offer ships in distress a place of refuge. This more detailed regulation can be given in guidelines. Those guidelines are necessary to answer questions about who has the power to decide that a ship has to be offered a place of refuge, which criteria need to be applied and what the consequences are of a wrong or right decision. My proposal is that the decision to grant or to refuse access should formally be with the national government. However the actual decision should be made by a person with knowledge in the field of salvage and with full authority to take decisions on the government's behalf. The guideline should also indicate what kinds of places are suitable and how many places of refuge are needed. The criteria to decide whether to grant or refuse access can be summarized in one sentence. A duty to offer a place of refuge exists when the expected total damages as a result of a refusal exceed the expected total damages as a result of permission. The guideline has to offer more specific criteria like practical and social factors as well as factors based on environmental interests. Criteria based on financial security in the guidelines are not recommendable.

There need to be consequences to a wrong as well as to an appropriate application of the guidelines. In case a State suffers damages as a result of offering a place of refuge, the existing and draft Conventions on this subject offer States a possibility to be (partly) compensated for those damages. The suggested Rule of International Law on Places of Refuge makes clear that States should be liable for the damages as a result of an unjust refusal to offer a place of refuge. These additional rules will minimize the danger that a minor incident unnecessarily turns into a major disaster like the *Prestige* has become.

The oil pollution damage as a result of the *Prestige* incident made governments also think about other ways to prevent future casualties near their coast. The phasing-out of single hull tankers and a ban on ship with dangerous cargo from the Exclusive Economic Zone (EEZ) are two of the proposed measures. A new EU regulation accelerated the phase-out of single hull ships and put an immediate ban on single hull ships carrying heavy grades of oil. Much is still unclear about the positive and negative effects the new measures will have on the economy and the environment. The IMO Marine Environment Protection Committee (MEPC) has adopted in December 2003 a revised accelerated phase-out scheme, an extended application of the CAS and a new regulation about a ban on the carriage of heavy grades of oil in single-hull tankers. These amendments to MARPOL are expected to enter into force on 5 April 2005. After the sinking of the *Prestige* Spain, France and Portugal adopted a policy of expelling ships they expect to endanger the environment from their EEZ. Now that no rule of international law provides States with the right to expel ships from his EEZ, the national laws concerning these subjects seem to be in conflict with international law and will therefore not be enforceable.

AN INTERIM DISCUSSION PAPER ON ALTERATION OF RISK

MALCOLM CLARKE*

1. The Route to Bordeaux
2. Approaching the Issue
3. Current Law: Rule or No Rule
 - 3.1 Common Law: Assumption of Risk
 - 3.2 The Civil Law Tradition
 - 3.3 General Obligations Law
 - 3.4 Discussion
4. Current Law and Practice: Alteration
 - 4.1 Awareness of the Alteration
 - 4.2 Discussion
5. Current Law and Practice: The Consequences of Alteration
 - 5.1 The Relevance of Fault
 - 5.2 Termination of Cover.

Annex: Standard Clauses from Finland, Norway and the United Kingdom.

This discussion paper presents a comparative picture of current law and policy wordings concerning alteration of risk during the insurance period¹. It seeks to take a further look at the problems previously outlined by Professor Wilhelmsen in 2000. It goes one step beyond the CMI mandate in that there is some discussion of the relative merits of the rules and wordings in existence. Corrections and/ or comment are welcome.

Rules of law dealing specifically with alteration of risk during a period of marine cover are relatively rare. Not surprisingly such rules for non-marine insurance, including personal insurance, are more common. Some of these purport to apply to insurance in general and, therefore, to marine insurance. However, it may be doubted that the legislator had marine insurance much in mind; in any event the legislation gives way in practice to policy terms. Policy terms, in particular as regards specific alterations of risk such as change of owner or voyage, are common.

The provisional conclusion is that the current 'system' of a range of policy options built on or around national legislation works well enough; that

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¹ CMI, Yearbook 2000, Singapore I, p 375 ff. See also Wilhelmsen, T-L, MaRius no 295 (2002) 115-172.

the ‘best is the enemy of the good enough’ and that the legislator should ‘leave well alone’.

1. The Route to Bordeaux

At a Symposium held in Oslo in June 1998² the proposal of Patrick Griggs was largely accepted by those present: that the CMI should prepare a comparative study of certain issues of marine insurance law.

Subsequently and with this proposal in mind an International Working Group (IWG) was set up, originally under the chairmanship of Thomas Reme, now that of John Hare. At Singapore in February 2001 the IWG was mandated thus by resolution of the Plenary of the CMI³. 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).

Among the issues “identified in CMI Yearbook 2000-Singapore I page 326” are four of those identified in 1999 as those “the most in need of attention”. They are (1) the duty of disclosure, (2) warranties, (3) alteration of risk, (4) the duty of good faith, and (5) misconduct of the assured during the period of cover. Work on issues (1) and (4) has been largely completed by the industry of Trine-Lise Wilhelmsen. Work on the others is under way: issue (2)

² See the Annual Report of the BMLA 1997 p 42.

³ CMI Yearbook 2000 vol. II p 211.

by Graydon Staring, issue (4) by Andrew Tulloch, and issue (3) by myself. It is with alteration of risk that this discussion paper is concerned.

2. Approaching the Issue

Any proposal of new insurance law or a new policy clause, marine or non-marine, it is submitted, should be evaluated with certain factors in mind.

A. *Certainty*: The main reason for buying insurance is certainty: certainty of cost⁴, certainty of cover⁵ and, even among seasoned businessman, associated peace of mind⁶. Only from such a position can commerce plan ahead.

B. *Effective compensation and loss spreading*: Society at large seeks to promote these, factors that overlap Factor A, in order to foster human activity – potentially useful human activity: society also wishes to discourage wanton or wasteful conduct in human affairs⁷.

C. *Risk management and loss prevention*: The insurer, as well as society at large, has an interest in this. Factor C overlaps Factor B in its concern to discourage wanton or wasteful conduct. Thus it suggests rules that at least allow some degree of intervention or control by the insurer over the conduct of the policyholder during as well as immediately before a period of insurance cover.

D. *The Human condition*. Too much should not be expected of even the reasonable and experienced policyholder. We all make mistakes. To achieve the purposes of insurance, insurers and must be prepared in some measure to take on unreasonable policyholders. In earlier days on the high seas, the master had to be many things from engineer to navigator, if not astrologer. Today some of the closer stars may be manufactured and directed by man. Today the master has the benefit of satellite communication but the world is also more congested and more complex. It is not in the interests of the ship or cargo owner, or that of the insurer wanting to sell insurance, to make the law more onerous for the insured than is really necessary.

E. *Virtuous inactivity*: Americans are sometimes quoted as saying, ‘if it ain’t broke, don’t fix it’. In England we say ‘the best is the enemy of the good’; and that, if current law and practice ‘works’ well enough, ‘don’t tempt providence’. Leave it be. Moreover, Factor E overlaps with Factor A. Those concerned know what the law and practice means (or think they do).

⁴ A matter of more concern to commerce – so much so that, recently, one insurer has been offering businesses a fixed premium for 3 years, because research confirmed that stable insurance planning was a selling point.

⁵ In the case of compulsory motor insurance, for example, this is evident not only in England (Road Traffic Act 1988 s.148(1) and s.151(1)) but also, for example, in France (c. d’ass. R211-13-3) and other countries: certain defences cannot be raised against third parties to whom the insured motorist is liable. Cover is of such importance that society intervenes to ensure that it is in place and effective.

⁶ The importance of this element is apparent from the way that insurers advertise their products as well as decisions of courts in common law countries – with the exception, however, of England: Clarke, *The Law of Insurance Contracts*, 4th edn. (London 2003) Chap 30-9C.

⁷ Abraham ‘Distributing Risk’ (New Haven 1986) p 60.

3 Current Law: Rule or No Rule

3.1 Common Law: Assumption of Risk

In common law countries risk management and loss prevention (Factor C) are important, however, once the insurance period is running, there is a tendency to put certainty (Factor A) ahead of active risk management or 'interference' by the insurer. If loss occurs within the scope of the cover of a kind that the insurer had not bargained for, the insurer must live with his policy – until the end of the insurance period. Until then he cannot have the contract changed or terminated – in general. Exceptionally, certain events may be specified as 'held covered' only under certain conditions.

Recoverable loss must, of course, be within the scope of the initial cover; and certain kinds of change of risk take the subject-matter outside the original cover. If a policyholder insures warehouse A and then moves his store to warehouse B, the latter is a different risk (whether better or worse) and insurance on A does not extend to B⁸. The classic marine case is that of a change in the voyage⁹.

Today the law of non-marine insurance remains that of 1849, that a policyholder "who insures may light as many candles as he please in his house, though each additional candle increases the danger of setting the house on fire"¹⁰. The law of marine insurance is no different. In 1808 in *Raine v Bell*¹¹ a vessel, insured for a voyage from ports in Spain to London, loaded additional cargo in the form of chests of dollars. Lord Ellenborough asked "whether the risk might not have been increased by the particular kind of cargo, namely, treasure, taken in there" because "if it were known at the time to an enemy, it might hold out an additional temptation for him to seek for and attack the ship"? Nonetheless, he observed, the cover would remain in place: "I do not know that a mere temptation of this sort has ever been held a sufficient ground to avoid a policy if the original act itself were lawful"¹².

Other countries of common law more or less share this starting point. In modern times an Australian jurist observed that the "assumption at common law is that the whole *raison d'être* of insurance is to transfer risks intrinsic to the unknown future"¹³. If the insurer cannot absorb the risk, it

⁸ *Company of African Merchants v British & Foreign Marine Ins Co* (1873) LR 8 Ex 154, 157 per Blackburn J; *Haddenfayre v British National Ins Sy* [1984] 2 Lloyd's Rep 393, 398 per Lloyd J.

⁹ MIA s. 45(2) codifying *Tasker v Cunninghame* (1819) 1 Bligh 87, HL.

¹⁰ *Baxendale v Harvey* (1849) 4 H & N 445, 449, 452.

¹¹ (1808) 9 East 195. See also *Toulmin v Inglis* (1808) 1 Camp 421: the policyholder took a number of Spanish prisoners onto the insured vessel, which was lost due to a subsequent mutiny, in which the prisoners were prominent. Nonetheless, it was held that the increase in risk did not affect the cover.

¹² P 398. Bennett, *The Law of Marine Insurance* (Oxford 1996) Ch 15.2.

¹³ Nicholson (1991) 4 Ins LJ 27, 29, citing decisions and judicial statements to that effect. In the USA it has been suggested that the duty of good faith and thus any duty of disclosure ends when the contract has been concluded; Schoenbaum, 'Key Divergences between English and American Law of Marine Insurance' (Centerville, Maryland 1999) p 122. Cf Malta which, it has been reported, applies English law on many points of insurance law; but where there is a duty of disclosure during the insurance period as regards aggravation of risk.

must make that clear by unambiguously excepting that (increase of) risk¹⁴.

Any requirement of risk management must be agreed before contract or, if during the insurance period, must be without cost of any kind to the policyholder. The underlying assumption of the common law is that the role of insurance is not to rein in human activity and endeavour but to encourage it: Factor B. To that end common law allows the policyholder as much freedom of action as possible. He must disclose any plans or projects, that might aggravate risk, when cover begins, cover is extended¹⁵ or is renewed; but, between those (relatively close) times, he does not have to fax his insurer every time he plans something new because it might be risky.

So, there is no general rule statutory or otherwise, in most common law countries. Any alteration of risk, is for insurer's account: a risk assumed by the insurer and (as far as possible) factored into the premium paid for by the policyholder.

3.2 *The Civil Law Tradition*

Many civil law countries, especially as regards non-marine insurance¹⁶ but also in some cases marine insurance, draw a very different inference: alteration of risk is not countenanced by the insurer. It creates a new situation. So, the policyholder may be required to tell the insurer about it, rather as he must when the contract is varied. The situation is thus seen as one in which the policyholder's duty is in substance perhaps but not in name one of utmost good faith. The pattern within the various countries differs.

Some countries, such as Israel and Spain¹⁷, have general rules about alteration of risk for non-marine insurance but not for marine insurance. Holland once had rules but the recent Code on Insurance Law is silent on the matter, which reflects the view of lawyers in Holland (like those of common law countries) that alteration of risk post-contract is for insurers' account¹⁸.

¹⁴ An exception of a kind is found in common law countries at large for wilful misconduct of the insured: there is a presumption of interpretation that the insurer does not intend to cover this risk. Alternatively it may be excluded as a matter of public policy: Clarke (above n. 6) Ch.19-2E1.

¹⁵ *Lishman v Northern Maritime* (1875) LR 10 CP 179, 182 per Blackburn J (Exch Ch); *The Star Sea* [2000] 2 WLR 170, para 54 per Lord Hobhouse (HL). Idem as regards 'held covered' clauses: *The Good Luck* [1988] 1 Lloyd's Rep 514, 545 per Hobhouse J.

¹⁶ As regards non-marine insurance, the civil law tradition is apparent from this extract written by jurists of that tradition: Whereas the policyholder still wants cover, from "the insurer's point of view, on the other hand, each increase of the risk is a particularly aggravating factor as it practically creates a new risk which has not been taken into account in its calculations and thus imposes a further burden on the loss statistics of the identical risks. The insurer must therefore strive to resile from the existing contract." Fritz Reichert-Facilides (ed.), *International Encyclopaedia of Comparative Law*, vol. IX ch. 6: Insurance Contracts, subch. VIII: Changes of the Risk After the Formation for the Contract (Bernhard Rudisch) para 329. See also Basedow and Fock (ed.), *Europaisches Versicherungsvertragsrecht*, (Tubingen 2002) Vol. 1, 82-84. Clarke, "Aggravation of risk during the insurance period" [2003] LMCLQ 109-124.

¹⁷ Israel has such rules for non-marine insurance but these do not apply to (reinsurance, aviation insurance or) marine insurance. The Ottoman Marine Commercial Code has no such rules. Resort has to be the general contract law. Spain has rules on aggravation of risk for non-marine insurance. However, although there are rules of marine insurance in the *Codigo de Comercio* (Art.707 to 805) these do not contain a provision for alteration of risk as such.

¹⁸ Cf Art. 293 c. com. affecting (non-marine) property insurance.

Italy, referred to in more detail below, is different. The ancient Civil Code, containing relevant provisions for non-marine insurance¹⁹, applies also to marine insurance, except when there is a specific provision on the matter in the Code of Navigation²⁰. The position is similar in Belgium²¹, the Peoples' Republic of China²², Malta²³ and Greece²⁴.

Outstandingly different are the Norwegian Insurance Plan²⁵; and the Code des Assurances in France which has a section on marine insurance with clear rules about alteration of risk²⁶. Likewise in Slovenia where the Maritime Code²⁷ contains only a duty of information disclosure at the time of contracting, however, the general law of insurance requires disclosure of any significant change in the risk throughout the insurance period; and, it is understood, this requirement applies to all insurance, marine and non-marine²⁸.

3.3 *General Obligations Law*

In countries, where there are no rules of law specifically on a question of marine insurance, in theory at least the question is governed in this respect by rules of general obligations law, such as 'frustration' of the contract or a general obligation of good faith. With respect to the new insurance legislation in the Netherlands, for example, the Dutch association states that, although it contains no specific regulations for disclosure of change of risk after the insurance has been effected, it appears that under the general legal principles of good faith and fairness under certain circumstances an obligation of the insured to inform underwriters about a material change in their exposure can be assumed. However, it does not obviously follow that breach of that obligation will entitle an insurer to avoid the insurance contract.

Usually the general law allows parties to agree contract terms on the matter, subject to any overriding rule of contract good faith e.g. in Israel²⁹. Subject to the general impact of any such rules the situation will be regulated by the standard terms agreed by marine underwriters. In practice therefore, as

¹⁹ Civil Code (CC) Arts. 1895-1898.

²⁰ Art. 522 and Art. 523 contain such provisions.

²¹ 11 June 1874.

²² Alteration of risk is provided for in Art. 36 of the Insurance Law of 1995, applicable to non-marine insurance. As there is no such provision in the Maritime Code of 1992, Art. 147 also applies to marine insurance.

²³ Part of the Commercial Code is devoted to marine insurance.

²⁴ Insurance Policy Act (Law No. 2496/1997 repealing relevant provisions of the Commercial Code of 1835) is applicable to non-marine insurance but also applies to marine insurance when there is no corresponding provision in the Code of Private Maritime Law. Unlike the Law of 1997, the latter has no provision for alteration of risk, so Art. 4 of the former applies to marine insurance.

²⁵ <http://exchange.dnv.com/NMIP/>. See Art. 3.8 ff.

²⁶ C. d'ass Art. L. 172-2 and 172-3.

²⁷ Off. Gazz. RS, Nos. 26/01 and 21/02, arts. 698 and 701, in force since 12th May, 2001.

²⁸ *Obligations Code*, Off. Gazz. RS, No. 83/01, arts. 938-942, in force since 1st January, 2002.

²⁹ Law of Contract (General Part) s. 39.

it is stated in the French code civile “les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites”³⁰.

3.4 Discussion: Rule or No Rule

The threshold question – rule or no rule special to insurance contract law – can be answered by reference to the Factors set out above³¹. Factor A (certainty for the policyholder) suggests a rule which is a clear restatement of the general law applicable. No rule at all (the common law ‘model’) would allow courts of different countries to apply national law and promote uncertainty between jurisdictions. Factor B (interests of society) is scarcely indicative except insofar as it reinforces Factor A. In any event the implications of Factor B for marine insurance are relatively remote. Factor C, the insurer’s interest in risk management and prevention is also that of society. The tendency has been to leave mature interest groups to seek their own salvation, and not to intervene. Otherwise Factor C would indicate a special rule for alteration of risk. Factor D (practicality) suggest that, if there is a special rule at all, it be a minimal rule. A minimal rule would be the least departure from general contract law and would promote ease of alignment and/or integration with other any developments of uniform law. Factor E reinforces such a conclusion. Indeed Factor E is important in this context.

A provisional conclusion, therefore, is to suggest that the current law and practice, notably the use of well known conditions (warranties) and standard terms, ‘work’ well enough and should be left alone³². If nonetheless there were to be any changes or innovations in the law, the next question in this discussion paper is what they might be. To answer that question there now follows a survey of some of the rules now in force dealing with alteration of risk.

4. Current Law and Practice: the Meaning of Alteration

Whatever the substance of a rule of law for alteration of risk, legislation usually describes or defines the alteration of circumstances that trigger the rule. Some legislation simply describes the alteration as a ‘material’ increase³³ or just an ‘increase’³⁴ in the risk insured but most national legislation goes further. A typical definition taken from the Italian Code, which applies to both marine and non-marine insurance, is an increase “in such a way as would have caused the insurer not to agree to the insurance

³⁰ France Art. 1134 CC.

³¹ ‘2. Approaching the Issue’.

³² A Project Group is currently drafting a Reinstatement of European Insurance Contract Law for personal insurance. Although most countries in Europe have rules of law for such contracts, the Group draft adopts a ‘light touch’. It does not predicate rules of law but only default rules by way of limits on what can be provided for alteration of risk in policy terms, if any. See Clarke [2003] LMCLQ 109.

³³ E.g. Finland: Insurance Act (no 543) of 28 June 1994, s 26. An English translation of the Act can be found in [1995] 1 C.L.E. 437. Such a rule is also found in Japan: Commercial Code Art. 825. Similarly in France. C. d’ass Art. L.172-3 al 1 specifies ‘une alteration sensible’

³⁴ E.g. Argentina, Navigation Act, 1973, Art. 419; P.R. China, Insurance Law Art. 36.

contract, or to agree only for a higher premium, if the new situation had existed and had been known to him at the time of making the contract"³⁵.

Policy terms on the question are usually focussed on specific alterations. However, the Finnish Marine Hull Conditions 2001 (FHC 2001) contain a general provision triggered when "the increase in risk is not a circumstance of a nature that the insurer is to be deemed to have taken into account" and when "the insurer would not have granted the policy had he been aware of the increase in risk". This provision is in line with the legislation in other countries, such as the Italian Code (above), insofar as it is usual to provide that, if the alteration is to permit the insurer to terminate the cover, the alteration must be one which, had it been the case at the time of contracting and unknown to the insurer, it would have vitiated consent³⁶.

In some instances, not only policy wordings but also legislation, there are rules of law for more specific situations in which the risk has changed; and, insofar as the situation that triggers the rule is clearly specified, the issue of defining an alteration of risk as such does not arise. For example, if there is a change of description of the interest insured, under general principles of insurance law the cover is likely to cease to attach; also perhaps standard policy terms³⁷. Yet more specific and to the point is a rule for 'Change of course, voyage or of ship' in Art. 523 of the Italian Code of Navigation for justifiable deviation³⁸. A similar provision is found in Belgium³⁹, Croatia⁴⁰, and in Argentina where, as regards hull insurance, such a rule operates when there is a transfer of ownership in a proportion higher than 50 per cent. of its value, or the transfer to another person: then 'it is possible to put an end to the contract' with effect from the date of the transfer⁴¹. Malta has a provision of that kind for war⁴². Under the UK's

³⁵ Italy (Art. 522 of the Code of Navigation). A similar definition for both marine and non-marine insurance is to be found in Greece in Art. 4.1 of the Insurance Policy Act 1997 (Law No. 2496/1997). Also in Art. 32 of the Belgian legislation of 11 June 1874 and Art. 26.1 al 2 of the law of 25 June 1992.

³⁶ In this sense e.g. the Norwegian Insurance Plan Art. 3.9.

³⁷ The Dutch Bourse Inland Hull policy form, for example, obliges the insured to inform the insurers about changes in the description of the interest insured, however, without stipulating a clear sanction for breach of the obligation.

³⁸ "The insurer is liable if the occurrence results from a forced change of the course or of the voyage. The deviation effected by the vessel in order to render assistance to a ship or an aircraft or to persons in danger shall be deemed to be a forced change of course. In case of change of course or of voyage resulting from a fact of the assured, the insurer shall be liable only if the occurrence takes place during the part of the navigation covered by the insurance unless proof is given that the change has not exerted any influence on the occurrence. In the insurance of goods the insurer shall not be liable if the goods are loaded on a vessel other than that indicated in the insurance policy. If the policy does not indicate the name of the vessel, the assured shall, as soon as the name of the vessel becomes known to him, communicate to the insurer the name of the vessel on which the goods have been loaded unless loading takes place on a liner ship. If the assured does not comply with the above obligation, the insurer is released from any obligation."

³⁹ Art. 25 of the Law of 11 June 1874.

⁴⁰ Art. 715 of the Croatian Maritime Code.

⁴¹ Art. 429 of the Navigation Act 1973.

⁴² Commercial Code Art. 381.

Marine Insurance Act, 1906, certain situations are singled out such as change of voyage⁴³. They are treated like promissory warranties in that Section 45(2) of the Act provides that, where there is a change of voyage, the insurer is discharged from the time of the change regardless whether or not the vessel has in fact set sail.

In the same way, when standard policy terms of this kind operate, mostly the issue of definition does not arise because the terms are likely to specify the situation that triggers the term, such as change of voyage⁴⁴ and (hull) requisition⁴⁵, change of registration⁴⁶, of ownership⁴⁷ or classification⁴⁸. In the case of change of voyage, there may well be a special provision for deviations to save human life⁴⁹. Also found though less easy to define is a provision for 'illegal activities'⁵⁰. The arbitrary and piecemeal character of such provisions has been cogently criticised by Wilhelmsen⁵¹.

In substance the effect is the same when a promissory warranty is broken about, for example, compliance with the recommendations of classification societies, holding SOLAS certificates and SOLAS compliance⁵², or compliance with the ISM Code⁵³.

4.1 Awareness of the Alteration

Both legislation and policy wording divide between rules (R1) that leave it to the insurer to learn about alteration of the risk and to reconsider the insurance when it becomes aware of the alteration; and rules (R2) that require the policyholder to alert the insurer by notifying the insurer about alteration.

R2 divide between those (R2A) requiring notification of alteration in the risk as such; and those (R2B) requiring notification of facts or circumstances amounting to an alteration of risk. In each case the rule assumes knowledge on the part of the policyholder – usually actual knowledge rather than constructive knowledge. R2A is found, for example, in standard terms in

⁴³ Change of voyage is defined by section 45(1) of the Marine Insurance Act as "where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy". See also the Maltese Commercial Code Art. 397.

⁴⁴ E.g. the Dutch Bourse Cargo policy, the Institute Cargo Clauses and the Norwegian Insurance Plan Art. 3-15.

⁴⁵ Norwegian Insurance Plan Art. 3-17.

⁴⁶ "A change of the State of registration, the manager of the ship or the company which is responsible for the technical/maritime operation of the ship shall be deemed to be an alteration of the risk": Norwegian Insurance Plan Art. 3-8.

⁴⁷ E.g. The Dutch Bourse Inland Hull policy, the Finnish Marine Hull Conditions 2001 (FHC 2001) Norwegian Insurance Plan Art. 3-21 and the Institute International Hull Clauses.

⁴⁸ E.g. The Dutch Bourse Inland Hull policy, the Finnish Marine Hull Conditions 2001 (FHC 2001), the Norwegian Insurance Plan Art. 3-14, and the Institute International Hull Clauses.

⁴⁹ E.g. FHC 2001, Art. 41.2 and the Norwegian Insurance Plan Art. 3-12 as well as the Standard Dutch Hull form and the Dutch Bourse Cargo policy form.

⁵⁰ Norwegian Insurance Plan Art. 3-16.

⁵¹ CMI, Yearbook 2000, Singapore I, p 404-405, 408.

⁵² See cl 13 of the Institute International Hull Clauses.

⁵³ S. 35.2 of FHC.

Germany,⁵⁴ Japan and Norway⁵⁵. R2B is found in Greek legislation of 1997 applicable to both marine and non-marine insurance⁵⁶. Some commentators reach the conclusion (disputed by others) that the same is true of the Italian civil code⁵⁷.

In both R2A and R2B a period of time is normally specified within which notification must be made. The period varies. In Austria, Germany and Japan the (non-marine) policyholder is required to notify the insurer “without delay”; and rules of that kind are likely to be interpreted to allow the policyholder a ‘reasonable time’, which takes account of the legitimate concerns of the parties⁵⁸. The insurer wishes to reassess the ongoing risk as soon as possible but the policyholder may have difficulties in assessing the changed situation and in communicating with the insurer. Wording of this kind is also found in cargo terms used in Germany⁵⁹. However, whereas the wording is not construed literally⁶⁰, it appears that the interpretation may be stricter than in other countries. In other countries still, the rule allows a specified but arbitrary time to notify the insurer: for example 3 days in France⁶¹.

4.2 Discussion

Evidently a notification rule of some kind, whether R2A or R2B, is the rule that best suits insurers⁶². It imposes practically no initial costs. Moreover, the policyholder out in the field is the one who knows (or should know) his own business and is best placed to assess the situation and report back. Against such a rule is the argument that to monitor risk is a task for which not every policyholder, however experienced or sophisticated, has either the expertise or the time. Few policyholders are entirely confident about what they should disclose – even when contracting insurance in the first place when they might be expected to seek advice. Are they really likely to seek (and pay

⁵⁴ ADS 1973, as amended in 1984. A similar provision is to be found in DTV-Goods Clauses 2000 cl. 5.2 and DTV-Hull Clauses 1978 cl. 11.2. Note: in Germany the basic text is found in the General Rules on Marine Insurance (ADS) 1919, since replaced as to cargo insurance by ADS Cargo 1973, as amended in 1984; and as to hull by DVT Hull Clauses 1978, as amended in 1982 and 1984. The DVT-Goods Clauses 2000, published by the German Insurance Association, have yet to attract widespread acceptance.

⁵⁵ Norwegian Insurance Plan, Art. 3-11.

⁵⁶ Art. 4.1 of the Insurance Policy Act 1997 (Law No. 2496/1997).

⁵⁷ Art. 1898 CC: the policyholder is required to give the insurer notice of “changes which increase the risk”.

⁵⁸ In Italy the policyholder is required to give “immediate notice”. Perhaps the same will be true there.

⁵⁹ ADS 1973, as amended in 1984, cl. 2.2.

⁶⁰ The reference to “immediate notice” has to be read subject to the general principle of good faith contained in Art.1375 CC. That means that in case of alteration of risk brought about by the policyholder, notice has to be given more or less immediately; but not in other cases.

⁶¹ C. d’ass Art. L.172-3 al 1: ‘jours feries non compris’.

⁶² Nonetheless some modern legislation does not impose any duty of notification, e.g. the Croatian Maritime Code: adopted in the Croatian Parliament on 27 January 1994, published in the Official Gazette No. 17 on 7 March 1994 and entered into force on 22 March 1994. It has been amended several times since 1994, but those amendments are not relevant to this study.

for) further advice during the insurance period, which itself is usually quite short? Whereas it is true that notification rules are found in non-marine insurance law, they are mostly found in countries where cover is commonly contracted for periods longer than a year and where there is a relationship of trust and mutual commitment between insurer and policyholder – an on-going relationship of a kind that might appear out of place in the marine market.

In any event, if there were to be a notification duty, a policyholder should be alerted to or reminded of what is required, as can be seen in some existing insurance legislation, both marine⁶³ and non-marine⁶⁴, as well as standard terms such as some of those used in Germany⁶⁵. This is also the effect of terms dealing with specific situations such as a change of voyage, and as regards hull insurance a change of ownership or classification.

5 Current Law and Practice: The Consequences of Alteration

If there were to be a notification duty, the rule would have to deal with the consequences of breach by the policyholder.

5.1 The Relevance of Fault

Non-marine insurance laws in Europe tend to vary according to whether and to what degree the alteration of risk is the responsibility of the policyholder. Fine tuning like this may well seem out of place in the more robust world of marine insurance. Nonetheless, a rule of this kind is apparently found in Japan, where under provisions applicable to both marine and non-marine insurance, the effect of a substantial increase in risk imputable to the policyholder is that the cover is without effect⁶⁶. However, Japan is one of a number of countries where the rules of law are not obligatory and are usually overridden by standard contract terms. Nonetheless the same objection might be made to the Norwegian Insurance Plan⁶⁷.

Fault as a determining factor has moral attractions, however, some countries⁶⁸ have rules that operate largely regardless of the reason for the

⁶³ E.g. in Denmark: only a risk identified in the policy attracts the relatively severe consequences of s. 42.1 of the Danish Maritime Law Convention of 1934 (DMIC) which restates s.45.1 of the Danish Insurance Contracts Act (DICA) for non-marine insurance. DICA dates from 24.10.86, as amended; the latest amendment was by Law No. 35 of 31.5.2000.

⁶⁴ See Clarke (above n. 16) p 119.

⁶⁵ The German ADS 1973, as amended in 1984, cl. 2.3 specifies alterations of risk to be notified, however, cl.2.3 does not purport to be exhaustive of alterations that must be disclosed. A similar provision is to be found in DTV-Goods Clauses 2000, cl. 5.3 and DTV-Hull Clauses 1978 cl. 11.5.

⁶⁶ Commercial Code Art. 656. A similar rule is to be found in Art. 718 of the Croatian Maritime Code.

⁶⁷ The consequences of failure by the policyholder to notify the insurer about an alteration of risk depend on whether the policyholder has a “justifiable reason”: Art. 3-11.

⁶⁸ E.g. Belgium, Italy and Greece. This is true of France as regards non-marine insurance but there are special rules along these lines for marine insurance: C. d’ass Art. L.172-3. In Italy too fault is relevant to marine insurance. Art. 523 of the Code of Navigation provides: “In case of change of course or of voyage resulting from a fact of the assured, the insurer shall be liable only if the occurrence takes place during the part of the navigation covered by the insurance unless proof is given that the change has not exerted any influence on the occurrence.”

alteration. Indeed, with one reservation there must be doubt whether 'fault' should affect the rule. The likelihood is that a fault based rule would be a source of many costly disputes.

The reservation concerns serious fault such as fraud and wilful misconduct. This is behaviour which few if any societies can ignore. In Greece, for example, the policyholder who fraudulently fails to notify the insurer of an aggravation of risk is penalised insofar as, when the insurer becomes aware of the situation the insurer is entitled to terminate cover immediately without giving the policyholder any time to seek alternative cover⁶⁹. Most countries have a rule of some kind that blocks recovery by a policyholder in respect of loss caused by 'wilful misconduct' i.e. intentionally or recklessly. Policies may also spell out the consequences of such behaviour⁷⁰.

5.2 Termination of Cover:

National legislation for non-marine insurance usually provides for alteration of risk to lead to alteration or termination of cover. Marine insurance law, once again, is more 'cut and dried'. Of course, the policyholder may be 'held covered' in certain cases according to contract terms but default rules in legislation usually provide (only) for termination of cover. An instance is found in Italy in Art. 1898 CC which applies to both marine and non-marine insurance. Another is found in the law of Greece⁷¹. Termination is also commonly the specified consequence of particular change of risk in standard policy terms. A more nuanced rule is found in Art. 3.9 para 2 of the Norwegian Insurance Plan: "If it must be assumed that the insurer would have accepted the insurance, but on other conditions, he is only liable to the extent that the loss is proved not to be attributable to the alteration of the risk."

In the event of termination of cover, whether as a contractual option for the insurer or as a rule of law, national legislation usually provides for return of premium, even when the policyholder is in breach of a duty to notify the insurer about the alteration of risk. However, some laws that deal in some detail with termination are silent on return of premium and the inference must be that return of premium is not intended⁷². In this respect French law is different: if the alteration is brought about by the policyholder, the insurer may terminate the contract and keep the premium⁷³.

⁶⁹ Art. 4.2 and Art. 3.6 of the Insurance Policy Act 1997 (Law No. 2496/1997) which apply to both marine and non-marine insurance. That is also the effect of standard terms in Germany: ADS Cargo 1973, as amended in 1984 cl. 2.4; and DVT-Güter 2000 cl. 5.4, which have that effect not only when the policyholder is fraudulent but also when the policyholder is grossly negligent in that regard.

⁷⁰ See, e.g. FHC s. s. 42.

⁷¹ Art. 4.2 of the Greek Insurance Policy Act 1997 (Law No. 2496/1997) which also applies to both marine and non-marine insurance.

⁷² E.g. Art. 4.2 and Art. 3.7 of the Greek Insurance Policy Act 1997 (Law No. 2496/1997) applicable to both marine and non-marine insurance.

⁷³ C. d'ass Art. L.172-3 al 3.

When termination is provided for, it usually takes effect so many days after the insurer has elected to terminate the contract of insurance and has notified the policyholder accordingly⁷⁴. The same is true of policy terms. Thus Art. 3-10 of the Norwegian Insurance Plan stipulates 14 days; and the Finnish (FHC) terms require the insurer to notify the policyholder ‘without undue delay’, otherwise, the insurer loses the right to terminate (‘avoid’) the cover, except in the case of fraud on the part of the policyholder. The position is similar under the Norwegian Insurance Plan⁷⁵.

Evidently the possibility of termination is a matter of importance to the policyholder and the insurer cannot be allowed to delay a decision unduly. In Italy Art. 1898 CC, para 2, provides that the “insurer can withdraw from the contract by giving written notice thereof to the insured within one month from the day on which he has received notice or has otherwise had knowledge of the increased risk”. In sharp contrast, the period in Argentina⁷⁶ and in France is three days⁷⁷.

However, in Italy Art. 1898 CC, para 3 states, apparently for both marine and non-marine insurance, a double rule that is more severe. “The withdrawal of the insurer is effective *immediately* if the increased risk would have caused the insurer not to agree to the insurance contract; such withdrawal is effective after fifteen days if the increased risk would have entailed a request for a higher premium for the insurance”⁷⁸.

Moreover, a widespread view is that, if the policyholder has information about alteration that he should have notified to the insurer but has deliberately withheld it in order to evade a premium hike, he should be penalised by immediate loss of cover⁷⁹. This is tantamount to wilful misconduct⁸⁰.

If loss occurs after the risk has altered and while it is still covered by the policy, some countries require the insurer to pay in full but others have a rule whereby the insurer is only obligated to pay a prorated amount in the same proportion as the agreed premium bears to the premium which would have been stipulated if the insurer had had knowledge of the true risk situation. Moreover, some countries make a distinction between claims for loss which are connected with the alteration of risk and those which are not: whereas the insurer must pay the latter in full the insurer is not obliged to pay the former⁸¹.

⁷⁴ E.g. 15 days after notice from the insurer has actually reached the policyholder: Art. 3.7 of the Greek Act of 1997 (above).

⁷⁵ See Art. 3-13.

⁷⁶ Navigation Act, 1973, Art. 419.

⁷⁷ C. d’ass Art. L.172-3 al 3.

⁷⁸ Emphasis added.

⁷⁹ E.g. this the rule in Denmark: s. 43.3 of the Danish Maritime Law Convention of 1934 (DMIC) which restates s.46 of the Danish Insurance Contracts Act (DICA) for non-marine insurance. Iso in Greece: Art. 3.6 of the Insurance Policy Act 1997 (Law No. 2496/1997) applicable to both marine and non-marine insurance.

⁸⁰ Above 5.1 *in fine*.

⁸¹ The latter is the case in China (Insurance Law Art. 36) when the policyholder is in breach of the duty to notify. Also Japan: Commercial Code Art. Art. 825 for marine risks.

That is the case in Italy for marine insurance⁸², where Art. 522 of the Code of Navigation also lays down a public policy exception whereby the insurer shall be liable “if the change or the alteration of the risk has been caused by actions adopted in account of human solidarity or in the protection of interest common to the insurer”. This is a reference to rescue and salvage services, on the one hand, and to general average on the other. A similar exception is found in standard terms such as those used in Germany⁸³.

⁸² Code of Navigation Art. 522. A similar rule applies in Italy to non-marine insurance: Art. 1898 CC para 5. Another such instance is found in Denmark: s. 42.2 of the Danish Maritime Law Convention of 1934 (DMIC) which restates s.45.2 and 3 of the Danish Insurance Contracts Act (DICA) for non-marine insurance.

⁸³ ADS Cargo 1973/ 1984, cl 2.5; DVT Hull Clauses 1978, as amended in 1982 and 1984, cl. 11.4; and DVT-Guter 2000, cl. 5.5. The latter contains an unusual exception, where the “increase in risk is made in furtherance of Underwriters”. An illustration given is when the risk is incurred in order to reach of port of refuge. However, we have been advised that in practice this exception has not been relied upon.

ANNEX

STANDARD CLAUSES**Finland****Finnish Marine Hull Conditions 2001 (FHC 2001)**

1. If after the conclusion of the insurance contract the policyholder contributes to an increase in risk or consents thereto and if the increase in risk is not a circumstance of a nature that the insurer is to be deemed to have taken into account, the insurer avoids the contract is exempted from liability, providing the insurer would not have granted the policy had he been aware of the increase in risk. If it can be assumed that the insurer would have granted the policy despite the increase in risk but on conditions other than those agreed, the insurer shall be liable for the loss or damage sustained only to such -an-the extent as-it is proved that the increase in risk did not contribute either to the occurrence of the recoverable casualty or to the extent of the loss or damage sustained.

2. If the risk has increased without contribution by or consent from the policyholder, and the policyholder has failed to notify the insurer thereof without any acceptable reason, the consequences referred to in the first subsection shall apply.

3. The insurer's right to terminate the contract is regulated by section 78.

4. If the action that increased the risk was taken with an intention to prevent injury to person or damage to property under circumstances where such action is to be deemed justifiable, the action shall not affect the insurer's liability.

Section 31 Circumstances to be observed by insurer when risk increases

1. If a changed circumstance which has increased the risk is restored or if the increase in risk is otherwise no longer of any importance, the insurer's liability shall not be affected.

2. If he-the insurer becomes aware of an increase in risk and does not without undue delay notify the policyholder of whether and to what extent he wishes to exercise the rights mentioned in section 30, the insurer may no longer invoke the rights.

3. If the policyholder has acted in bad faith with fraudulent intent, the second subsection shall not apply.

Section 32 Change of owner

If the owner of the vessel changes, the policy shall cease to be in force with immediate effect.

Section 33 Classification, change of classification society and loss of class

1. The vessel shall be rated classed throughout the validity of the insurance by a classification society approved by the insurer throughout the validity of-the insurance.

2. If the classification society is changed or if the rating class given by an approved classification society ceases to be in force is lost, the policy shall cease to be in force with immediate effect. If the vessel is at sea when the rating~ceases to be in force class is lost, cover shall continue until the vessel arrives at the first port approved by the insurer with reasonable opportunities to take the measures needed to remedy the situation.

3. The vessel shall be deemed to lose its class

(a) if the shipping company shipowner applies for withdrawal of the class;
or

(b) if the class is declared void cancelled, suspended, withdrawn or deferred until further notice for a reason other than a recoverable casualty.

4. If the classification society has specifically explicitly granted an extension for the performance of a survey and the policyholder has fulfilled the conditions that the society may have imposed on the extension, the vessel shall not be deemed to lose have lost its class until such extension has expired.

Section 34 Insurer's access right to information filed with classification society

1. The insurer is authorised by the policyholder to extend a request directly to the classification society direct for any such information on the vessel as the insurer may deem justified. Notwithstanding this the insurer shall notify the policyholder prior to asking requesting for such information.

2. If the insurer does not have access to the information referred to in the first subsection, the circumstance lack of such information shall be deemed an increase in risk.

Section 35 Safety management system

1. The Shipping company shipowner (*the Company*) shall have an approved safety management system and the vessel shall have approved management arrangements for the safe use of the vessel, drawn up in accordance with the International Safety Management Code included regulated in chapter IX of the SOLAS Convention. This requirement is met if a valid Document of Compliance evidencing the Company's approved safety management system and a valid Safety Management Certificate evidencing an approved safety organisation for the vessel are available at all times during the insurance period.

2. Unless the policyholder is able to produce the document or certificate referred to in the first subsection, the policy shall cease to be in force with immediate effect. If the vessel is at sea when the document or certificate referred to in the first subsection expires, cover shall continue until the vessel arrives at the first port approved by the insurer with reasonable opportunities to take the measures needed to remedy the situation.

3. If the document or certificate referred to in the first subsection is obtained before the expiry of the insurance period after the policy has ceased to be in force in accordance with the second subsection, the policy shall be reinstated.

4. If the policyholder otherwise fails to meet the requirements imposed on the Company's safety management system and on the management arrangements designed for the safe use of the vessel as provided in the ISM

Code, in any other rules based thereon or in the Company's individually approved safety management system, such failure shall be deemed an increase in risk only if the insurer proves that the failure is material of fundamental nature. The insurer may not invoke any other kind of violation of the ISM Code. Without prejudice to this, the insurer may invoke any other provisions of these MH4FHC 2001 Conditions.

Section 36 Insurer's access right to information on authorities' inspection control

1. The policyholder shall, whenever requested, supply the insurer with any information needed on any comments remarks made in inspections in the flag state or port state. The policyholder has authorised the insurer to ask The insurer is authorised by the policyholder to extend a request directly to the inspection-controlling authorities direct for any such information on the vessel as the insurer may deem justified. Notwithstanding this, the insurer shall notify the policyholder prior to asking for such information.

2. If the insurer does not have access to the information referred to in the first subsection, the circumstance lack of such information shall be deemed an increase in risk.

Section 37 Docking

The policyholder shall notify the insurer of his choice of dock. If this information is not given, the docking shall be deemed an increase in risk.

Section 38 Change of manager

The insurer shall give his specific explicit consent to any change of manager. Failure to obtain such consent shall be deemed an increase in risk.

Section 39 Downgrading of ice dues class

If the vessel's ice dues class is downgraded, the downgrading shall be deemed an increase in risk, in view of section 9.

Section 40 Use of the insured vessel for salvage

If the vessel is used for salvage or assistance under circumstances where the action is justifiable, the insurer shall cover the loss or damage caused by such increase in risk even if the vessel had not been insured as a salvage vessel.

Section 41 Trading limits waters

1. Trading limits shall include The policy covers all trading waters other than those specified as excluded waters or conditional trading limits waters in the annex to these MH4FHC 2001 Conditions specifying the trading limits. Excluded trading limits waters also include the loading and discharging places where the vessel lies against the sea bottom at low tide (dry docks). If the vessel deviates from the trading limits, the policyholder shall notify the insurer thereof in advance.

2. If the vessel deviates from the trading limits enters excluding waters, the policy shall cease to be in force, unless the insurer has consented thereto to such entry in advance or unless the deviation-entry results from unintentional action on the part of the master or from life-saving life or from the fact that the insured vessel has on its voyage salvaged or attempted to salvage another

vessel or cargo-en-its-way.

3. If the vessel returns to the-trading limits leaves excluded waters before the expiry of the insurance period, the policy shall be reinstated.

4. The insurer shall be entitled to require that the policyholder have the vessel drydocked and surveyed at his-the policyholder's own expense both immediately before and after the period during which the insurance contract ceases to be was not in force on account of the vessel being having been taken to excluded waters and immediately after its return to the trading limits. The policyholder shall notify the insurer of such survey well in advance.

5. If the insurance contract has been concluded for a definite period of time, the insurer shall return part of the premium on a pro rata temporis basis for the period during which the policy has not been in force for reasons specified in the second and third subsections.

6. If the vessel navigates within conditional waters the policyholder shall pay an additional premium for navigating within conditional trading limits and observe an increase in the deductible as notified by the insurer. If the vessel is damaged while navigating within conditional trading limits-waters with the policyholder's consent without any advance notice of the deviation communicated to the insurer, the amount of compensation shall be reduced by 25 per cent, yet no more than 125,000 euros. The reduction shall be calculated on compensation payable under these M444FHC 2001 Conditions and under the insurance contract before deduction of the deductible agreed in the insurance contract.

Section 42 Loss or damaged caused deliberately intentionally or through gross negligence

1. The insurer shall not be liable is exempted from liability to anyone that who has caused a loss or damage deliberately intentionally.

2. If the policyholder has caused any loss or damage through gross negligence, compensation may be reduced or refused according to the circumstances.

Norway

The Norwegian Insurance Plan (<http://exchange.dnv.com/NMIP/>) includes:

§ 3-8. *Alteration of the risk* An alteration of the risk occurs when there is a change in the circumstances which, according to the contract, are to form the basis of the insurance, and which alter the risk contrary to the implied conditions of the contract.

A change of the State of registration, the manager of the ship or the company which is responsible for the technical/maritime operation of the ship shall be deemed to be an alteration of the risk as defined by subparagraph 1.

§ 3-9. *Alteration of the risk caused or agreed to by the assured* If, after the conclusion of the contract, the assured has intentionally caused or agreed to an alteration of the risk, the insurer is free from liability, provided that he would not have accepted the insurance if, at the time the contract was concluded, he had known that the alteration would take place.

If it must be assumed that the insurer would have accepted the insurance, but

on other conditions, he is only liable to the extent that the loss is proved not to be attributable to the alteration of the risk.

3-10 Right of the insurer to cancel the insurance If an alteration of the risk occurs, the insurer may cancel the insurance by giving fourteen days' notice.

3-11. Duty of the assured to give notice If the assured becomes aware that an alteration of the risk will take place or has taken place, he shall, without undue delay, notify the insurer. If the assured, without justifiable reason, fails to do so, the rule in § 3-9 shall apply, even if the alteration was not caused by him or took place without his consent, and the insurer may cancel the insurance by giving fourteen days' notice

3-12. Cases where the insurer may not invoke alteration of the risk The insurer may not invoke § 3-9 and § 3-10 after the alteration of the risk has ceased to be material to him. The same shall apply if the risk is altered by measures taken for the purpose of saving human life, or by the insured ship salvaging or attempting to salvage ships or goods during the voyage.

3-13. Duty of the insurer to give notice If the insurer becomes aware that an alteration of the risk has taken place, he shall, without undue delay and in writing, notify the assured of the extent to which he intends to invoke § 3-9 and § 3-10. If he fails to do so, he forfeits his right to invoke those provisions.

3-14. Loss of class or change of classification society When the insurance commences the ship shall be classed with a classification society approved by the insurer. The insurance terminates in the event of a loss of class or change of classification society, unless the insurer explicitly consents to a continuation of the insurance contract. If the ship is under way when the class is lost or changed, the insurance cover shall nevertheless continue until the ship arrives at the nearest safe port in accordance with the insurer's instructions. Loss of class occurs where the assured, or someone on his behalf, requests that the class be cancelled, or where the class is suspended or withdrawn for reasons other than a casualty

3-15. Trading limits The ordinary trading area under the insurance comprises all waters, subject to the limitations laid down in the Appendix to the Plan as regards conditional and excluded areas. The person effecting the insurance shall notify the insurer before the ship proceeds beyond the ordinary trading limit. The ship may sail in the conditional trading areas, subject to an additional premium and to any other conditions that might be stipulated by the insurer. If damage occurs while the ship is in a conditional area with the consent of the assured and without notice having been given, the claim shall be settled subject to a deduction of one fourth, maximum USD 150,000. The provision in § 12-19 shall apply correspondingly. If the ship proceeds into an excluded trading area, the insurance ceases to be in effect, unless the insurer has given permission in advance, or the infringement was not the result of an intentional act by the master of the ship. If the ship, prior to expiry of the insurance period, leaves the excluded area, the insurance shall again come into effect. The provision in § 3-12, subparagraph 2, shall apply correspondingly

3-16. Illegal activities The insurer is not liable for loss which results from the ship being used for illegal purposes, unless the assured neither knew nor ought to have known of the facts at such a time that it would have been possible for him to intervene. If the assured fails to intervene without undue delay after becoming aware of the facts, the insurer may cancel the insurance by giving fourteen days' notice. The insurance terminates if the ship, with the consent of the assured, is used primarily for the furtherance of illegal purposes.

3-17. Suspension of the insurance in the event of requisition If the ship is requisitioned by a State power, the insurance against marine perils as well as war perils is suspended. If the requisition ceases before expiry of the insurance period, the insurance comes into force again. If the ship proves to be in substantially worse condition than it was prior to the requisition, the insurer may cancel the insurance by giving fourteen days' notice, to take effect at the earliest on arrival of the ship at the nearest safe port in accordance with the insurer's instructions. If the ship is insured with The Norwegian Shipowners' Mutual War Risks Insurance Association, the insurance against war perils shall nevertheless not be suspended in the event of a requisition by a State power. The insurance against war perils shall in that case also cover the perils which, under § 2-8, are covered by an insurance against marine perils.

3-18. Notification of requisition If the assured is informed that the ship has been or will be requisitioned, or that it has been or will be returned after the requisition, he shall notify the insurer without undue delay. The insurer may demand that the assured have the ship surveyed in a dock for his own account immediately after the ship is returned. The insurer shall be notified well in advance of the survey. If the assured has been negligent in fulfilling his duties according to subparagraph 1 or 2, he has the burden of proving that any loss is not attributable to casualties or other similar circumstances occurring whilst the ship was requisitioned

3-19. Suspension of insurance while the ship is temporarily seized If the ship is temporarily seized by a State power without § 3-17 becoming applicable, the insurance against marine perils is suspended. In that event the insurance against war perils shall also cover marine perils as defined in § 2-8. § 3-18 shall apply correspondingly

3-20. Removal of ship to repair yard If there is reason to believe that the removal of a damaged ship to a repair yard will result in an increase of the risk, the assured shall notify the insurer of the removal in advance. If the removal will result in a substantial increase of the risk, the insurer may, before the removal commences, notify the assured that he objects to the removal. If such notice has been given, or if the assured has neglected to notify the insurer in accordance with subparagraph 1, the insurer will not be liable for any loss that occurs during or as a consequence of the removal.

3-21 Change of Ownership. The insurance terminates if the ownership of the ship changes by sale or in any other manner.

United Kingdom**Institute Clauses**

are or have been used in a number of countries including Canada and Finland. A recent instance is as follows:

INTERNATIONAL HULL CLAUSES (01/11/02)**13 CLASSIFICATION AND ISM**

This Clause 13 shall prevail notwithstanding any provision whether written typed or printed in this insurance inconsistent therewith.

- 13.1 At the inception of and throughout the period of this insurance
 - 13.1.1 the vessel shall be classed with a Classification Society agreed by the Underwriters
 - 13.1.2 there shall be no change, suspension, discontinuance, withdrawal or expiry of the vessel's class with the Classification Society
 - 13.1.3 any recommendations, requirements or restrictions imposed by the vessel's Classification Society which relate to the vessel's seaworthiness or to her maintenance in a seaworthy condition shall be complied with by the dates required by that Society
 - 13.1.4 the Owners or the party assuming responsibility for operation of the vessel from the Owners shall hold a valid Document of Compliance in respect of the vessel as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof
 - 13.1.5 the vessel shall have in force a valid Safety Management Certificate as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof.
- 13.2 Unless the Underwriters agree to the contrary in writing, in the event of any breach of any of the provisions of Clause 13.1 above, this insurance shall terminate automatically at the time of such breach, provided
 - 13.2.1 that if the vessel is at sea at such date, such automatic termination shall be deferred until arrival at her next port
 - 13.2.2 where such change, suspension, discontinuance or withdrawal of her class under Clause 13.1.2 above has resulted from loss or damage covered by Clause 2 or by Clause 44.1.3 (if applicable) or which would be covered by an insurance of the vessel subject to current Institute War and Strikes Clauses Hulls-Time, such automatic termination shall only operate should the vessel sail from her next port without the prior approval of the Classification Society.

A pro rata daily net return of premium shall be made provided that a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof.

14 MANAGEMENT

This Clause 14 shall prevail notwithstanding any provision whether written typed or printed in this insurance inconsistent therewith.

- 14.1 Unless the Underwriters agree to the contrary in writing, this insurance shall terminate automatically at the time of

- 14.1.1 any change, voluntary or otherwise, in the ownership or flag of the vessel
- 14.1.2 transfer of the vessel to new management
- 14.1.3 charter of the vessel on a bareboat basis
- 14.1.4 requisition of the vessel for title or use

provided that, if the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, such automatic termination shall if required be deferred, whilst the vessel continues her planned voyage, until arrival at final port of discharge if with cargo or at port of destination if in ballast. However, in the event of requisition for title or use without the prior execution of a written agreement by the Assured, such automatic termination shall occur fifteen days after such requisition whether the vessel is at sea or in port.

- 14.2 Unless the Underwriters agree to the contrary in writing, this insurance shall terminate automatically at the time of the vessel sailing (with or without cargo) with an intention of being broken up, or being sold for breaking up.
- 14.3 In the event of termination under Clause 14.1 or Clause 14.2 above, a pro rata daily net return of premium shall be made provided that a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof.
- 14.4 It is the duty of the Assured, Owners and Managers at the inception of and throughout the period of this insurance to
- 14.4.1 comply with all statutory requirements of the vessel's flag state relating to construction, adaptation, condition, fitment, equipment, operation and manning of the vessel
 - 14.4.2 comply with all requirements of the vessel's Classification Society regarding the reporting to the Classification Society of accidents to and defects in the vessel.

In the event of any breach of any of the duties in this Clause 14.4, the Underwriters shall not be liable for any loss, damage, liability or expense attributable to such breach.

HARMONIZATION OF WARRANTIES AND CONDITIONS: STUDY AND PROPOSALS

GRAYDON S. STARING*

Contents

- I. Introduction
 - A. The Problem Identified
 - B. Resources and Structure
 - C. Use of the Word "Warranty"
 - D. About the Premises
- II. Practical and Political Limits of Solutions
- III. Desiderata Solutionis
- IV. Summary of Conclusions
- V. The Importance of Conditions in Marine Policies
- VI. Of Sources and Character of the Common Law Rules
- VII. Of Conditions in Common and Civil Law
- VIII. Of Conditions Called "Warranties" in Policies
 - A. Generally
 - B. Of Materiality, Causation and Intent
 - C. Of Sanctions
 - D. Of Wordings
 - E. Of Relationships of "Warranty" to Other Doctrines
 - F. The International Hull Terms
- IX. Conclusions

I. Introduction

A. The Problems Identified

The harmonization of warranties and conditions is an important and challenging topic. My purpose here is to state a plausible approach to it and stimulate discussion.

The specific problems identified are:

1. "Automatic" termination for breach or right to terminate;
2. Expression and identification;
3. Causation;
4. Materiality; and
5. Limitation of conditions implied by law. (Deferred)

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B. Resources and Structure

The Common Law and practice of marine insurance are accessible to me and I have some acquaintance with commercial practice and the views and concerns of underwriters. I do not, however, have the advantage of familiarity with the Civil Law. I will refer to general principles of the Civil Law as they appear mainly in old authorities I happen to possess, and rely very much on the splendid work of Trine-Lise Wilhelmsen for guidance in that field, hoping that if I misunderstand her she will kindly set me straight.

I would remind the reader that my understandings are personal even if, as I hope, they may be supported by authority. I do not cite authority for some propositions I suppose to be well known. Also as we search for solutions for a community of nations, I cannot sensibly overlook what I think are the predilections and possibilities in my own, and some bias will doubtless therefore be found toward the law most familiar to me.

Professor Shoenbaum's recent article¹ presenting the historical background and comparing American and English doctrines of warranty is scholarly and lucid and will be frequently cited. The academic criticism of the Common Law warranty rules, for the perceived harshness of their results in some cases and their confusion and unpredictability, has been well summarized by him.

C. Use of the Word "Warranty"

It is notorious that the word "warranty" is loosely used in the Common Law world. That is a semantic annoyance that produces substantial problems. Apart from some quotations, I use the word only in its strict or "proper" Common Law sense to describe a true condition on coverage, general or particular. Also, unless otherwise stated, I refer only to express warranties, putting off discussion of implied warranties for separate discussion; the problems they may present are different and do not usually involve policy wordings.

D. About the Premises

My analytical method was to compile a considerable number of paragraphs of factual and legal premises and then look for a solution to accommodate them. In organizing this paper, I have redistributed those paragraphs among several headings, according to the conclusions they particularly support, and numbered them for convenient reference. Some of the premises are legal, for which I think sound authority can be given, at least in the Common Law. Others are of economic or institutional perceptions. I look for all of them to be closely scrutinized for their validity.

II. Practical and Political Limits of Solutions

1. It has been understood from the outset that we were not to compose a draft convention, or indeed seek international uniformity. That has left us to consider proposing model laws or modifications of policy terms.

¹ Prof. Thomas J. Schoenbaum, *Warranties in the Law of Marine Insurance: Some Suggestions for Reform of English and American Law*, 23 Tulane Mar. L.J. 267 (1999) (hereinafter Schoenbaum).

2. The American Institute of Marine Underwriters is the leading organization of its kind in the U.S. Through its President it addressed a letter a year or so ago to the President of the Maritime Law Association of the United States protesting MLA's participating in, or supporting, the present CMI Marine Insurance project, under the evident impression that the project aimed at changing the American law of the subject. The MLA's reply was calculated to assure AIMU that nothing radical was expected.

3. Lord Mustill, at Singapore, supported our study, warned against the IWG's "taking on too much, and losing focus and credibility in the process", and reported that the British Maritime Law Association did not "at this stage consider that international measures to change marine insurance law and practice are appropriate"².

4. As I reported at Singapore, there is no practical prospect that in the United States "any formal legislative measures would be undertaken on a federal level [which would doubtless be viewed with greater dismay by marine insurers than was expressed to the MLA], but that worse still ... would be the enactment of state legislation—perhaps with differences in all 50 states"³.

5. Model laws do not offer practical solutions because there is no prospect of their being welcomed in the principal centers of marine insurance and because their spotty reception by the nations would be likely to lead to less rather than more harmony.

6. Thus legal and industrial considerations make some forms of solution impractical and unrealistic to propose.

7. The London market's recent adoption of the International Hull Terms, discussed below, strongly signifies the practical possibility of progress by means of clarification of policy terms.

III. Desiderata Solutionis

8. Our solutions cannot change obligatory rules where they exist, although we might have to ignore obligatory rules of a few countries while seeking to harmonize the rest, recognizing that if a country's national rule imposes an obligatory qualification on a generally legal express condition, harmonization may be impossible as to that country.

9. They must be acceptable to leading, identifiable segments of the marine insurance market, and any change of substance in risk or cost must therefore be widely acceptable commercially.

10. They should be represented by express wordings or a set of definitional provisions to be incorporated in policies by reference, in either case simple enough to be reliably translated.

² Singapore II, 206.

³ *Id.*

⁴ See generally P.T. O'Neill and J.W. Woloniecki, *The Law of Reinsurance in England and Bermuda* Chaps. 1 and 2 (1998); Graydon S. Staring, *Law of Reinsurance* Chaps. 1 and 2 (1993) (hereinafter Staring).

11. They should lie within the doctrines of the general law of contracts.
12. Congruence with the reinsurance market, which is vastly greater than the marine insurance market and follows the same rules as the Common Law marine market⁴, is a substantial consideration.
13. Consideration should be given to relaxing the rigor of some of the conditions presently enshrined in standard forms, where there is evidence that underwriters might frequently not require it.

IV. Summary of conclusions

The most practical solution is to undertake the adoption in the principal markets, starting with the Common Law markets, of a discontinuance of “warranties” and the substitution of “conditions” with explicit sanctions, and the routine reduction of some present warranties to exclusions, limited in some instances to losses caused by breach, all with held covered clauses where appropriate.

V. Of the Importance of Conditions in Marine Policies

13. The marine insurance market in most of the world is a free market; insurers sell only coverages they are willing to sell, with limitations acceptable to them and at acceptable premiums, which they almost alone are equipped to assess.
14. Underwriters in the Common Law world have frequently expressed: (1) “warranties” that are not true conditions at all, however otherwise legitimate (e.g., the F.C & S. Warranty); and (2) warranties that were true conditions but extended, I believe, beyond the commercial interest at heart and could have been acceptable as exclusions and perhaps otherwise thoughtfully narrowed (e.g., navigational warranties).
15. Prudent underwriters know that the risks they assume extend beyond the fortuities expressed in the policy and that every policy involves a degree of moral hazard, that is, the risk that it will be wrongly taken advantage of, whether by negligence or fraudulent intent. Underwriters will try to minimize this, as they are not in the business of insuring moral hazard beyond what is necessarily inherent⁵.
16. Another important risk is that of uncertainty and the consequent cost of investigation and litigation to determine whether coverage exists. This focuses attention on the objective certainty of contract terms as alternative to terms that invite consideration of reasonableness and the weighing of circumstances, risks and expenses the underwriter may be unwilling to assume. For example, an underwriter may accept a risk on an unpowered vessel in certain operations with the security of a specified tug standing by, but be unwilling to accept a merely “suitable” tug to be called when storms are predicted; to do so would involve the parties, in the event of loss, in subjective issues of interpretation, knowledge, judgment and reasonableness. Or, the fact that certain waters are notoriously infested with drug trade, the

⁵ See, e.g., *Knight v. United States Fire Ins. Co.*, 1987 AMC 1, 804 F.2d 9 (2nd Cir. 1986) (facts indicating high moral risk undisclosed).

risks of which may spill over in time, geography and responsibility, might reasonably lead him to insist on a full termination of coverage rather than an exclusion while the vessel remains in those waters.

VI. Of the Sources and Character of the Common Law Rules

19. Marine insurance is an ancient commercial device shared by the Civil Law and Common Law nations with long development as part of the law merchant (*lex mercatoria*). It is “well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom ... its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe”⁶.

20. Most of the Common Law rules have their origins in judicial decisions, which are not prescriptive law but judicial recognition of the usages of commerce. “An English merchant in the seventeenth century was *bound*...in his foreign transactions by rules of the Law Merchant before any Lord Mansfield had told him that he was so bound.”⁷ The exceptions are the rules prescribing legal remedies.

21. English precedents relying and elaborating on the usages of the market, together with continental authorities, mostly French, came to be represented in the Marine Insurance Act 1906, which by copy or direct application came into force throughout most of the former British Empire. The United States inherited this body of law and usage and, with very few deviations, follows it. We may therefore speak of the Common Law of marine insurance without much distinction of countries.

22. Marine insurance law in the Common Law world (contrary to occasional suggestions) has always been within the general Common Law of contracts, which comprises aleatory contracts⁸ as well as recognition of the trade usages that make up most of its body.

23. While marine insurers are regulated for their financial security, marine policies as commercial instruments are very lightly regulated, if at all, in the Common Law world. It has always been accepted that the Common Law rules do not prescribe policy terms, or limit the rights and duties parties can undertake, and that the usages represented by the marine insurance law may be negated by express policy terms and are effective where such terms are lacking⁹.

24. Accordingly, “warranty” terms can be reformed by underwriters. An important American example is found in the Hull Clauses of the American Institute of Marine Underwriters, which are widely used, and which in recent years do not refer to “warranties” at all but to “conditions”, and specify the

⁶ *New England Marine Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 31, 1997 AMC 2394, 2404 (1871).

⁷ Carlton Kemp Allen, *Law in the Making* 29 (1927).

⁸ See *Restatement (Second) of Contracts* § 76 comment c, § 232 comment c, § 239 comment b and § 379; see also *Code Napoléon* §§ 1104, 1964-83.

⁹ 1 Sir Michael J. Mustill and Jonathan C.B. Gilman, *Arnould's Law of Marine Insurance and Average* §§ 61, 63 (16th ed. 1981); see MIA § 87.

result of breach as terminating the contract¹⁰. This usage may not be followed faithfully in all policies based on these clauses because additional conditions, using older wordings, are often added by underwriters in particular instances.

VII. Of Conditions in Common and Civil Law

25. In the Common Law of contracts, “[c]onditions may be created by the very words of a contract. Of such cases there is nothing to be said, for parties may agree to what they choose”¹¹. The failure of the condition gives the obligee the right to treat as terminated the contract as a whole or a more particular obligation to which the condition is attached¹². Nothing to be found in the general law of contracts imposes on the promissory conditions agreed by the parties any requirement of materiality according to the judgment of a third party.

26. The historic general principles of the Civil Law appear also to recognize agreed strict conditions on the obligations of contract generally¹³. In the narrower field of marine insurance, Professor Wilhelmssen reports a few instances of conditions similar to “warranties”¹⁴ and refers the problem of comparison mainly to Alteration of Risk, which is intended to deal with the same problem as warranties, but typically involves an examination of materiality¹⁵.

27. It is unclear to me how much flexibility exists in Civil Law countries in respect of conditions. Professor Wilhelmssen reports that Sweden, Denmark, France and Italy have mandatory legislation concerning alteration of risk, a concept that serves somewhat as do conditions; she does not state that these have any effect on stated conditions¹⁶. She also reports that the laws of Sweden and Denmark concerning alteration of risk do not appear to permit the harshness of “warranties”, and those of France and Italy are at least more favorable to assureds than the Common Law of warranties¹⁷. Does this mean that a true condition precedent, clearly expressed, would not be enforced in accordance with its terms?

28. Subject to these observations, I proceed in the assumption that the Civil Law generally allows parties to contract freely as to conditions, if they are clear about their purpose and sanctions.

¹⁰ American Institute Hull Clauses (June 2, 1977) “*ADVENTURE*”, Nicholas J. Healy and Joseph C. Sweeney, *Law of Marine Collision*, App. 9, pp. 597-98 (1997).

¹¹ O.W. Holmes, Jr., *The Common Law* 322 (1881).

¹² *Id.* 316-19.

¹³ See *Institutes of Justinian*, Bk. III, Tit. 14. 1, 4; *Code Napoleon* §§ 1175-77; Kojo Yelapaala, Mauro Rubino-Sammartano and Dennis Campbell, *Drafting and Enforcing Contracts in Civil and Common Law Jurisdictions*, 86-88 (Kluwer, 2000) (relying variously on Italian, French and German law; hereinafter Yelapaala); compare R.J. Pothier, *Contract of Sale* (translated by L.S. Cushing), Part II, Chapt. I, § II (1839) (rigor of warranty).

¹⁴ Singapore I, at 391-93.

¹⁵ See Singapore I, at 375-85.

¹⁶ Singapore I, at 376.

¹⁷ Singapore I, at 393.

VIII. Of Conditions Called “Warranties” in Policies

A. Generally

29. Insurance warranties and representations were early distinguished by Lord Mansfield:

There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail till the 2d, the warranty would not be complied with. A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with¹⁸.

30. The propensity to style restrictions as “warranties”, when carried into printed standard terms, has probably resulted in making warranties out of what might have been acceptable to underwriters as exclusions. This appears especially likely in respect of navigational limits and perhaps also such terms as crew and passenger limits. If standard terms treated navigational limits as exclusions only, it would still be open to the underwriter in special instances to make a navigational limit a condition by a rider to that effect.

31. There is some disuniformity in the treatment of marine insurance warranties in the United States mainly because of the confusion caused by the *Wilburn Boat* case¹⁹ and differences in State laws²⁰. The historic Common Law rule of warranties has been modified in some States, probably most, with respect to personal lines and, in some instances, to all but marine insurance and reinsurance. The modifications take account of materiality or causation or both and are accomplished by statutes that ordinarily except marine insurance and reinsurance. The majority rule of marine insurance (prevailing in New York and California) is stated by a leading maritime court of appeals:

This conclusion [that a provision is a warranty] is significant because of the special status that warranties hold under the law of insurance contracts, and especially the law of maritime insurance contracts. A “warranty” is a promise “by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.” Leslie J. Buglass, *Marine Insurance & General Average in the United States* 27 (2d ed. 1981) (quoting §33(1) of the English Marine Insurance Act of 1906, a traditional source of shared Anglo-American

¹⁸ *De Hahn v. Hartley*, 99 Eng. Rep. 1130, 1131 (K.B. 1786), quoted in Schoenbaum, at 278.

¹⁹ *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 1955 AMC 467 (1955).

²⁰ See Schoenbaum, at 295-300 for examples.

²¹ *Commercial Union Ins. Co. v. Flagship Marine Services, Inc.*, 2000 AMC 1, 5-6, 190 F.3d 26 (2nd Cir. 1999) (text headed “[t]he following warranties...” establishes warranty); see also *Cal. Ins. Code* §§ 447, 449.

maritime law). A warranty, whether express or implied, stands in contrast to an exclusion, which does not represent a promise on the part of the insured, but merely “define[s] the coverage limits . . . [by] clarify[ing] and defin[ing] the types of events an insurer does not intend to cover.” David D. Hallock, Jr., *Recent Developments in Marine Hull Insurance: Charting a Course Through the Coastal States of the Fourth, Fifth, Ninth, and Eleventh Circuits*, 10 U.S.F. Mar. L.J. 277, 301 (1998).

Under the federal rule and the law of most states, warranties in maritime insurance contracts must be strictly complied with, even if they are collateral to the primary risk that is the subject of the contract, if the insured is to recover. *See* Buglass at 27-28, 34; Patrick J.S. Griggs, *Coverage, Warranties, Concealment, Disclosures, Exclusions, Misrepresentations, and Bad Faith*, 66 Tul. L. Rev. 423, 431-32 (1991). The rule of strict compliance with warranties in marine insurance contracts stems from the recognition that it is peculiarly difficult for marine insurers to assess their risk, such that insurers must rely on the representations and warranties made by insureds regarding their vessels’ condition and usage²¹.

B. Of Materiality, Causation and Intent

32. We may reasonably assume that, under either system of law, the parties have the right to contract for any covenant or condition they intend, as expressed in the contract, within limits fixed by public policy and effects on third parties?

33. Materiality is that character of a term that would affect a party’s decision whether to enter into a particular contract. As such it is inherently a matter of a party’s intent.

34. By reason of its inclusion as an express element of contract performance, the stipulated condition precedent is inherently material, in contrast to a mere representation, which is subject to a test of materiality because it is merely documentation of a placing disclosure. “The very fact that the parties have expressly stipulated for the future performance of any act is in effect conclusive evidence that they regarded the performance of that act as material.”²²

35. Neither in the Common Law of contracts generally nor the marine insurance law does there appear any support for the idea that a condition depends upon an event, such as a casualty, not mentioned in it²³. Nor does that appear in such limited sources of Civil Law as I have seen. A condition is met or fulfilled so long as the statement remains true and is breached when the statement is false. Its truth or falsity has no logical relationship to a casualty

²² Prof. William R. Vance, *The History of the Development of the Warranty in Insurance Law*, 20 Yale L.J. 523, 532 (1911) quoted in Schoenbaum, at 285; *De Hahn v. Hartley*, 99 Eng. Rep. 1130, 1131 (K.B. 1786) (Lord Mansfield: “It is perfectly immaterial for what purpose a warranty is introduced.”).

²³ See, e.g., MIA § 33; O.W. Holmes, *op. cit.* 316-19, 322.

unless the casualty is referred to in the statement itself. Thus a true condition on the existence or continued existence of the contract can be enforced on discovery of its breach, e.g., loss of class or change of owner, at any time, without regard to the occurrence of a casualty or loss. Causation would become an issue only if damages were sought for the breach. The right of termination arises, not because the insurer has not agreed to assume certain losses but because he has not agreed to assume certain risks. Causation is indeed a proper subject for agreement and when it is injected into a supposed condition or warranty the result is an exclusion rather than a condition. In any case, it is important that the policy wording be clearly understood as to whether it amounts simply to an exclusion or to a condition with explicit sanctions.

C. Of Sanctions

36. It appears that the rule in England discharges the insurer from the date of breach, absent waiver or affirmation²⁴.

37. Upon the authority of the United States Supreme Court in old cases never overruled, the breach of a warranty of seaworthiness (and presumably any other condition warranty) at the inception makes the policy wholly void²⁵ and, if arising after inception and allowed to continue through failure of diligence, discharges the insurer from liability for any consequence of the failure but does not affect the contract as to any other risk or loss²⁶. As to breaches after inception, Professor Schoenbaum considers the majority rule in the lower courts to be that breach merely suspends the policy until the breach is cured, but the evidence of this is to count the number of cases in the Fifth Circuit and several state courts in the Southeast, some applying State laws, and one trial court elsewhere²⁷. What he regards as the minority rule, that the contract is voidable from the date of breach, so that the contract continues unless the insurer acts to terminate it, is, I submit, the better rule, supported by fewer citations but by four circuits (including again the Fifth!)²⁸, and as codified in California²⁹. The rule may be varied by wording of the policy, as in the American Institute Hull Clauses, which state that the policy is "terminated" by breach of certain conditions.

38. So far as I can tell, the Civil Law agrees generally with the Common Law in avoiding the obligation on the breach of an undoubted condition precedent³⁰.

²⁴ MIA § 33(3); *Bank of Nova Scotia v. Hellenic Mut. War Risks Ass'n*, [1992] 1 App. Cas. 233 (1991).

²⁵ *London Assurance v. Companhia De Moagens*, 167 U.S. 149 (1897).

²⁶ *Union Ins. Co. v. Smith*, 124 U.S. 405 (1888).

²⁷ Schoenbaum, at 289, note 170.

²⁸ Schoenbaum, at 290, note 173.

²⁹ Cal. Ins. Code § 447.

³⁰ Yelapaala, *supra* note 13, 86-88.

D. Of Wordings

39. The MIA provides that no particular form of words need be used to create a warranty³¹. The U.S. Supreme Court has held that warranty depends on the intentions of the parties as revealed by the contract³² and, because warranties are not favored, the intentions must be clear³³.

40. Professor Schoenbaum provides this summary, citing both English and American cases (all omitted):

A statement on a document extraneous to the policy, such as the proposal form, must be incorporated by reference into the contract to be a warranty. Statements of opinion, such as to the “best of my knowledge” or “belief” are not warranties. Moreover, certain statements in a policy such as “warranted free from insurrection” or “free from capture and seizure” are to be construed as exceptions from the risk and not warranties. Thus, even the use of the term “warranty” is not conclusive. Ambiguous language creating a warranty will be construed against the insurer under the *contra proferentem* rule³⁴.

E. Of Relationships of “Warranty” to Other Doctrines

44. The warranty rule is intimately related to the disclosure rule in Anglo-American insurance law. Both the Marine Insurance Act 1906³⁵ and the law of the U.S.³⁶ provide that a disclosure need not be made where there is a warranty against the fact to be otherwise disclosed. The rationale is that the breach of the express warranty will have (in most cases) the same effect as its non-disclosure would have had, and at the same time establish the materiality of the fact.

45. Warranties governed by the same rules and relationship to disclosure as in marine insurance are widely used in the much larger field of reinsurance³⁷, on which both marine and non-marine insurers rely heavily. While the reinsurance contracts and underlying policies do not have to be identically worded, their substantial correlation is important to both parties³⁸.

F. The International Hull Terms

46. New International Hull Clauses, to supplant the Institute Hull Clauses, have been adopted by the Joint Hull Committee and published in London for use by underwriters at Lloyd’s and companies there, and elsewhere as desired³⁹,

³¹ MIA § 35(1).

³² *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U.S. 183, 190-91 (1887).

³³ *Hearne v. New England Mut. Marine Ins. Co.*, 87 U.S. (20 Wall.) 395 (1874).

³⁴ Schoenbaum, at 281.

³⁵ MIA § 18(3): In the absence of inquiry the following circumstances need not be disclosed, namely:***(d) Any circumstance which is superfluous to disclose by reason of any express or implied warranty.

³⁶ See 2 J. Duer, *The Law and Practice of Marine Insurance*, 552, 559-60 (New York 1846); 1 W. Phillips, *Law of Insurance* § 601 (5th ed. New York 1867); 1 A. Parks, *Law & Practice of Marine Insurance & Average* 224-30 (1987); 3 J. Joyce, *Law of Insurance* § 1786 (2d ed. 1917); *Cal. Ins. Code* §§ 333, 335, 336, 1900.

³⁷ See Staring, *supra* note 4, § 12:3.

³⁸ See *id.* §§ 12:5, 12:7, 13:3, 13:4.

³⁹ Joint Hull Committee, International Hull Clauses (01/11/02).

They make significant changes in conditions by moving almost completely away from the use of “warranty” and setting out in plain terms the intent of the conditions and the sanctions variously intended for each.

47. The Navigation Warranties and others, indeed all conditions save one, have been stripped of their old “warranty” tags and stated as the conditions or exclusions they are, rather than as warranties, and the consequences of breach spelled out, rather than left to the MIA. The Disbursements Warranty⁴⁰ remains; it deals with additional insurances allowed and the presumable purpose is to leave it enforceable under the MIA by discharge of any liability of the insurer from the date of breach, without restoration of cover by remedy of the breach⁴¹.

48. The former trading or navigation warranties have become exclusions suspending the cover for any loss occurring while the breach continues, subject to a notice and held covered provision⁴².

49. Automatic termination at the time of breach remains the sanction for loss or change of class, lack of valid Safety Management Certificate (ISM compliance), Document of Compliance under SOLAS⁴³, or change of ownership, flag or management, or bareboat charter or requisition without written agreement⁴⁴.

50. For non-compliance with certain statutory requirements of the flag state or with reporting requirements of the classification society as to accidents and defects, however, the sanction is non-liability of the insurer for losses attributable to the breach, and is therefore explicitly dependent on causation⁴⁵.

51. Stripped of warranty talk, the War, Strikes, Malicious Acts, Radioactive Contamination and Chemical, etc. Exclusions are all properly so-called, and

⁴⁰ Clause 24.

⁴¹ See MIA §§ 33(3) and 34(2).

⁴² 10 NAVIGATION PROVISIONS

Unless and to the extent otherwise agreed by the Underwriters in accordance with Clause 11 below

10.1 the vessel shall not sail nor be employed in breach of any provisions of this insurance as to cargo, trade or locality (including, but not limited to, Clause 34 below)

11 BREACH OF NAVIGATION PROVISIONS

In the event of any breach of any of the provisions of Clause 10, the Underwriters shall not be liable for any loss, damage, liability or expense arising out of or resulting from an accident or occurrence during the period of breach, unless notice is given to the Underwriters immediately after receipt of advices of such breach and any amended terms of cover and any additional premium required by them be agreed.

⁴³ Clause 13.1; clause 13.2: Unless the Underwriters agree to the contrary in writing, in the event of any breach of any of the provisions of Clause 13.1 above, this insurance shall terminate automatically at the time of such breach, provided ...

⁴⁴ 14.1 Unless the Underwriters agree to the contrary in writing, this insurance shall terminate automatically at the time of ***

⁴⁵ 14.4 It is the duty of the Assured, Owners and Managers at the inception of and throughout the period of this insurance to

In the event of any breach of any of the duties in this Clause 14.4, the Underwriters shall not be liable for any loss, damage, liability or expense attributable to such breach.

so worded that the insurance not “cover loss damage or expense caused by” the excluded causes⁴⁶.

52. In sum therefore, the results, as to the subject of this paper, are that, in some instances the rigors of undertakings and sanctions have been reduced, in almost all instances sanctions are explicitly a matter of contract and not dependent on the MIA, and the whole is accomplished in clear wordings. The issuance of the Terms strongly indicates the possibility of harmonizing conditions through policy terms and provides examples for doing it. One should hope that the American Institute, putting aside any pride of authorship, would embrace the International Hull Terms or at least adopt its treatments of conditions and exclusions.

IX. Conclusions

I conclude that, if acceptable wordings can be devised, it is practical to seek solutions through the cooperation of marine underwriters in the leading centers of the business, starting presumably in the Common Law markets, where it appears that the greater changes may be required. London wordings already much reformed will presumably be acceptable throughout the Commonwealth and also even in some civil law countries where London wordings are presently influential. In the United States, the American Institute is probably less dominant but its wordings will be used in major placements and should come to be influential in others. The following proposal obviously owes much to the start made in London with the new International Hull Terms.

With the hope that they may be found workable also under the Civil Law, I propose consideration as a solution that:

1. The word “warranty” be completely abandoned in policies, severing all links with rules concerning warranties and, taken with the further proposals that follow, presumably ending judicial inquiry as to whether a “warranty” or condition is intended;
2. The word “condition” be used where, and only where, a true condition precedent is intended;
3. In every instance of a condition, the policy spell out the exact consequences of breach, in most cases the termination of coverage at the time of breach or on reaching port, subject to held covered clauses;
4. Navigation limits be routinely exclusions to cover while limits are breached, subject to held covered clauses, leaving it to underwriters in particular cases to raise the limit to the level of a condition (as where breach may suggest moral hazard or reckless operation)⁴⁷;
5. In appropriate instances coverage be excluded only as to losses caused by breach of condition; and
7. A clause be considered for use with standard printed terms to control deviation from these standards in manuscript riders.

Alternatively, a general statement of interpretation might be attempted, for adoption by underwriters, as explaining the significance of their conditions and exclusions where not otherwise expressly provided.

⁴⁶ Clauses 29-33.

⁴⁷ See paragraph 17, *supra*.

UTMOST GOOD FAITH

ANDREW TULLOCH*

1. Introduction

In *Carter v Boehm* (1766) 3 Burr 1905 at 1909, Lord Mansfield stated:

“Insurance is a contract based upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation and proceeds upon the confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.”

Subsequently the English common law developed the concept that all contracts of insurance were contracts *uberrimae fidei*, it being required that each party to the contract must act with “utmost good faith” in dealings with the other.

In common law jurisdictions, the position has developed differently in the general law of contract even though at the time of *Carter v Boehm* Lord Mansfield was of the view that the doctrine of “good faith” applied to all contracts and not just contracts of insurance.

In many civil law countries “utmost good faith” is not confined to marine insurance law as, somewhat differently from the position in many common law countries, all contracts (whether relating to insurance or not) are to be executed with good faith (see for instance French Civil Code, Article 1134 and Italian Civil Code, Articles 1366 and 1375).

When Sir McKenzie Chalmers drafted the codified English law of marine insurance in the *Marine Insurance Act 1906*, it provided in Section 17 beneath the heading “Insurance is *uberrimae fidei*” –

“A contract of marine insurance is a contract based upon the utmost good faith and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.”

Most common law jurisdictions have modelled their marine insurance law closely upon the United Kingdom legislation and most have retained in their legislations a provision equivalent to Section 17.

However, there has in recent times been consideration given as to whether the doctrine of utmost good faith is out of date. Indeed it formed the basis of a Seminar on Marine Insurance held during the 1994 CMI Conference in Sydney. Papers on that topic were delivered by The Honourable Justice Michael Kirby (then President of the Court of Appeal of New South

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Wales and now Justice of the High Court of Australia), Graydon Staring (then partner of Lillick & Charles in San Francisco now of Nixon Peabody), Patrick Griggs (then senior partner of Ince & Co, London and now CMI President) and Jean-Serge Rohart (senior partner of Villeneuve Rohart Simon, Paris). Each of these papers (which are published in the CMI 1994 Yearbook) provided a scholarly review of the law relating to good faith and should be read in conjunction with this paper. So too should the report prepared by Professor Trine-Lise Wilhelmsen for the CMI Singapore Conference in 2001, which provided a thorough jurisdictional comparison. This paper does not purport to repeat that comparison but works from that as the basis of the recommended position.

The Discussion Paper presented at the Singapore Conference in February 2001 outlined the issues relating to good faith as follows:

- “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), and
 - for the full period of cover,
 - including during the submission of claims?
- 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?
- 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 when 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?”

This paper suggests a recommended path through these issues.

2. Mutuality

It is clear from Section 17 of the UK legislation that the duty of utmost good faith applies to both the underwriter and the assured (see also *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1994) 3 WLR 677 at 717 to 718 per Lord Lloyd of Berwick).

This is also accepted in the United States to be the position. It is acknowledged that it is extremely rare for the doctrine to be applied against underwriters at the pre-contractual stage, but through developments in the United States in particular, is now more commonly relevant to underwriters at

the time of claims handling.

However, one can conceive of a situation of an insured seeking to maintain that an insurer has been in breach of its duty of utmost good faith if the insurer seeks to mislead a prospective insured about the terms of cover being offered or seeks to mislead the insured about his duty of disclosure in circumstances where to do so would benefit the insurer's interests.

In all the circumstances the strong majority supports mutuality of the principle, such that it should apply equally to insured and to insurer.

3. Should the standard be objective or subjective?

Most of the debate on this issue has taken place in the context of the duty of disclosure and discussion regarding the obligations in relation to representations made at the time of contract formation. Tests of materiality of facts to be disclosed and a requirement of actual inducement of the underwriters have been developed, for instance (see *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* (1995) 1 AC 501).

The position in the United States is less clear as the question of materiality has been differently interpreted in Federal Courts than some State Courts. For instance it is noted that while most Federal Courts appear to have applied the prudent underwriter test of materiality, the Californian State Court applies materiality to the actual underwriter.

In civil law jurisdiction there does not appear to be a consistent position. Although in most jurisdictions it is the actual underwriter who must be influenced rather than the hypothetical prudent underwriter.

This paper supports the position adopted in the United Kingdom in *Pan Atlantic v Pine Top*, there being both objective and subjective tests to be applied in determining whether there has been a breach of duty of utmost good faith.

4. Duration of the duty

It is clear that in most jurisdictions the duty applies both pre-contractually and post-contractually.

Most recently the House of Lords in *Manifest Shipping Co Ltd v Unipolaris Insurance Co Ltd and Anor (the "Star Sea")* (2001) 1 Lloyd's Rep 389, considered the duration of the duty of utmost good faith.

The House of Lords held that the duty continued to apply after the conclusion of the insurance contract but once the parties were in litigation, it was the procedural rules which governed the extent of the disclosure which should be given in the litigation and not the duty as stated in the *Marine Insurance Act*.

Lord Clyde stated at p. 392:

"In my view the idea of good faith in the context of the insurance contracts reflects the degree of openness required of the parties in the various stages of their relationship. It is not an absolute. The substance of the obligation which is entailed can vary according to the context in which the matter comes to be judged. It is reasonable to expect a very high degree of openness at the stage of the formation of the contract, but there is no justification for requiring that degree necessarily to continue

once the contract has been made.”

Lord Hobhouse commented at p. 401:

“The courts have consistently set their face against allowing their assureds duty of good faith to be used by the insurer as an instrument for enabling the insurer himself to act in bad faith. An inevitable consequence in the post-contract situation is that the remedy of avoidance of the contract is in practical terms wholly one sided. It is a remedy of value to the insurer and ... of disproportionate benefit to him; it enables him to escape retrospectively the liability to indemnify which he has previously and ... validly undertaken.”

In his paper at the CMI Conference in Sydney, Graydon Staring noted the strength of the consumer protection movement in the United States and its effect upon the insurance industry in relation to claims handling.

In civil law countries the position is less clear and there does not seem to be a consistent approach regarding the duration of the duty. Many civil law countries require an insured to inform the insurer of any alteration of risk after commencement of the cover. This duty is akin to a duty of utmost good faith although is not normally expressed as such.

Taking all into consideration it is submitted that the duty should continue after contract formation as it is clearly of relevance to any variation of a cover subsequently requested and to renewal of the cover. It also interplays with the obligations in relation to warranties in the policy in respect of which the insured is frequently aware of relevant facts and circumstances unknown to the insurer but which are directly relevant to the risk.

5. Application to claims

The doctrine of good faith is frequently used to deal with fraudulent claims, the implication being that the presentation of claims must be made in good faith.

As noted above, in the United States in particular, the consumer protection movement has had the effect that insurers are under increasing obligations to deal promptly and openly with claims.

It is worth noting that in International Hull Clauses - 2002 there are quite specific provisions in relation to claims handling, setting out in Clause 48 the duties of the assured in relation to the claims, and in Clause 49 the duties of the underwriters in relation to claims. These provisions are commendable and should circumvent the need for reliance upon the duty of utmost good faith.

It is submitted that duties of the insurers in relation to claims handling can better be stated in the policy wording itself rather than relying upon a need to fall back upon a legislatively imposed duty of utmost good faith.

6. Should utmost good faith be defined?

In his paper delivered to the CMI conference in Sydney, Justice Kirby noted that the concept of “utmost good faith” has drawn criticism for its uncertainty. For instance in the Appellate Division of the Supreme Court of South Africa in *Mutual & Federal Insurance Co Ltd v Audtshoorn Municipality* (1985) 1 AD 419 at 433, it was stated that:

“The expression *uberrima fides* was an “alien, vague, useless expression

without any particular meaning in law”, and

Our law of insurance has no need for *uberrima fides* and the time has come to jettison it.”

Justice Michael Kirby on the contrary expressed the view that:

“The judicial method in common law countries is assisted by concepts such as the doctrine of utmost good faith. Only when the courts are armed with such concepts can they fairly resolve the particular circumstances of the many and varied cases coming before them, doing so in a just and fair manner. Inflexible formulae and precise rules, while they may achieve certainty in the market place, lend themselves to injustices; the applicable doctrines having no inherent inflexibility to deal with the nuances of differing fact situations.”

He maintained that it cannot properly be said that the doctrine of utmost good faith is out of date although he did acknowledge that in the context of marine insurance it was in need of further substantive reform in bringing an element of causality into the doctrine and modifying the test of materiality.

The arguments put by Justice Kirby do have considerable merit and it is submitted that the arguments in favour of retention of the somewhat vague expression outweigh those in support of the removal of the expression.

It is submitted that there should continue to be a specific provision in marine insurance legislation regarding good faith in those jurisdictions where good faith is not already a requirement of contract law in general.

However, it is submitted that the use of the word “utmost” adds little to the concept and its removal or omission should not be seen to weaken the concept. The Latin term *uberrima fides* is not recommended for retention as the use of Latin terms becomes less common with each passing year. Any legislative reform should attempt to use plain language in common usage.

7. Remedy for breach

As has been noted above, the remedy of avoidance of the contract is clearly of far greater value to an insurer than it is to an insured. It in general has no attraction for an insured who is aggrieved by a lack of good faith on the part of an insurer.

It is submitted in these circumstances that it may be preferable if breach of the duty of utmost good faith entitle either avoidance of policy or an entitlement to damages. This would redress the imbalanced position which otherwise applies in favour of the insurer. It would also have the benefit for the insurer of providing an alternative remedy to avoidance.

This paper maintains, however, that an immaterial breach of the duty of utmost good faith which is irrelevant to the risk or loss or claim and has not induced the innocent party into a position in which loss or prejudice may result should not provide a basis for such a remedy, except in circumstances where fraud can be established.

8. Summary

In responding to the issues raised in the Discussion Paper presented at the Singapore conference, it is submitted that marine insurance law should require from both parties to the contract of marine insurance strict adherence

to both objective and subjective standards of good faith, both pre-contractually and for the full period of cover, including during the submission and handling of claims up to the point of commencement of litigation in respect of claims.

In jurisdictions where it is not otherwise part of the general law of contract, there should continue to be a provision that in relation to contracts of marine insurance there is an overriding duty of good faith. The obligations and duties in relation to disclosure and misrepresentation should be clearly stated in the legislation but the general concept should also be retained.

Absence of good faith should give rise to the power of the aggrieved party to claim damages and/or rescind the contract in situations 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 or where such breach amounts to a fraud.

MISCONDUCT OF THE ASSURED AND IDENTIFICATION

TRINE-LISE WILHELMSEN*

1. Introduction

This article addresses two questions in marine insurance, namely, loss caused by the misconduct of the assured and identification. By marine insurance is here meant insurance for hull and cargo. The paper is a part of the ongoing work in the Committee Maritime International to achieve harmonization of the marine insurance clauses. As a first step in this process, the CMI wants a comparative analysis made of the main problems in marine insurance and the way they are solved in the different CMI nations. As a starting point, 12 main issues were defined by the General Secretary of the CMI, Patrick Griggs, at a Marine Insurance Symposium in Oslo 4-6 June 1998¹. This list was further developed by Thomas Remé, chairman of the CMI International Working Group, to deal with the harmonization of marine insurance clauses². So far, the following general issues have been addressed: duty of disclosure, duty of good faith, alteration of risk and warranties. In addition, the more specific problems concerning seaworthiness, safety regulation, and change of flag, nationality and management have been analyzed. The paper dealing with these problems is published in the CMI Yearbook 2000 Annuaire, Singapore I, pp. 332-411³. This paper, then, is a continuation of the CMI analysis to provide a basis for the discussion of harmonization, and deals with the two remaining issues concerning the duties of the assured⁴.

The discussion of these issues includes both common law and civil law perspectives. The paper includes the legislation in the UK, the USA, Canada, Hong Kong, Australia, New Zealand, South Africa, Norway, Sweden, Denmark, Finland (Scandinavia), Germany, Belgium, the Netherlands, France, Spain, Portugal, Greece, Italy, Croatia, Slovenia, Israel, Venezuela, China, Japan and Indonesia⁵.

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¹ See Reports from Marine Insurance Symposium Oslo 4-6 June, MarIns no. 242, p. 245.

² CMI Yearbook 2000 Annuaire, Singapore I, pp. 330-331.

³ The paper is also published in the Yearbook of the Scandinavian Institute of Maritime Law, *Simply* 2001 p. 45.

⁴ The remaining issues concern insurable interest and valuation, perils insured against, comprising ordinary wear and tear, inadequate maintenance, faults in design, construction or material, subrogation and limitation.

⁵ An overview of the marine insurance legislation and contractual documents in these countries is given in Issues of Marine Insurance item 2, CMI Yearbook p. 333 ff., *Simply* 2001 p. 47 ff. Full references to all legislation and contracts will be found here. In addition to the CMI questionnaires, the material for this paper was gathered in connection with a marine insurance

As mentioned, the synopsis of the issues is based on the material from the different CMI nations. As the extent of the answers to the questionnaires varies substantially, so will the description of the different regulations vary in this presentation. To the extent that the questionnaires were enclosed with an English translation of the regulations, it has been possible to supplement the questionnaires by the original legal sources. However, as many nations have not supplied such translations, the only material available from these nations is the answers to the questions. This material is in no way sufficient to answer the more detailed elements of the issues that will be discussed.

As a starting point, only public legislation and standard marine insurance clauses will be included in this presentation⁶. It may also be pointed out that even if the material covers many legal systems, the main focus will be on the UK and the US for common law and on the Scandinavian perspective for civil law. There are several reasons for this. One reason is, of course, that material from these countries is easily accessible, and that there are no language problems. Some of the other participants in the work have, as mentioned, not included English translations of their legislation and/or their standard clauses. This will, of course, limit the presentation of their insurance systems. Another reason is that the UK legislation is adopted more or less unaltered in several other common law countries and that the UK and the US regulations are fairly similar. A discussion of the regulations in the UK and the US is therefore relevant for most of the common law countries. As for the Scandinavian systems in general and the Norwegian system in particular, a further reason is that Norway, Sweden and Finland have revised their insurance conditions in recent years. These conditions are therefore among the more modern presented in the material.

The two issues will be dealt with under item 2: Misconduct of the assured, and item 3: Identification.

2. Misconduct of the assured

2.1 Introduction

The regulation concerning misconduct of the assured defines to what extent the insurer may be free of liability because the loss wholly or in part is caused by the actions of the assured. Contrary to the regulation concerning duty of disclosure, rules concerning misconduct of the assured regulate the actions of the assured during the period when the insurance is running, and not the situation when the contract is entered into. In this respect, the regulation of misconduct is parallel to the regulation concerning alteration of risk, seaworthiness, safety-measures, and change of flag, nationality and management. However, contrary to these rules, which regulate defined risk factors, the rules concerning misconduct address the conduct of the assured

conference held in Oslo in June 1998. This material was collected with the help of CMI representatives in different civil law countries. I especially wish to express my gratitude to Avv. Francesco Siccardi, Dr. Tom Remé, Dr. P. Sotiropoulos, and Dr. Hermann Lange for providing me with the necessary documentation and explanations.

⁶ See Issues of Marine Insurance item 2, CMI Yearbook p. 333, *Simply* 2001 p. 47 ff.

in general, and not the acts or omissions connected to specified duties or requirements. This means that if there is a breach of a more specific requirement this breach may also constitute misconduct of the assured, but this is not necessarily so. On the other hand, there may be a case of misconduct even if there is no breach of the other duties. In this respect, the regulation concerning misconduct may be seen as a safety net for the insurer to ensure a certain minimum level of prudent behavior by the assured.

The regulation is mandatory in some systems. The mandatory regulation either concerns exclusions for willful⁷ or gross misconduct⁸, or protection of the assured for ordinary negligence⁹.

A general feature of the regulation concerning misconduct of the assured is that the regulation distinguishes between different levels of fault: the most serious misconduct is fraudulent behavior, discussed below under item 2.3. Concerning the degree of fault at a lower level than fraud, there is a general conceptual distinction between the systems. The common law systems and some civil law systems operate with the concept of "willful misconduct", whereas the concept used in other civil law systems is either intent, gross negligence, or both. In this paper, willful misconduct and intent are treated together under item 2.3, whereas gross negligence is discussed under item 2.4. The lowest level of fault is ordinary negligence or general misconduct, see below under item 2.5.

However, as a basis for the discussion, it is first necessary to look into the connection between the description of the perils insured against and the misconduct of the assured as a cause of the loss, see below under item 2.2.

2.2 Misconduct of the assured and the perils insured against

The approach to the coverage for negligence or general misconduct is closely connected to the approach to defining the perils insured against. Generally, there are two different approaches to defining what perils are covered under the insurance. One approach is the all-risk principle, where the insurer covers all perils that lead to a casualty unless otherwise provided for. This approach is used in some civil law systems for hull insurance¹⁰, and also in both common law and civil law for cargo insurance for so-called A clauses, which are the most extensive coverage for cargo insurance. The starting point for all-risk insurance is that losses caused by the assured's acts or omissions are covered unless there are specific exclusions for negligence or misconduct. Such exclusions are normally found for gross negligence and higher levels of fault, but not necessarily for negligence, see below.

⁷ UK Marine Insurance Act (MIA) sect. 55 (2), ref. Arnould: *Law of Marine Insurance and Average*, § 786 (Arnould). Slovenian Marine Insurance Act art. 713 first part, Italian Civil Code (CC) art. 1900 (intent).

⁸ Belgian Insurance Law 1874 (IL 1874) art. 16.

⁹ Scandinavian Insurance Contracts Act (ICA) 1930 § 20, Norwegian Insurance Contracts Act (ICA) 1989 § 4-9 second and third parts, ref. § 1-3 for national transport of goods.

¹⁰ German general rules of Marine Insurance (ADS) 28, French Marine Hull Policy (FMHP) art. 1, Swedish Plan § 23, Norwegian Marine Insurance Plan (NMIP) § 2-8 first part, Danish Hull conditions (DH) 3.1, Finnish draft Hull Conditions (HC) § 5.

The other approach is the named-peril system, where the perils insured against are expressly listed. This approach is used generally in common law marine insurance for hull¹¹, in some civil law hull conditions, and for more limited cargo insurance, i.e. B and C clauses¹². Coverage for misconduct or negligence must under this approach be expressly provided for. The starting point under these systems is that there is no express provision to cover the assured's misconduct as an insured peril, but coverage for insured perils may include losses where the assured's acts or omissions have contributed to the loss. This implies that the question of covering the assured's negligence only arises if this negligence is combined with an insured peril, for instance, if the assured's negligence triggers an insured peril to strike the insured ship or goods.

2.3 *Fraud*

The highest degree of fault is where the loss is caused fraudulently by the assured. Fraud in this context means that the assured deliberately causes the loss for the purpose of receiving payment from the insurer. If the assured causes the loss deliberately, this will normally be fraudulent, but at least theoretically the assured may cause the loss deliberately but without fraudulent intent.

None of the systems will cover losses caused by fraudulent behavior. In the UK this follows from common law principles. The same seems to hold for the US.¹³ Some provisions or conditions also contain expressly stated exclusions for intent¹⁴ or bad faith¹⁵, which of course will also include fraud. The same seems to follow in civil law. This may follow either from a general exclusion for any misconduct or negligence¹⁶, or from an exclusion for loss caused by gross negligence¹⁷ or willful misconduct, or from exclusions for loss caused by intent¹⁸.

The sanction against fraud might be that the contract could be avoided and that the premium be retained¹⁹. However, if the exclusion for fraud is contained in a general exclusion for intent or willful misconduct, the response will normally be freedom from liability, see item 2.3 below²⁰.

¹¹ See, for instance, Institute Time Clauses Hulls 1983 (ITCH) A clause clause 6.

¹² For instance, Institute Cargo Clauses (ICC) B clauses clause 1.

¹³ Winter: *Marine Insurance*, p. 177.

¹⁴ Croatian Maritime Insurance Law (no reference), Italian Civil Code art. 1900, NMIP § 3-32, Swedish Hull Conditions 2000 (HC) § 13, Finnish draft HC § 38, Finnish Cargo Conditions (CC) 1993 4.1.1, Swedish Cargo Conditions (CC) § 2.1.

¹⁵ Japanese Commercial Code sect. 641, Japanese Hull Clauses 12-(1) and Cargo Clauses 8-1-(4).

¹⁶ Belgian Marine Insurance Law (MIL) art. 205. Dutch Code of Commerce art. 276. As these provisions are directory, they are not followed in the marine insurance policies. Also Venezuelan Code of Commerce art. 565, Chinese Ocean Marine Cargo clauses II no. 1 and Chinese Hull Insurance Clauses II no. 2 excludes any fault or negligence.

¹⁷ Belgian 1874 Act art. 16, French Insurance Code L 172-13, Slovenian Marine Insurance Act art. 713 second part no. 1.

¹⁸ NMIP § 3-32, Finnish draft HC § 38 no. 1, Swedish HC § 13, General Swedish Marine Insurance Plan of 1957 (SP) § 40, Chinese Maritime Code art. 242.

¹⁹ Belgian MIL art. 205.

²⁰ NMIP § 3-32, Swedish HC § 13, SP § 40.

2.4 *Willful misconduct – intent that is not fraudulent*

The common law system and some civil law systems operate with the concept of willful misconduct. The starting point in these regulations is that the insurer will not be liable for losses caused by willful misconduct of the assured. The exclusion is laid down in the UK MIA section 55 (2) letter (a), stating that the “insurer is not liable for any loss attributable to the willful misconduct of the assured” and is normally also adopted in other systems based on the MIA²¹. The UK MIA sect. 55 (2) letter (a) is, as already mentioned, mandatory and cannot be departed from. It is also general and thus applies both to hull insurance and cargo insurance²². The same explicit exclusion is found in some civil law regulations²³. In the US, there is no specific national legislation on this point, but exclusion for willful misconduct follows from court practice²⁴. The rationale for the rule seems to be that losses caused by willful misconduct are not fortuitous, and thus not covered by a marine insurance policy²⁵.

There is no legal or statutory definition of the concept of “willful misconduct”, but the concept is defined through court cases²⁶. The interpretation is for the most part similar in the common law systems, but there are some specific differences.

As a starting point, “willful misconduct” includes damage caused intentionally (deliberate misconduct)²⁷, and also a reckless assumption of risk²⁸. However, the interpretation of “reckless assumption of risk” differs somewhat in the common law systems. One difference is whether the “reckless assumption of risk” should be evaluated subjectively or objectively, i.e. whether subjective knowledge of the risk is required. In the UK and the US this interpretation is subjective: the decisive test is whether the assured is acting “without caring whether the action was wrongful or not” or if there is

²¹ New Zealand Marine Insurance Act (MIA) sect. 55 (2), Hong Kong Ordinance sect. 55 (2) (a), Australian MIA sect. 61 (2). The Canadian MIA, on the other hand, does not contain a similar provision.

²² Hodges: *Law of Marine Insurance*, p. 221.

²³ French Marine Cargo Insurance Policy 2-2, Marine Insurance Law in Greece, 1998, Issaias Law Office, item 30.1.

²⁴ *Orient Mutual Insurance Company v. Adams*, 123 U.S. 67 (1887) concerning “misconduct”. The same result follows for “wilfull misconduct” in later cases, see *Youell v. Exxon Corp.*, 1995 AMC 1147, 1154-1154 (2nd Cir. 1995), *New York, New Haven and Hartford Railway Co. v. Grey*, 1957 AMC 616, 616-619, 240 F. 2d 460 (2nd Cir. 1957), *Northwestern Mutual Life Insurance Co. v. Linard*, 1974 AMC877, 883 (2nd Cir. 1974).

²⁵ *Youell v. Exxon Corp.*, 48 F.3d 105, 109 (2nd Cir. 1995).

²⁶ As the concept is used also for dry insurance and in other contexts, for instance, in transport by road law and aviation law, court cases from other areas are deemed to be relevant also for the interpretation of the concept in marine insurance.

²⁷ *Johnson v. Marshall, Sons & Co. Ltd.* [1906] A.C. 409, 411 for UK, *Youell v. Exxon Corp.*, 48 F.3d 105, 109 (2nd Cir. 1995) for US. See also Arnould § 786. The same is stated for New Zealand and Hong Kong.

²⁸ Bennett: *The Law of Marine Insurance*, 1996, p. 218, *Wood v. Associated National Insurance Co. Ltd.* (1985) 1 QdR 297 for Australia, New Zealand answers, *Bayer Corp. v. British Airways*, 2000 AMC 1974 (4th Cir. 2000), p. 1950 for US (aviation law).

a “deliberate courting of a known risk”²⁹. There is “willful misconduct at common law if a person’s conduct increases the risk of loss and that person is actually aware of this”³⁰. This clearly implies a condition that the assured has to be conscious of the fact that he is wrongfully increasing the risk.

According to the material from New Zealand, on the other hand, recent Court of Appeal rulings indicate that the test is likely to be objective. Therefore, an insurer may be able to establish the requisite knowledge of the assured by proving that a reasonable person in the position of the assured would have perceived the risk.

The second question is whether it is sufficient that the assured increases the risk of loss and is actually aware of this, or whether there is also a condition that there is an objective probability of loss. The UK interpretation on this point is that it is sufficient that the assured acts with indifference to what the results may be, i.e. the act may be reckless even if there is no objective probability of a loss³¹. The decisive point is thus the (subjective) recklessness of the act itself, i.e. the indifference towards the result of the act. The English interpretation on this point is developed through ca. 19 railway cases and 20 air law cases³², but must also be considered as correct for marine insurance.

In the US, on the other hand, the assured must act “recklessly with subjective knowledge that damage would probably result”³³. An increase of risk is thus not sufficient if the loss is not likely to happen.

On the other hand, the concept of willful misconduct does not include “a thoughtless act on the spur of the moment”³⁴. Neither does it include negligence or even gross negligence: “willful misconduct is something entirely different from negligence, and far beyond it, whether the negligence be culpable, or gross or howsoever denominated”³⁵.

In the civil law systems, the concept of willful misconduct is more seldom used. The normal solution here is to exclude loss caused by intent (for instance, Italy, Germany, Sweden, Finland, Norway³⁶) and/or gross

²⁹ Arnould § 786, see also Bennett p. 218. The interpretation is supported by court cases concerning UK dry insurance and transport by road and aviation law, see Clarke: *International Carriage of Goods by Road*: CMR, 2nd ed. p. 501 ff. apparently, there are no court cases concerning marine insurance on this issue.

³⁰ Clarke: *The Law of Insurance Contracts*, 2nd ed. p. 393, 2001 sect. 17-3A3 (pp. 17-18). Similar: Bayer Corp. v. British Airways, 2000 AMC 1974 (4th Cir. 2000), p. 1950 for US (aviation law).

³¹ Clarke: CMR 2nd ed. pp. 503-504.

³² Clarke: CMR 2nd ed. p. 107.

³³ Clarke *l.c.*, Bayer Corp. v. British Airways, 2000 AMC 1974 (4th Cir. 2000), p. 1950 for US (aviation law).

³⁴ Johnson v. Marshall, Sons & Co. Ltd. [1906] A.C. 409, 411, Bennett p. 218.

³⁵ (1993) 1 W.L.R. 996, Bennett p. 218, Orient Mutual Insurance Company v. Adams, 123 U.S. 67 (1887) concerning “misconduct”. The same result follows for “willful misconduct” in later cases, see Youell v. Exxon Corp., 1995 AMC 1147, 1154-1154 (2nd Cir. 1995), New York, New Haven and Hartford Railway Co. v. Grey, 1957 AMC 616, 616-619, 240 F. 2d 460 (2nd Cir. 1957).

³⁶ Italian Civil Code art. 1900, NMIPS 3-32, Danish Convention § 67 first paragraph, Swedish HC § 13 first part, ref. SP § 40 first paragraph, Finnish HC § 36 (1), Finnish draft HC § 38 no. 1, Finnish CC 4.1.1, FMHP art. 3 third part, ADS 33, German Cargo Clauses 2000 (DTV Cargo 2000), sect. 3, and Greek Law 2496/1997 § 7 fifth paragraph.

negligence, see below under item 2.5. Similarly to the concept of “willful misconduct” the concept of “intent” is normally not defined. However, some explanation is found in the Commentary to the Norwegian Marine Insurance Plan. At p. 121-122 it is stated that

The question of whether the assured acted intentionally must primarily be considered in the same manner as in criminal law. Intent will be present when the assured deliberately brings about the casualty so as to receive indemnity under the insurance policy; i.e. fraudulent intent, and when the assured realises that his conduct will, on a balance of probabilities, bring about the casualty. The concept of intent will also encompass the situation where the assured foresaw the occurrence of the casualty as a possible consequence of his conduct and accepted the risk of that consequence (i.e. was willing to accept it as part of the bargain).

This definition seems fairly close to the US interpretation of “willful misconduct” as a willful action with a reckless disregard of the probable consequences. It is, however, difficult to say whether the condition of the probability of the loss in the US is equivalent to “possible consequence”. The English interpretation seems to reach further since, as mentioned, there is no requirement that the loss is probable or likely.

The normal sanction for loss caused by intent is that the insurer is free from liability. In addition, he may have a right to cancel the contract³⁷. In the Norwegian system, the insurer may also cancel other insurance contracts with the assured³⁸.

2.5 Loss caused by gross negligence

As mentioned above under item 2.4, the common law systems exclude losses caused by willful misconduct. As this concept does not include negligence of any kind, i.e. ordinary or gross negligence, the result is that gross negligence will be covered according to the UK MIA and other systems using the same regulation. It should be remembered, however, that gross negligence is only covered if the loss is caused by an insured peril. If gross negligence on the part of the assured implies that the loss is not fortuitous, it will not be covered by the insurance.

However, the normal approach in the civil law system is to have specific exclusions for loss caused by gross negligence. Such exclusions may follow from a general exclusion for negligence, see under item 2.5.1 below, but can also follow from more detailed provisions.

In France, Italy, Sweden, Norway, Finland, Greece, Germany, Slovenia, Croatia and Japan, however, there is a general exclusion for loss caused by gross negligence³⁹.

³⁷ Swedish HC § 22 no 1 (a), NMIP § 3-34 first part, Norwegian Cargo Clauses § 58 no. 1.

³⁸ NMIP § 3-34 first and second part.

³⁹ Italian Civil Code art. 1900, French Marine Cargo Insurance Policy art. 2-2, Swedish HC § 13, Finnish CC 4.1.1, Finnish draft HC § 38 no. 2, FMHP art. 3.1 third part, French Insurance Code L 172-13, SHC § 21 first paragraph and Greek Law 2496/1997 § 7 fifth paragraph, Marine Insurance Law in Greece, 1998, Issaias Law Office, item 30.1. In the Greek regulation, however,

The Dutch expression is “major fault”⁴⁰. Whether the degree of fault inherent in this expression is equivalent to the expression “gross negligence” is difficult to say.

Gross negligence lies somewhere between ordinary negligence and intent. However, similarly to the concept of willful misconduct, the concept of gross negligence is not defined in the legislation. Ordinary negligence occurs when the assured has not acted as a competent and reasonable person would have done in a similar situation. Gross negligence is a more specific form of negligence; the deviation between the conduct of the assured and the relevant norm is more pronounced⁴¹. Some relevant arguments in evaluating whether the loss is caused by gross negligence on the part of the assured will be the extent of the risk for loss, whether the assured was aware of the risk (conscious gross negligence) or not (unconscious gross negligence), the possibility to avoid the risk or the loss, how much time he had to act, and his experience concerning the risk.

The normal sanction when the assured is guilty of gross negligence is that the insurer is freed from liability⁴². In Norway, Denmark and Finland the provisions for gross negligence in respect to hull conditions generally and also in the Finnish Cargo Conditions are based on the regulation in the common Scandinavian Insurance Contract Act of 1930. There is no absolute exclusion, but rather a reduction in the indemnity, depending on the degree of fault and on other circumstances in general⁴³. An even more detailed regulation of the reduction in indemnity is found in the Norwegian Cargo Clauses, which on this point follow the system in the Norwegian ICA 1989 § 4-9, second part. The rule here is that the insurer’s liability will be reduced according to the degree of fault, the causation, whether the assured was intoxicated when causing the loss, and other circumstances. This regulation is mandatory for the national transport of goods, but is also applied to the international transport of goods. The Norwegian Cargo Clauses thus contain no regulation of the insurer’s liability where the assured has caused the loss by gross negligence.

if there is a third party liability insurance, the insurer is relieved from liability only if the insured acted willfully, see Greek Law 2496/1997 § 25. Slovenian Marine Insurance Act art. 713 second part no. 1. Croatian Maritime Insurance Law (no. reference), DTV Cargo 2000, sect. 3, Japanese Commercial Code sect. 641 (general) and sect. 829-1 (marine insurance), Japanese Hull Clauses 12-(1) and Cargo Clauses 8-1-(4).

⁴⁰ Dutch Cargo Conditions 1991 art. 18.

⁴¹ Commentary NMIP p. 122.

⁴² Italian Civil Code art. 1900, French Marine Cargo Insurance Policy 2-2, FMHP art. 3.1 third part, French Insurance Code L 172-13, Swedish HC § 13, Swedish CC § 2.1 first paragraph and Greek Law 2496/1997 § 7 fifth paragraph, Marine Insurance Law in Greece, 1998, Issaias Law Office, item 30.1. In the Greek regulation, however, if there is a third party liability insurance, the insurer is relieved from liability only if the insured acted willfully, see Greek Law 2496/1997 § 25. Slovenian Marine Insurance Act art. 713 second part no. 1. Croatian Maritime Insurance Law (no reference), DTV Cargo 2000, sect. 3, Japanese Commercial Code sect. 641 (general) and sect. 829-1 (marine insurance), Japanese Hull Clauses 12-(1) and Cargo Clauses 8-1-(4).

⁴³ Finnish HC § 36 (2), Finnish draft HC § 38 no. 2, Danish Marine Insurance Convention 1934 (DC) § 67 second paragraph, and NMIP § 3-33.

In addition to total or partial freedom from liability, gross negligence on the part of the assured will often give the insurer a right to cancel the contract⁴⁴.

2.6 *Negligence*

2.6.1 *Exclusions for negligence*

As mentioned above under item 2.3, some insurance legislation or conditions exclude any misconduct or negligence⁴⁵. However, this regulation is normally not mandatory, and the marine insurance conditions may depart from this provision⁴⁶.

Another approach which achieves a somewhat similar result is to define the duty for the assured as that of taking reasonable care of the vessel or the cargo insured. This method is followed in the French policies. Non-compliance with this duty may lead to a proportionate reduction of the indemnity⁴⁷. Whether this leads to the same result as a general exclusion for negligence is, however, difficult to say.

2.6.2 *Coverage for negligence*

The normal solution is, however, to protect the assured against losing coverage due to his own negligence. As mentioned above under item 2.2, the full extent of such protection will depend on whether the insurance is based on named perils or on an all-risk system. The general starting point for insurance coverage is that the loss has been caused by an insured peril in a way that satisfies the legal requirements of causation. Under the named-risk system, the listed perils will normally not include the assured's negligence. Thus, losses caused by the assured's negligence will not be covered. The assured's negligence is consequently only relevant if the assured's acts have intervened in the chain of causation from the peril to the loss.

For common law, this starting point is said to follow from the UK MIA section 55 (2):

The insurer is ... liable for any loss caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.

As can be seen, there is no explicit reference to the misconduct or negligence of the assured. It may, however, be inferred from the language of the subsection that, even where the peril occasioning the loss has been due to negligence (not amounting to willful misconduct, see above), the insurer will not be relieved of liability because of such negligence⁴⁸. This implies that nothing short of willful misconduct would disqualify the assured from recovering. On the other hand, the wording clearly expresses the condition

⁴⁴ NMIP § 3-34 first part second point, Norwegian CC § 58 no. 1, Swedish HC § 22.

⁴⁵ Belgian MIL art. 205, ADS 33 (1), Chinese Ocean Marine Cargo clauses II no. 1, Chinese Hull Insurance Clauses II no. 2, Venezuelan Code of Commerce art. 565.

⁴⁶ For instance, Belgian policies.

⁴⁷ FMHP art. 11 ref. art. 14 last part.

⁴⁸ Arnould § 763 A, Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co. (1898) 2 Q.B. 114 (C.A.).

that, regardless of the assured's negligence, the loss must be proximately caused by an insured peril. The solution is illustrated by the following statement from *Trinder, Anderson & Co. v. Thames and Mersey Marine Insurance Co.*:

The risk undertaken by an underwriter upon a policy covering perils of the sea is that if the subject matter insured is lost or damaged immediately by a peril of the sea, he will be responsible, and in my judgement, it matters not if the loss is remotely caused by the negligent navigation of the captain or the crew, or of the assured himself, always assuming that the loss is not occasioned by willful act of the assured himself.

This implies that if the assured's act or omission is the proximate cause of the loss, and not any of the named perils, he will not recover under the policy. According to Arnould⁴⁹ it

is submitted that negligence giving rise to a casualty may only properly be seen as the proximate cause of loss if the event occasioned thereby does not constitute the operation of some named peril, or is not an event operating externally upon the subject-matter of insurance. Thus, where negligent acts or omissions cause damage within the vessel, for example, by a machinery breakdown, or by improper loading or stowage, without any external operation of the seas causing or attributing to the casualty, and without the occurrence of any named peril, such as fire, for example, negligence may properly be said to be the proximate cause of the loss.

On the other hand, if there is a marine casualty of a fortuitous nature that would not have occurred in the absence of negligence, this has been treated by the English courts as a loss by perils of the seas⁵⁰. If a loss has been caused by a peril insured against, there is a very strong presumption that it is covered regardless of any associated negligence on the part of the assured. The same seems to hold for the US.⁵¹

Most civil law marine insurance systems, are, on the other hand, based on all-risk coverage. Thus, the starting point is that the insurer covers any peril that is not expressly excluded. The only condition is that there is a casualty or an insured event. This implies that if the assured causes a loss by negligence, this will be covered if there is no exclusion for negligence. Normally, there will be exclusions for willful misconduct and/or gross negligence⁵², but no exclusion for ordinary negligence.

This implies that the assured will be covered if he causes the loss by ordinary negligence. For Denmark, this protection of the assured is

⁴⁹ Arnould § 763 A.

⁵⁰ *The Warilda* (1923) AC 292, 301, *Canada Rice Mills case* (1941) AC 55, pp. 68-69, Arnould § 763 A.

⁵¹ Winter p. 177.

⁵² See above item 2.4 and *inter alia* Swedish HC § 13, NMIP § 3-33, FMHC art. 3 no. 1 third part (see, however, art. 11 concerning preventive measures), Italian Civil Code sect. 1900, Japanese Commercial Code art. 641, 829 no. 1, Japanese HC art. 12-1, Japanese CC art. 8-1 (4), Slovenian Marine Insurance Act art. 713 second part no. 1.

mandatory, see the Danish ICA 1930 § 20. The same holds for the national transport of goods according to the Norwegian ICA 1989 § 4-9 ref. § 1-3 letter (g).

The difference between the named-peril principle and the all-risk principle concerning the coverage for negligence is then that the named-peril system focuses more heavily on the condition that the casualty is caused by a covered peril. If so, ordinary negligence as an additional cause will not bar the assured's claim. According to the all-risk principle, it will be enough to establish that there is a casualty. Any peril, including negligence, will be covered, unless there is a specific exclusion. Apart from this, the protection for ordinary negligence seems similar in the two systems.

The Canadian MIA, the Portuguese and the South African legislation contain no provisions concerning the assured's general misconduct during the term of the insurance. The Canadian MIA does, however, contain a rule concerning the duty to avert or minimize losses (section 80). Whether this will include a general duty of good behavior does not follow from the material.

2.7 Summary

The regulation concerning misconduct or negligence seems to be more homogeneous than the rules discussed in the previous CMI report. The common features of the regulation are exclusions for fraud, willful misconduct, intent and – in the civil law systems – also for gross negligence. Exclusions for fraud and willful misconduct may be mandatory, but as there is no mandatory protection for an assured being guilty of such acts or omissions, this should cause no specific problem. It is also clear that the exclusion for willful misconduct includes the civil law concept of intent. On the other hand, it does not include the civil law concept of gross negligence. Thus, the concept of willful misconduct implies a degree of fault that departs further from the standard of reasonable behavior than gross negligence. A more detailed comparison of these concepts is outside the scope of this article. The general conclusion, however, is that this exclusion is more strict in the civil law systems than in the common law systems.

There are also some differences concerning the reaction to gross negligence: some systems allow for a partial reduction of the indemnity according to the degree of fault and other circumstances instead of total freedom from liability. Such partial reduction is mandatory in Norway for the national carriage of goods, and in general in Denmark. However, the Danish ICA is under amendment, and there may therefore be changes on this point.

On the other hand, ordinary negligence is normally covered in full, but here there are exceptions. However, there is a certain distinction between the named-peril systems and systems using the all-risk approach. In the latter case, any casualty caused by ordinary negligence by the assured will be covered. Under a named-peril system, there is an additional requirement that negligence has struck the insured object by a peril insured against.

It should also be noted that protection for ordinary negligence is mandatory according to the Danish ICA 1930 in general and the Norwegian

ICA 1989 for the national transport of goods.

The material further seems to imply that the regulation concerning misconduct of the assured has caused fewer problems and also is less practical than many of the other provisions covering the duties of the assured during the period of the insurance. The reason for this may be that the most practical situations where losses are caused by the acts or omissions of the assured are already regulated by rules where the insurer may invoke lesser degrees of fault (ordinary negligence) or rules that may be invoked regardless of fault (*inter alia*, warranties). The lack of interest for the regulation in the UK MIA concerning willful misconduct may be explained by the fact that the insurer can obtain a much better protection by using warranties, where there is neither a question of fault nor a condition of causation. Compared to the warranty approach, the regulation concerning willful misconduct is a much less effective tool for the insurer to avoid liability.

3. Identification – assured’s responsibilities for others

3.1 The concept of identification and the problems

The regulation concerning loss caused by the assured’s own actions or omissions that are described above under issue 2 is addressed to the assured, and implies that the duty of due care is a duty of the assured. The question then arises as to what extent the acts or omissions of others may bar the assured’s right to indemnity. Similarly, several of the other duties of care that are contained in a marine insurance contract and that are a part of the issues which have been analyzed by the CMI, may be addressed to the assured. This holds generally for provisions concerning alteration of risk, seaworthiness and safety regulation, and in some cases also for change of flag, management and ownership. If there is a breach of these provisions by a third party, for example, the assured’s servant or another assured, the question is to what extent the insurer may invoke this breach against the assured.

In Scandinavian marine insurance, this is characterized as a question of identification. The concept of identification is, however, unknown in the other civil law countries and also in the common law systems, at least for insurance matters. In the lack of a common concept within these systems, the CMI has expressed the problem as a question of the assured’s responsibility for faults committed by a third person. In this paper, I will, however, use the concept of identification as a general expression.

The concept of identification or the responsibility of third persons presumes that the exclusion will only apply if the assured is guilty of negligence or misconduct. If the exclusion may be invoked regardless of fault on the part of the assured, there is no identification issue. In such cases, the insurer may invoke the exclusion whether the assured or any third party is at fault or not. For warranties in general⁵³ and absolute exclusions resulting from change of ownership, flag or management⁵⁴, there is thus no problem of

⁵³ Wilhelmsen item 6 (CMI Yearbook 2000 p. 385 ff., *Simply* 2001 p. 127 ff.).

⁵⁴ Wilhelmsen item 7 (CMI Yearbook 2000 p. 393 ff., *Simply* 2001 p. 141 ff.).

identification as this is defined in Scandinavian law. Or – stated in other words – the assured will automatically be identified with any third person not having fulfilled the conditions of the policy.

This, however, does not necessarily mean that the insurer in common law may invoke a breach of a warranty against other assureds than the one responsible for the breach. According to court practice in the US, where a policy covers two classes of property which are clearly and definitely separated, so that the insurance is divisible, a breach of a condition which applies to one class alone may not be invoked against another class with a separate assured. However, courts do not agree as to what constitutes a distinct class⁵⁵. From the US it is further stated that express warranties and implied warranties for seaworthiness in a marine insurance policy are objective rules, and that identification is no issue.

The question of identification or responsibility for others is also relevant for a breach of the duty of disclosure, which is included among the CMI issues⁵⁶. On this point, however, there is a conceptual difference between Scandinavian marine insurance and the other systems. The Scandinavian systems distinguish between the person effecting the insurance and the assured. The person effecting the insurance is the person who enters into the contract with the insurer, whereas the assured is the person who has the right of indemnity when a casualty occurs. To use ordinary insurance terminology, the assured has an economic and legal interest in the matter insured. The requirement of an economic and legal interest is a common feature of both common and civil law. The reason for the mentioned distinction in some civil law systems is that the person effecting the insurance need not be the assured under the contract, viz. he may not have a right of recovery. The practical effect of the distinction is that the duty of disclosure, which is connected to the negotiations and the entering into the contract, is addressed to the person effecting the insurance, whereas the duties connected to the insurance period are addressed to the assured.

In other civil law countries and in common law, there is no similar distinction between the assured and the person effecting the insurance. Thus the duty of disclosure rests with the assured. Even so, there is reason to treat the identification issue concerning the duty of disclosure separately from the question of identification of the assured with his servants. The servant is, in the first case, involved with the formation of the contract, and the fault that may be invoked concerns breach of the duty of disclosure, typically misrepresentation. Normally, general contract law concerning agency solves the question of identification at this stage. This departs from the approach to solving third-party breaches of contractual duties while the insurance period is running. Here, the starting point is who the assured may be held legally responsible for either because it is stated in the insurance regulation or because it follows from the more general principles of vicarious liability or

⁵⁵ Clarke p. 515.

⁵⁶ Wilhelmsen item 3 (CMI Yearbook p. 347 ff., *Simply* 2001 p. 70 ff.).

similar regulation. It may be that the law of agency and the regulation concerning legal responsibility, identification or vicarious liability will lead to the same result, but in principle the approaches are different⁵⁷.

The question of identification thus concerns two different sets of duties: the duty of disclosure and the different duties imposed on the assured while the insurance is running. Concerning the third party who may be in breach of these duties, the most practical case will be the situation where the person effecting the insurance or the assured uses a servant. This servant may be part of the assured's own organization (internal identification) or part of another organization (external identification). However, the situation may also be that there is more than one assured. In this case there is a question as to what extent faults committed by one assured may bar the other assured's right of recovery. In systems where the person effecting the insurance is included in the concept of the assured, this problem will include the question of identification between the assured and the person effecting the insurance if the latter breaches his duty of disclosure. However, as the Scandinavian systems, as mentioned, make a distinction between these two persons and operate under different regulations in respect to the identification issues, it is natural to treat this issue as a separate one.

Thus, there are four main identification issues to be discussed:

1. Identification of the person effecting the insurance with his servants.
2. Identification of the assured with his servants.
3. Identification between two or more assureds.
4. Identification of the assured with the person effecting the insurance.

According to the Norwegian marine insurance system, the question of identification must be distinguished from the question of identifying the assured or the person effecting the insurance as such. If the assured is a company, this question will depend on who is entitled to represent the company or has the authority to act on behalf of the company. If a limited liability company is stated as being the person effecting the insurance or the assured, actions taken by the management (Board of Directors/Chief Executive Officer) of that company will be deemed to be actions of the company itself. The company management *is* the company⁵⁸. However, this distinction may only be established if there are separate provisions concerning who acts on behalf of the company and identification. In systems that do not operate with the concept of identification in insurance matters, the distinction between who is the company and whose acts or omissions the company will be held responsible for is less clear. This also holds for Sweden and Denmark where the concept of identification is used, but there are no clear rules

⁵⁷ See for English law specially *Armogas v. Mundogas* (1986) A.C. 717. The case concerned a manager guilty of fraudulent misrepresentation. The court held that the misrepresentation was outside the ostensible authority of the manager, and also that the defendants were not vicariously liable for the deceit of their servant. The relationship between agency and vicarious liability is also discussed in *Reynolds and Bowstead: Agency* (1996), 1-026.

⁵⁸ Commentary NMIP p. 126.

defining how far the concept reaches. Also, there is some evidence that the concept of identification in Anglo-American law is used to define who is acting for the company when a company is penalized under criminal law⁵⁹, or when there is a question of “actual fault or privity”⁶⁰. In the following, it is thus not always possible to distinguish between the issue of identification and the question of defining who acts as the company.

3.2 *Identification of the person effecting the insurance with his servants*

The Scandinavian systems distinguish as mentioned between the assured and the person effecting the insurance. The duty of disclosure is addressed to the person effecting the insurance. If this person uses a servant to enter into the insurance contract, the question is to what extent the insurer may invoke a breach of the duty of disclosure made by the servant against the person effecting the insurance. A similar question arises in the other systems, but here this will be a question of identification between the assured and his servants or agents during the contract negotiations.

It should be noted that if the person effecting the insurance uses a servant and fails to pass over to the servant material information that should be disclosed to the insurer, this is not a question of identification. In this case, the servant will be in good faith concerning the information, and thus there is no breach on his part that the assured can be responsible for. On the other hand, by not passing over the information to the insurer, the person effecting the insurance has himself breached the duty of disclosure. It is therefore not possible to avoid the duty of disclosure by entering the contract with the help of an innocent servant⁶¹.

A characteristic feature concerning the contract formation in marine insurance is the use of brokers operating as separate entities and not as a part of the assured's organization. However, the assured may of course also use a servant within his organization (internal identification) or an agent from another organization, e.g. the charterer's organization (external identification). The legal principles governing the question of identification will, however, be the same. If it is established that the broker or the actual servant is acting as an agent for the person effecting the insurance, the starting point is that there will be full identification between the person effecting the insurance as principal and the agent. This holds for the UK⁶², Australia⁶³, the

⁵⁹ *Tesco Ltd. v. Nattrass* (1972) A.C. 153, at p. 190, concerning an offence under the Trade Description Act 1968. The question here was whether a corporate body should be identified with the manager of the store where the offence was committed, or whether the manager was “another person”.

⁶⁰ *The Star Sea*, (1997) 1 Lloyd's Rep. 360 concerning MIA sect. 39 (5).

⁶¹ Hare: Assured's Responsibility for Servants and Agents. Relations between Assured, Broker and Underwriter. Insurance for Joint interest. In: Reports from Marine Insurance Symposium, Oslo, 4-6 June 1998, p. 212, Ivamy: *General Principles of Insurance Law*, 6th ed. p. 578.

⁶² MIA sect. 19, Arnould chapter 7, § 637, Clarke pp. 576-579, 2001 ed. sect. 23-8 A (pp. 23-27 to 31).

⁶³ Australian MIA sect. 21 (2).

US⁶⁴, Norway⁶⁵, Denmark⁶⁶, Sweden⁶⁷, Germany⁶⁸, the Netherlands⁶⁹, Venezuela⁷⁰ and, according to the CMI material, also for Hong Kong, Croatia and Italy.

If the broker acts as an independent intermediary, on the other hand, the starting point is no identification. A more detailed discussion of when the broker or another servant acts as an agent for the person effecting the insurance as principal falls outside the scope of this paper.

To outline the extent of the identification of the person effecting the insurance with the faults of the broker or servant as agent, a distinction should be made between two different situations. The first situation is that both the person effecting the insurance and the agent possess material information, and the agent fails to pass this information over to the insurer. The second situation is that the agent acquires material information, but fails to pass it both to the person effecting the insurance and to the insurer.

In the first situation, where the agent withholds information possessed by both the agent and the person effecting the insurance, the latter will be held responsible for this. This holds even if the person effecting the insurance has forwarded the information to the agent and told him to pass it over to the insurer. In the second situation, the person effecting the insurance is supposed to have acquired the same knowledge that the agent has. If the agent does not pass over material information to the insurer, this will thus be assessed according to the regulation of the duty of disclosure on the part of the person effecting the insurance, even if he is in good faith about the matter⁷¹. On the other hand, in both these situations, the assured may have rights of action against the agent for breach of contract or of fiduciary duty.

3.3 *Identification of the assured with his servants*

3.3.1 *Characteristic features of the regulation*

The question of identification of the assured with his servants concerns the situation where the assured's servant has breached some of the duties of the assured towards the insurer. As mentioned above, these duties will normally be addressed to the assured, implying that a breach made by a third party, viz. the servant, may not be invoked against the assured. The question here thus concerns to what extent the insurer may invoke a breach made by a servant against the assured.

⁶⁴ Buglass p. 9, Cattell: *Marine Insurance Survey. A comparison of United States Law to the Marine Insurance Act of 1906*, *Tulane Law Journal* no. 20, 1995-1996, p. 23.

⁶⁵ Commentary NMIP pp. 126-127.

⁶⁶ Lyngsø: *Dansk forsikringsret*, 7th ed. p. 99.

⁶⁷ Hellner: *Försäkringsrett*, 1965, ch. 19.

⁶⁸ German Civil Code (§ 278 BGB).

⁶⁹ Dutch Civil Code 6:76, 6:170, 6:171 (text not attached).

⁷⁰ Venezuelan Code of Commerce art. 565.

⁷¹ MIA sect. 19 (a), Canadian MIA sect. 21 (2) letter (a). Commentary NMIP pp. 126 and 72, Hare p. 212, Buglass p. 30, Parks: *Law and Practice of Marine Insurance and Average*, (1988), p. 222.

This question is of course closely connected to the general regulation concerning vicarious liability and legal responsibility for others. However, it is outside the scope of this paper to discuss these general principles. The scope here is limited to the regulation of this question in the marine insurance context, even if the question of vicarious liability is touched upon. It should thus be kept in mind that the principles outlined below may be supplemented by the general principles, and that the assured may be held responsible for others to a greater extent than for what follows from the marine insurance regulation alone.

Traditionally, most marine insurance regimes have contained provisions protecting the assured against the breaches made by the master and crew of the ship. Thus, this regulation does not give any right of identification, but a bar against such identification. On the other hand, less regulation has been included concerning other servants. To the extent that such regulation is incorporated in the marine insurance acts or conditions, it has normally been written in very general terms, and in many systems this question is left to be solved by more general legal principles, *ref. above*. This was also the situation under the previous Norwegian Marine Insurance Plan of 1964 and the Plan for Transport Insurance of Goods of 1967. However, under the amendment of the Norwegian Insurance Contract Act of 1989, a provision was made stating that the insurer would have no right to identify the assured with his servants unless such identification was provided for in the insurance conditions⁷². This implies that the insurer is free to include provisions concerning identification, but if he fails to do so, he may not invoke the faults of the assured's servants against the assured. As this represented a shift in the legal principles of identification in insurance contracts, provisions for identification had to be incorporated in the Norwegian Cargo Conditions and the Marine Insurance Plan. These conditions have later been the model for the draft of the new Finnish Hull Conditions.

Item 3.3.2 will deal with the general question of identification. Special rules for identification connected to the breach of the safety regulation are discussed under item 3.3.3. The last item 3.3.4 concerns the question of identification with master and crew.

3.3.2 Identification of the assured with his servants, main regulation

Many of the systems contain positive provisions stating that faults made by the assured's servants may be invoked against the assured, but the approach and extent of the regulation varies. The variation concerns the systematic approach of the regulation, the status of the servant as a condition to invoke his acts against the assured, what kind of faults the insurer may invoke, and whether identification is limited to employees within the assured's own organization (internal identification) or applies also to servants in other organizations (external identification).

The normal **systematic approach** is that provisions concerning identification are included in the specific regulation concerning the duties of

⁷² Norwegian ICA 1989 § 4-11 third part.

the assured. In most systems, such provisions are contained only in the regulation concerning the general acts or omissions (negligence and intent or willful misconduct) of the assured⁷³. However, in the Scandinavian systems, there are normally also special identification clauses in the provisions concerning safety regulation⁷⁴.

The position in common law is that there are no specific provisions concerning this issue. Both the UK MIA sect. 55 (2) letter (a) concerning willful misconduct and the MIA sect. 39 (5) concerning seaworthiness in time policies are, however, interpreted so as to address not only the assured, but also his “alter ego”⁷⁵, see further below.

The immediate implication of including the identification issue in the regulation for misconduct is that there is no identification issue concerning other duties of the assured, for example, concerning alteration of risk, seaworthiness, safety regulations or change of flag, ownership and management. However, the significance of this depends on the underlying relationship between the regulation for misconduct and the other provisions. If the insurer may invoke only gross negligence or willful misconduct, which is the normal rule⁷⁶, he will not be able to identify the assured with a servant who negligently breaches the more specific duties concerning, for example, safety regulations, alteration of risk or the requirement of seaworthiness. On the other hand, safety regulations often contain special identification rules, see below under item 3.3.3. Also, if the more specific exclusions are objective and may be invoked regardless of fault, there will be no need for identification, ref. the discussion above under 3.1 concerning warranties. On the other hand, if alteration of risk, breach of the seaworthiness requirement or other exclusions are connected to ordinary negligence, a provision for identification concerning gross negligence and willful misconduct will not apply to negligence concerning the more specific exclusions. Thus, the insurer will not be able to depend on the identification provision in this instance, unless more general principles can be applied, see below.

If the general exclusion for misconduct applies not only to gross negligence, but also to ordinary negligence⁷⁷, this may include faults committed in connection with more specific duties.

⁷³ Chinese HC II no. 2, Marine Insurance Law in Greece, 1998, Issaias Law Office, item 30.1, Finnish CC 4.1.1, Swedish HC with Commentaries p. 25. FMHP art. 3 no. 1 third part, Italian Civil Code art. 1900, Slovenian Code art. 713, second part (2).

⁷⁴ Hellner p. 294, Lyngsø p. 304 ff. and below under item 3.3.3.

⁷⁵ Arnould § 786 and note 43 § 720. The same approach seems to apply in US, see Winter p. 177. The “alter ego” principle is primarily used when a company is penalized under the criminal law, or the issue is that of “actual fault and privity” under legislation such as the Merchant Shipping Acts. However, it is argued that the concept should be given a wider application.

⁷⁶ Marine Insurance Law in Greece, 1998, Issaias Law Office, item 30.1, Finnish CC 4.1.1, FMHP art. 3 no. 1 third part, Italian Civil Code art 1900, Slovenian Code art. 713, UK MIA sect. 55 (2), see Arnould § 786. The same approach seems to apply in the US, see Cattell p. 60 and Winter p. 177.

⁷⁷ Chinese HC II no. 2.

The Norwegian and Finnish approach to hull insurance gives a more flexible tool as these conditions contain general identification rules connected to faults and negligence⁷⁸. These provisions may therefore also be applied to any of the specific duties where there is a condition of negligence for a breach to be invoked.

The regulation also varies concerning the definition of the **group of servants to be identified with the assured**. The normal approach in civil law is that identification is limited to servants in senior positions, but how far down in the hierarchy of the company the identification issue reaches varies. The same holds for some common law systems. The members of the group may be defined in more general terms as representatives⁷⁹, legal representatives⁸⁰, persons for whose conduct the assured is responsible by law⁸¹, or employees in a senior position⁸². A more detailed list of servants is found in France, where the assured is identified with his senior administrators, viz. directors and officers, agency managers, superintendents or heads of technical departments (hull insurance)⁸³, and his servants, representatives or other authorized persons (cargo insurance)⁸⁴. In Italy, the group of servants whose acts may be invoked against the assured is wider. Here, the assured will be held responsible for “persons for whose acts the insured is answerable”, viz. his servants in general⁸⁵.

An even wider approach is used in the Norwegian MIP and the draft of the Finnish Hull Conditions, where as a starting point identification may take place concerning any individual⁸⁶. However, this latter regulation is not as wide as it seems because it is limited by the definition of the functions and the kind of fault that may trigger identification, see below.

The common law approach on this point is less clear as the identification issue is not expressly regulated. Both the UK MIA sect. 55 (2) letter (a) concerning willful misconduct and sect. 39 (5) concerning seaworthiness for time policies are, however, as mentioned interpreted to address the assured or his “alter ego” in the case of a corporate assured. Apparently, Anglo-American law uses the concept of “identification” in certain connections synonymously with the “alter ego” concept, ref. above under item 3.1. As mentioned, this seems parallel to the definition of who is “the assured” in the case of a corporate assured, which falls outside the scope of the Norwegian concept of identification, but it is possible that the alter ego principle reaches further than this. However, the concept is developed through court cases concerning criminal law or the issue of “actual fault or privity”, and it is difficult to say if the result would be the same for misconduct of the assured’s servants.

⁷⁸ NMIP § 3-36 second part, Norwegian CC § 10, Finnish draft HC § 46 no. 1.

⁷⁹ Chinese HC II no. 2, Winter p. 177 for the US.

⁸⁰ Marine Insurance Law in Greece, 1998, Issaias Law Office, item 30.1.

⁸¹ Slovenian Code art. 713 second part no. 2.

⁸² Finnish CC 4.1.1, Norwegian CC § 10 letter (a).

⁸³ FMHP art. 3-1 third part.

⁸⁴ FMCP art. 7 no. 2.

⁸⁵ Italian Civil Code art. 1900.

⁸⁶ NMIP § 3-36 second part, Finnish draft HC § 46 no. 1.

The classic statement of the alter ego principle in the mentioned context is the person or persons who is or are “really the directing mind and will of the corporation, the very *ego* and center of the personality of the corporation”⁸⁷. It is also stated that the fault should be “the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself”⁸⁸. In this case the management director of the plaintiff’s company, who was also the managing director of the company which acted as ships’ managers for the plaintiff company, was deemed to be acting as the company itself. In a later case concerning the concept of unseaworthiness according to the Merchant Shipping Act sects. 502 and 503, there is a suggestion that the alter ego principle may be extended to include the registered ship’s manager and head of the traffic department of the company, who was not a director or a member of the board of the plaintiff’s company⁸⁹. This solution has been criticized in another context⁹⁰, but was cited with apparent approval in a later case concerning the UK MIA sect. 39 (5)⁹¹. This approach was also accepted by the court in the *Star Sea*⁹². Here the court states that the question of alter ego is “obviously more complex where one corporation owns the ship and may be the assured technically, but where the management and responsibility have been placed in the hands of other corporations”. Even so, the “aim of the exercise must be the same”. The court held that the owners of the ship, a Cypriot company, must be identified with the directors of the management company (an English company) and the director of the registered management (a Greek company). The decisive test was “who was involved in the decision-making processes required for sending the *Star Sea* to sea”⁹³.

The American courts have held that the test for a breach of the obligation of maintaining the seaworthiness of the vessel is whether those having shore-side managerial responsibilities were at fault, and that neglect by agents and servants below the level of management will not be imputed to the assured⁹⁴.

⁸⁷ *Lennard’s Carrying Co. v. Asiatic Petroleum Co.* (1915) A.C. 705, Arnould § 720, note 67, *The Lady Gwendolen* (1965) 1 Lloyd’s Rep. 335, at p. 345, concerning the issue of unseaworthiness in the Merchant Shipping Act, 1894.

⁸⁸ *Lennard’s Carrying Co. v. Asiatic Petroleum Co.* (1915) A.C. 705, also cited in *The Lady Gwendolen* (1965) 1 Lloyd’s Rep. 335, at p. 345.

⁸⁹ *The Lady Gwendolen* (1965) 1 Lloyd’s Rep. 335, p. 340 ff., Arnould § 720 note 67.

⁹⁰ *Tesco Ltd. v. Nattrass* (1972) A.C. 153 at p. 200, Arnould § 720.

⁹¹ *Compania Mar. San Basilio S.A. v. Oceanus Mutual Underwriting Assn.* (1976) 2 Lloyd’s Rep. 171 at p. 177, Queen’s Bench 49 (C.A.). Contrary to what was assumed after the *Tesco Ltd. v. Nattrass* case, the view today is that there is no overarching theory of attribution. Rather, each case must be read as confined to the construction of the statutory provision in the particular case, see *Meridian* (1995) 2 A.C. 500.

⁹² *The Star Sea*, (1997) 1 Lloyd’s Rep. 360, pp. 375-376, affirmed in (2001) 1 Lloyd’s Rep. 389, p. 395.

⁹³ *The Star Sea* 1997 p. 375.

⁹⁴ *Saskatchewan Government Ins. Office v. Spot Pack Inc.* (1957) A.M.C. 655, at p. 663, *Spooner v. Connecticut Fire Ins. Co.* (1963) A.M.C. 859.

Concerning willful misconduct, there is less authority on this issue. The reason for this is that in most cases that have come before the courts, the owner was either an individual, or there was no doubt as to the person to be regarded as the assured. Arnould § 764 seems to imply that the misconduct of subordinate employees or agents of the assured cannot be attributed to the assured according to the alter ego principle. At the same time, it is, however, argued that the alter ego principle should be supplemented by ordinary rules of vicarious liability, see below. This may imply that the alter ego test is only a part of the question of identification for willful misconduct. From the US it is stated that the rules concerning misconduct as a starting point concern the assured only. If the assured is a corporation, however, the concept of personal misconduct is supplemented by the concept of privity. This implies that the misconduct of a high ranking officer or manager of the corporation as a whole or a manager to whom is delegated the management of the matter which the misconduct concerns, will be imputed to the corporate assured. It is difficult to say how far down in the hierarchy of the organization the alter ego principle reaches in this connection, and apparently the UK solution is different from that of the US. In the US case, the “Padre Island”, the knowledge of a port captain who had shoreline managerial responsibility, and who, except for the necessity of obtaining approval for major expenditures, ran the entire operation of the stranded vessel, was imputed to the owner⁹⁵. According to Arnould the result would be contrary in the UK⁹⁶.

In addition to identification according to the alter ego principle concerning privity, it has been argued that the UK MIA sect. 55 (2) must be supplemented by the normal rules of vicarious liability for the willful actions of the assured’s other authorized agents and servants⁹⁷. A similar argument may be used for the other systems, where the identification issue will normally also be addressed in general principles in the different systems. It is therefore difficult to say whether the differences in the definition of the group of servants whose acts or omissions are relevant correspond to similar differences in results. It may be a general proposition that the assured will be responsible for his servants and agents according to the general regulation concerning vicarious liability⁹⁸. If this is the case, the result may not be so different as the differences in the regulations imply. On the other hand, this seems to stretch the identification issue much further than the Scandinavian approach, and is also contrary to the alter ego approach in English court cases and theory. Also, the definition of the group of persons is closely connected to the definition of the functions they may have, and the kind of faults the insurer may invoke, see below.

Many of the provisions define the persons the assured shall be identified with without limiting the identification issue to certain **functions**⁹⁹. As a

⁹⁵ The “Padre Island” (1971) 2 Lloyd’s Rep. p. 431, Arnould § 786 and note 43.

⁹⁶ Arnould § 786 and note 43.

⁹⁷ Hare p. 214.

⁹⁸ This seems to be the case in Germany, see German Civil Code (§ 278 BGB).

⁹⁹ *Inter alia*, FMHP art. 3-1 third part, French Cargo Conditions art. 7 no. 2, Finnish CC 4.1.1, Italian Civil Code art. 1900, Chinese HC II no. 2, Slovenian Code art. 713 second part no. 2.

starting point, some limitation will follow here from the concept of servant or representative, which implies that the person is acting on behalf of the assured in certain matters. Also, the question of identification will only arise if the servant has committed a fault which results in a casualty for the insured object. One may therefore presume that the servant having caused the breach will have some authority or function concerning the insured object. However, if such function is not a condition, identification may take place even if the servant has no such authority and thus acts outside his mandate.

If the identification provisions in the insurance legislation are supplemented by the normal rules of vicarious liability for the acts or omissions of the assured's other authorized agents and servants, the result may be different. In this case, the assured will only be identified with faults committed by the agent or servant where the actions are carried out in the course and scope of the employment of the servant and within the mandate of the agent. If the agent or servant has no authority concerning the insured object, the assured will normally be able to claim that the actions of the agent or servant went beyond the course and scope of the mandate of employment¹⁰⁰.

Also, according to some provisions, identification may only take place if the servant or representative has been delegated a defined authority. Examples are identification with a legal representative or third persons entrusted by profession with the task of watching the insured object¹⁰¹, or employees in a senior position with responsibility for the transport of goods¹⁰².

The most detailed regulation on this point is found in the Norwegian MIP and the draft of the Finnish Hull Conditions. According to the NMIP § 3-36 second part, the insurer may invoke against the assured faults and negligence committed by any organization or individual to whom the assured has delegated authority concerning functions of material significance for the insurance.

The criterion for identification is that decision-making authority has been delegated "concerning functions of material significance for the insurance". Delegation of decision-making authority denotes the power to act on behalf of the assured in the area in question¹⁰³. This may be compared to identification with agents or servants whose mandate is to act on behalf of the assured in matters concerning the insurance. However, it excludes identification with servants or agents whose tasks are not connected to the insurance, and it is also a condition that the delegated function is of "material significance". The area for identification thus seems more limited than the ordinary rules of liability for others. On the other hand, the general requirement that the servant must act within his mandate before identification

¹⁰⁰ Hare p. 214 for common law. The same seems to apply for German law, see German Civil code (§ 278 BGB).

¹⁰¹ Marine Insurance Law in Greece, 1998, Issaias Law Office, item 30.1.

¹⁰² Norwegian CC § 10 letter (a).

¹⁰³ Commentary NMIP p. 130.

can take place may lead to a similar result. The act or omission leading to a casualty will normally have some significance for the insurance cover. As this act must be within the acting person's mandate, the practical result will normally be that the servant has authority within areas of significance for the insurance, see above. However, the significance need not be "material".

Whether the delegation involves "functions of material significance for the insurance" is a factual question. The purpose of this approach is to obtain flexibility connected to the variety of ways that ship operations are organized. Such organizations may vary from limited partnerships in which the owners are not involved in operations at all and have organized everything in separate companies, to large professional shipping companies that take care of all or most operational functions. It is further stated in the Commentary pp. 130-131 that:

There are also big differences in how operational responsibility is placed internally in a single company. Most shipowners have a central operational organisation on land, but some have a small land-based organisation with wide-ranging powers delegated to the superintendent level. In some cases, there may also be shipowners with a small land-based operational organisation or none at all, where the captain is given wide-ranging powers in relation to the operation of the ship. This need not be blameworthy: modern management philosophy places great emphasis on decentralisation of the management function, and in some cases it may be natural to make the ship's officers part of the management. One consequence of this is that it becomes impossible to give a general rule that there shall be identification with certain groups of person or companies.

The criterion for identification in the subparagraph 2 is based on the view that the shipowner must be free to organise ship operations as he sees fit, but that the assured must bear the consequences of the management model chosen. If the assured chooses to delegate a large portion of the management to others, the assured must also accept responsibility for faults or negligence committed by the organizations or persons in question within the area of authority they have been given. The determining factor in relation to identification then becomes who has real authority in areas which are of significance for the insurance. "Functions of material significance for the insurance" refers to all types of management function regardless of whether they are grouped together or exist separately. If the operations are organised through a separate management company or similar entity which has the overall responsibility for the ship's technical/nautical and commercial operation, then of course the assured must be identified with the manager. Likewise, if the management function is divided into technical, nautical and commercial operations, there must be identification in relation to the person who has been given responsibility for the different functions, insofar as these functions are of material significance for the insurance. The same will be true for the person or company who is responsible for crewing.

If the individual management function is split up as well, it becomes more difficult to pinpoint what will trigger identification. On the one hand, it is clear that the assured may not avoid liability by dividing up management functions into as many units as possible. Here, as elsewhere, the assured must take responsibility for the management model chosen. On the other hand, not each and every element of the management responsibility will constitute a basis for identification, for example, if a subordinate employee in the company is given responsibility for an operational function on one occasion.

A separate question from the definition of the relevant function is the question of **what kind of fault** the insurer may invoke. The only provisions dealing with this question are the NMIP § 3-36 and the draft of the Finnish Hull Conditions § 46, stating that the fault or negligence must occur in connection with the performance of those functions. This means that it is necessary to distinguish between faults or negligence committed in the exercise of the delegated authority, and faults or negligence committed in the performance of other tasks. The assured must accept being identified with a senior employee who has responsibility for organizing supervision for a laid-up ship and the employee is at fault. There will not be identification, however, if the same employee commits an isolated error while personally carrying out supervision¹⁰⁴.

The other provisions define either only the group of persons or the group of persons and the function, but do not say anything about the fault. If neither the function nor the fault is defined, the servant may have no authority concerning the object insured, and any actions concerning this will be outside the scope of his authority, or he may have the relevant authority, but the actions may be outside the scope of this authority. In both cases the provision alone will facilitate identification, but this may be limited by the general rules. If the function is defined, but there is no condition that the fault be committed within that authority, identification is limited to persons with the defined authority, but the fault may still be outside the scope of their authority.

If it may be presumed that the identification provisions will be supplemented by ordinary rules concerning liability for others, the result may be different. In such cases identification will only take place if the servant or agent acts within his authority or mandate. If he has no authority concerning the insured object, actions concerning this will normally be outside the scope of his authority. On the other hand, if he possesses the relevant authority or functions, actions outside this authority may not be invoked against the assured¹⁰⁵.

The last question to be dealt with here is the question whether the identification is **internal only, or both internal and external**. Again, the clearest picture is found in the Norwegian Hull Conditions, where identification may take place concerning "any organisation or individual".

¹⁰⁴ Commentary NMIP p. 133.

¹⁰⁵ Hare p. 214.

This provision thus encompasses both external and internal identification. External identification refers to all cases where the authority of importance for the insurance is entrusted to organizations other than the assured's own, e.g. where one or more central operational functions are transferred to other companies. Internal identification refers to cases where the assured must be identified with those persons in his own organization who have the authority to make decisions concerning matters which are significant for the insurance¹⁰⁶.

The other provisions are less clear on this point. If the assured is responsible for employees or staff in a senior position, this will only encompass internal identification. It is less clear whether "representatives" and persons the assured "is responsible for by law" or "any person" will include external identification. Whether external identification will follow from ordinary rules does not follow from the material.

3.3.3 Extended identification for breach of safety regulation

A safety regulation is a regulation concerning measures for the prevention of loss. This legal device to obtain preventive measures seems to be a Nordic invention and is not used in other systems¹⁰⁷. In the Norwegian and Swedish conditions, this regulation also includes an extended right of identification concerning the acts or omissions of a third party. A condition for such identification is that there is a breach of a special safety regulation laid down in the insurance contract. If so, the hull insurer may invoke a breach of the regulation made by anyone who has a duty on behalf of the assured to comply with the regulation¹⁰⁸ or to ensure that it is complied with¹⁰⁹.

The difference from the general Norwegian identification rule for hull insurance defined above is that there is no requirement that the person breaching the safety regulation has been given authority concerning functions of material significance for the insurance. However, it may be presumed that an obligation to comply with a safety regulation will always be of material significance for the insurance. Another difference concerning the Norwegian approach is that identification in this instance can be made not only with the person who shall ensure that the regulation is complied with, but also with the person who has the actual duty to act.

The Norwegian cargo insurer may in case a safety regulation is breached, invoke acts or omissions against other persons engaged to organize the transport¹¹⁰.

3.3.4 Identification of the assured with the master and crew

Regulation concerning identification of the assured with the master and crew is inherent in most marine insurance systems for hull insurance. As a main rule, the insurer may not invoke the negligence and faults of the master or crew against the insured. However, the level of protection for the assured differs.

¹⁰⁶ Commentary NMIP p. 132.

¹⁰⁷ Wilhelmsen item 7.4, CMI Yearbook p. 400 ff., *Simply* 2001 p. 152 ff.

¹⁰⁸ NMIP § 3-25 second part.

¹⁰⁹ NMIP § 3-25 second part, Swedish HC § 11 no. 6, Swedish Plan § 52.

¹¹⁰ Norwegian CC § 10 second part.

One difference is connected to that between the named-peril and the all-risk systems and concerns the relationship between the actions of the master and crew and the external peril immediately causing the loss. Another difference is whether the assured is protected against all levels of fault. A third difference concerns the kind of fault the assured is protected against.

Similarly to the regulation on the misconduct or negligence of the assured, the coverage for negligent acts committed by the master or crew must be seen in relation to the legal framework concerning the perils insured against. For insurance based on the named-peril system, which is the starting point in common law and also used in some civil law systems, misconduct or negligence of the master or crew will not be covered unless such cover is specially provided for. It may therefore be argued that the coverage for such actions is not a question of identification, but of defining the perils insured against. In all-risk systems, which are the basis in many civil law countries, the situation is the opposite. An all-risk system will include casualties caused by acts or omissions of the master or crew unless there is an exception for such acts or omissions. However, this starting point may be departed from if there is a general rule of identification in respect to the assured and his servants, see above under item 3.3.2. As the master and crew will be servants of the assured, an exception from the general rule will be needed if the right of identification may also include the master and crew.

Similarly to the general regulation of identification, the regulation concerning the master and crew may be included in the provisions concerning faults of the assured (*inter alia*, in Swedish, German, and Slovenian common law¹¹¹), but may also be incorporated as a separate provision (*inter alia*, in Italy and Norway¹¹²). If the latter approach is used, it is clear that any fault or negligence is covered, whether this fault or negligence concerns general acts or omissions, or the negligence is connected to the lack of seaworthiness or a breach of other, more specific duties. It is less clear if the result is the same if the regulation is included as a part of the general regulation of the assured's actions. In this case it may be argued that if the negligence of the master or crew represents a breach of more specific duties this is not covered. This will, however, only present a problem if there is a general right of identification concerning these breaches. As the regulation concerning identification normally is also included in the general provisions concerning misconduct of the assured, this regulation will not give a right of identification of other issues, see above item 3.3.2. On the other hand, if general rules concerning liability for agents and servants give a more general right of identification, the solution will be that identification can take place for such breaches.

The next question to be addressed is what levels of fault are covered. The starting point in common law is the UK MIA sect. 55 (2) stating that the insurer

¹¹¹ ADS 33 (3), Swedish HC § 13, Slovenian Code art. 713 third part, UK MIA sect. 55 (2).

¹¹² Italian Code of Navigation art. 524, NMIP § 3-36, Finnish draft HC § 46 no. 2, DC § 70, Tybjerg: *Om søassurandørens ansvar*, 1952, p. 72 ff. The same solution seems to apply in Greece, ref. Issaias Law Office item 30.

unless the policy otherwise provides ... is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew¹¹³.

In the civil law systems, the protection concerns "fault"¹¹⁴, "faults or negligence"¹¹⁵, "acts or omissions"¹¹⁶, "intent or negligence"¹¹⁷, "neglect, omission, or barratry"¹¹⁸, and "wrongful acts wilfully committed" or "negligence"¹¹⁹. As for Germany and Slovenia, this provision applies only to the crew, but under German doctrine this includes the master¹²⁰.

Some provisions include cover for willful misconduct and/or intent by the master and crew. If the regulation covers only fault, negligence or gross negligence, however, the question arises as to how to evaluate intent. A general question is also how fraud by the master and crew shall be assessed. On this point, a distinction must be made between the common law and the civil law systems. It follows from the UK MIA sect. 55 (2) that what is covered is not any casualty caused by misconduct by the master and crew, but any loss proximately caused by a peril insured against, *even though the loss would not have happened but for the misconduct or negligence of the master or crew*. This implies that the assured must be able to prove that the loss is caused by one of the named perils, and not by misconduct alone, ref. above concerning the coverage for the misconduct of the assured. According to court decisions, the loss will probably be regarded as fortuitous if barratries conducted by the master or crew exposed the vessel to a marine casualty, but without the intention that the vessel be lost. In cases of deliberate infliction of loss, the position is different. In the case of, for instance, the scuttling of the ship, the misconduct of those responsible, and not any peril of the seas, is the proximate cause of the loss. If, however, deliberate acts of the master or crew strike the ship through a peril insured against, for instance, arson by the master, the assured will be covered¹²¹. This holds even if the acts of the master or crew were outside the scope of their employment, and also if the master were drunk¹²².

The position in an all-risk system is different on this point because there is no condition of an outside peril of a fortuitous nature. If the ship is sunk by scuttling, this will therefore in principle be covered. Some provisions do, however, regulate this question. The Italian solution is to cover "also" fraud by the master or crew in the case of cargo insurance, thus implying that "fault" in the general provision does not include fraud¹²³. It is also stated in the material

¹¹³ Hong Kong Ordinance sect. 55 (2) (a), Canadian MIA sect. 61 53 (1).

¹¹⁴ Greek Code of Private Maritime Law of 1958 sect. 274, Marine Insurance Law in Greece, 1998, Issaias Law Office, item 30, Italian C Nav sect. 524.

¹¹⁵ NMIP § 3-36 first paragraph.

¹¹⁶ ADS 33 (3).

¹¹⁷ SHC § 13 second sentence ref. SP § 40 second paragraph, DC § 70, Finnish HC § 36 (3).

¹¹⁸ Dutch Civil Code art. 637.

¹¹⁹ Chinese HC I. 7 (3) and (4), but only for total loss.

¹²⁰ ADS 33 (3), Slovenian Code art. 713 third part.

¹²¹ Arnould § 764.

¹²² Hare pp. 212-213.

¹²³ Italian Code of Navigation sect. 524 second part ref. first part.

that the general provision does not include intent, which thus corresponds to the UK solution. Similarly the Dutch regulation for cargo includes “neglect, omission or barratry”¹²⁴, whereas barratry is not covered for ships¹²⁵.

Most of the provisions concern faults and negligence in general, without further qualification of the faults concerned. The Norwegian and Finnish solution, however, is to qualify the fault further by stating that the cover includes only faults and negligence in connection with the master’s or crew’s service as seamen¹²⁶. This must be seen in conjunction with the general rule for identification with persons or organizations having been delegated authority concerning matters of significance for the insurance. If the master or crew has authority concerning matters outside their service as seamen, for instance, authority to make commercial decisions concerning cargo or sea route, this general rule for identification will be applied¹²⁷.

3.4 Identification between two or more assureds

3.4.1 General remarks

The question of identification between two or more assureds is practical when there is more than one owner of the ship or cargo, and the insurance in question is for the benefit of both or all of these owners. For the insurance of ships, the owners will normally be co-owners. For the insurance of goods, the practical situation will be that risk of or title to the goods is transferred during their transport. Also, insurance effected by the owner may include the economic interest of a mortgagee or other named third party. The question of identification arises when one of the assureds, A, fails to fulfill his duties toward the insurer, and thus loses his right of indemnification: To what extent may the insurer invoke the failure of A against the other assured, B?

The practical importance of this problem depends on the extent to which a co-owner, a buyer of the transported goods, or other third parties can be covered under the insurance contract of another assured. Also, provisions relating to joint insurance for a third party may state that this third party will not obtain any better position under the contract than the person effecting the insurance or the “main assured”. As these questions are not discussed in the CMI material, it is difficult to undertake a full discussion of this issue here. Thus, the discussion is limited to what follows from the material concerning identification, and to what may be found in English textbooks on marine insurance. Because of the differences in the material, it is natural to divide the discussion between civil law and common law regulations.

3.4.2 Civil law

Express provisions concerning this identification issue for **hull insurance** are found in the NMIP § 3-37 and the Finnish draft Hull Conditions § 80. According to the NMIP § 3-37, the insurer may not invoke

¹²⁴ Dutch Code of Commerce sect. 637.

¹²⁵ Dutch Code of Commerce sect. 640.

¹²⁶ NMIP sect. 3-36 first part, Finnish HC draft § 46 no. 2.

¹²⁷ Commentary NMIP p. 129.

against the assured faults or negligence committed by another assured unless the relevant assured has overall decision-making authority for the operation of the ship. Thus, the starting point is that no identification shall take place. The exception is when the assured who has committed the fault has “overall decision-making authority for the operation of the ship”.

According to the Commentary pp. 134-135, the reasoning behind the provision is as follows:

The purpose of the basic rule is to protect all (other) assureds in cases where the fault or negligence is committed by ... an assured who does not have overall decision making authority in relation to the operation of the insured ship. It would be quite extraordinary and unusual for a ... coassured who does not have such authority to intervene in the operation of the ship and it does not seem reasonable that the other assureds should suffer for faults he might commit in such a situation.

On the other hand, if the assured is the person with the ultimate authority in relation to the insured ship, identification shall take place. According to the Commentary p. 135, “the wording ‘decision-making authority for the operation of the ship’ means the ultimate decision-making authority for the ship”. The relevant authority will often lie with the owner, but this is not necessarily the case. The crucial factor will be who has the ultimate authority to decide how the operation is to be organized and resources are to be allocated. When people or organizations with that authority commit a fault or act negligently, it is natural that there be identification in relation to all assureds. In this instance, the assured responsible has been charged with taking care of the interests of the group and has been entrusted with the formal competence to act on behalf of all.

The decision-making authority under § 3-37 is concerned with the situation where one person or organization has the overall or ultimate authority. If operational responsibility is shared, the crucial factor will be who has organized the division, and who has the ultimate responsibility for the allocation of resources between the persons and organizations responsible. This is contrary to identification between the assured and his servants according to the MNIP § 3-36, where several persons or organizations may have been given authority resulting in identification downwards through the organizational hierarchy, see above under item 3.3.

As already mentioned, **cargo insurance** will often be effected for both the seller and the buyer of the goods if ownership of the goods is transferred during their carriage. If the seller effects the insurance and the buyer possesses the claim, an important question is whether the seller's acts or omissions may bar the buyer's right to recovery. For cargo insurance, the most general regulation is found in the Norwegian conditions. The solution here is that acts or omissions committed by the person effecting the insurance or the previous owner of the cargo may be invoked against the assured¹²⁸. The right of identification includes any breach of the insurance conditions, i.e. breach

¹²⁸ Norwegian CC § 10 first part letter (b).

of a safety regulation and gross negligence. The French and Finnish conditions are more limited. The French solution is to exclude willful misconduct or gross negligence of the assured or any other beneficiary of the insurance¹²⁹. This implies that both the seller's and the buyer's gross negligence will be relevant and that acts or omissions committed by one of these persons may be invoked against the other. A similar solution is found in the Finnish conditions, where intent or gross negligence both by the person effecting the insurance and the assured is excluded¹³⁰.

The material from the other civil law marine insurance systems sheds little light on the question of identification when there are two or more assureds. The German ADS chapter XIII contains rules concerning Insurance on Account of a Third Party, but does not regulate whether the insurer may invoke faults committed by one assured when the period is running against another assured. The question of identification concerning breach of the duty of disclosure is treated below. The same holds for chapter XII concerning Assignment of Interest, Mortgage of Claims.

3.4.3 Common law

The position in common law is also very unclear. There seems to be no specific regulation of this issue in the UK MIA, in the hull conditions or in the cargo conditions. In general, the concept of joint insurance in the common law system is divided into two different groups: composite insurance and joint insurance. If two persons with different economic interests in the insured object are insured under the same policy, this is composite insurance. A joint insurance implies that the assureds have a joint interest in the insured property, for instance, when they are joint owners. Characteristic of joint insurance is that the assureds' economic interests are inseparably connected, so that loss or gain necessarily effects them both¹³¹.

The starting point for joint insurance is that "defences arising from the conduct of any of them are available against them all"¹³². Interestingly enough, the court has, in a brief discussion on this issue, used an argumentation that is very similar to the solution in the Norwegian Plan. The case concerned a ship owned by three family members, where two were guilty of willful misconduct. The court stated that the third assured, having left the control of the vessel to his two co-owners, was not now in a position to urge that loss was not attributable to any willful misconduct on his own part¹³³.

The solution for composite insurance seems less clear. However, as far as willful misconduct of the assured is concerned, the actions of one assured, A, will not bar the claim of B under the same policy, where A and B are

¹²⁹ FMCP art. 7 no. 2.

¹³⁰ Finnish CC 4.1.1.

¹³¹ Clarke p. 717, 2001 ed. 27-2C6 (p. 27-22 ff.).

¹³² Lombard Australia Ltd. v. N.R.M.A. Insurance Co. Ltd. (1969) 1 Lloyd's Rep. 575, Samuel v. Dumas (1924) A.C. 431 at p. 445, Arnould § 341, § 764 (p. 607) and § 786 (p. 647).

¹³³ Wood v. Associated National Insurance Co. Ltd (1985) in *QdR* 297 at p. 308, Hodges pp. 227-228.

separately interested¹³⁴. This will be the case when the insurance is effected to the advantage of two or more assureds, for instance, for both the mortgagor and mortgagee¹³⁵. On the other hand, if the claimant is not an original assured, but derives his title by assignment, the insurer may invoke willful misconduct by the assignor against the assignee¹³⁶.

3.5 Identification of the assured with the person effecting the insurance

As mentioned above, the Scandinavian marine insurance systems distinguish between the person effecting the insurance and the assured. The person effecting the insurance is the person who negotiates and enters into the insurance contract, whereas the assured is the person having the claim for indemnity. It should be noted that this distinction is used even if the person effecting the insurance and the assured are the same person. The legal significance of the distinction is that the duty of disclosure rests with the person effecting the insurance, whereas the duties when the insurance period is running rests with the assured. If the person effecting the insurance breaches his duty of disclosure, the question then arises whether this breach will bar the assured's claim against the insurer.

If the person effecting the insurance and the assured is the same individual or organization, breach of the duty of disclosure will of course bar the assured's right of indemnification. This is not a question of identification, but a question of bearing the consequences for a breach he himself has committed. As this will be the normal situation, the question of identification under this item is less practical than the issues discussed above.

The question of identification further presumes that the person effecting the insurance acquires the insurance solely or partly for the benefit of a third party or for "whom it may concern". A further condition for this identification issue is, however, that the person entering into the contract has status as the person effecting the insurance and is not acting as an agent for the person effecting the insurance. The latter situation is discussed under item 3.2 above.

The situation under this issue that gives rise to a question of identification, then, is where the person effecting the insurance for the benefit of a third party or for "whom it may concern" also has status as the "assured" (in addition to the third party). This will be the situation where, for example, the ship owner enters into an insurance contract that is also for the benefit of the mortgagee or another owner, so that both the owner and the mortgagee or co-owner will have an insurable interest in the ship. This can also be the situation for cargo insurance if the seller enters into an insurance contract covering both the interest of the seller and of the buyer, i.e. the title to or the risk for the goods is transferred during the carriage. As may be seen, there is

¹³⁴ Arnould § 786 (p. 647) and note 44 and § 764 (p. 607). See also Clarke p. 717.

¹³⁵ Samuel v. Dumas (1924) A.C. 431, Hodges pp. 226-227. In Westport Coal Co. v. McPhail (1898) 2 Q.B. 130 it was held that the insurer could not invoke a navigational fault a co-owner had made as master of the ship against another co-owner.

¹³⁶ Graham Joint Stock Shipping Co. Ltd. v. Merchants' Mar. Ins. Co. Ltd. (1924) A.C. 294, Arnould § 786 and note 44, and § 251, Hodges p. 227, Ivamy p. 464.

a close connection between this item and the question of identification between two assureds; the difference is that this item concerns breach of the duty of disclosure only.

Naturally, this question is expressly regulated only in the Scandinavian systems. The clearest picture is found in the NMIP § 3-38, the Norwegian Cargo Conditions, and the Finnish draft Hull Conditions § 81. According to the NMIP § 3-38, the insurer may invoke against the assured faults or negligence committed by the person effecting the insurance. The same solution follows from the Cargo Conditions § 10 letter (b) and the Finnish draft HC § 81.

The position in the other civil law countries is less clear. According to the Italian legislation, the contracting party is, if the insurance is acquired on account of a third party, under a duty to perform all obligations under the contract directed towards the assured. An exception to this is provided for duties that may only be performed by the assured. This implies that the person effecting the insurance has a duty of disclosure when the contract is entered into. Defenses that may be raised against the contracting party can also be raised against the assured¹³⁷.

The common law solution on this point also seems uncertain. According to Arnold § 251 pp. 167-168, the question concerning a mortgagee's or assignee's position depends on "whether the party who directed the insurance to be effected intended to do so as an agent for a person having a mortgage or similar interest, so as to enable the latter to claim as an original assured, or whether the mortgagee has only a derivative interest". In the latter case, the mortgagee seems to have the same right for compensation as the party effecting the insurance¹³⁸. If the latter party breaches his duty of disclosure, this will bar the mortgagee's claim. In the first case, the person effecting the insurance will act as an agent for the assured,¹³⁹ and a similar solution will follow from the UK MIA sect. 19, see above under item 3.2. This further illustrates the close relationship between the different questions of identification discussed in this paper.

3.6 Summary

The questions concerning identification or responsibility for others are more complicated than many of the other CMI issues. The reason for this is partly that the concept of identification is not a common marine insurance concept, but a concept developed in Scandinavian law, and mainly in the Norwegian marine insurance system. This implies that it is more difficult to define the common questions to be discussed. Another problem is that much of the regulation concerning this issue is found in the general legislation and not especially in the marine insurance regulation. It is therefore difficult to establish the full picture concerning this. This makes it difficult to compare the regulations and also difficult to determine who is acting as the assured and

¹³⁷ Italian Civil Code art. 1891 first and third parts.

¹³⁸ See also Ivamy p. 464.

¹³⁹ See also Ivamy p. 566.

whose acts or omissions the assured is responsible for. The first question is partly a question of company law, whereas the second is a question of insurance law.

Some common features may, however, be pointed out. As for identification between the person effecting the insurance and his agents, the common solution seems to be that faults committed by the agent are the risk of the person effecting the insurance. It does not matter whether the agent is a servant within the organization of the person effecting the insurance, or a broker outside this organization. The responsibility for others is therefore extensive in this phase of the insurance contract.

Concerning the identification between the assured and his servant, the general starting point is less clear. The question concerning identification between the assured and his senior servants is often not regulated at all, or the regulation is so general that it is difficult to determine how far down in the hierarchy of the organization identification may take place. It is also difficult to see whether this is a question of who acts as the assured, and whose acts or omissions the assured will be held responsible for. However, there seems to be a general attitude that acts or omissions committed by ordinary employees without special authority concerning insurance matters shall not bar the recovery. Also, there is a general provision that no identification shall take place for acts or omissions committed by the master or crew, even if the more detailed regulations on this point vary.

Identification between two or more assureds is also a very complicated question. On this point the CMI material is very limited, probably because the CMI issues are essentially not concerned with the coverage of third parties' interests. Some information can be gathered from Anglo-American textbooks, but court practice in common law is far from clear on this point.

It may also be noted that there seems to have been little discussion concerning these problems in the common law systems, except perhaps for the question of faults committed by brokers and servants as agents. Similarly to the question concerning willful misconduct, this may be explained by the use of warranties in the common law system. Characteristic of the warranty approach is that negligence or fault is not an issue. This implies that the question of identification between the assured and his servants is not relevant, even if the question of identification between two or more assureds may be¹⁴⁰.

The CMI material further illustrates that the concept of identification, the problems of identification, and the solution to the problems are discussed first and foremost in the Norwegian Marine Insurance Plan and Commentaries. The more detailed solutions in the Norwegian system may, of course, be less well-fitted to systems with different frameworks. However, the Norwegian system may here be used as a guide for defining the problems to be discussed by the CMI, and also for providing a pattern for discussion.

¹⁴⁰ Clarke p. 515.

REPORT ON THE IWG MEETING IN LONDON, NOV 2003

Present: Tom Reme
Malcolm Clarke
Simon Beale
John Hare
Sarah Derrington (by invitation)

The purpose of the meeting was to get together informally to review progress of the IWG to date, and to discuss the way forward to the Vancouver conference in June 2004.

It was confirmed that the four issues investigated by the group since the Oslo meeting in 1998 *viz* the requirement of good faith, the duty to disclose, alteration of risk and warranties, would remain the focus of the group's attention for Vancouver. At this stage, expanding into any other issues of marine insurance is not envisaged, although Prof Trin-Lise Wilhelmsen's latest research paper expands her original paper (See Singapore I at 332) and deals with misconduct of the assured and identification.

It was also confirmed that the group would aim to bring its work to an end at the Vancouver conference.

There was a report and short discussion on developments since our last meeting. It was noted that the USA has revived its intention to prepare a marine insurance act for the USA. The Australian draft remains in the legislative pipe, though its priority is regarded as low at present. There was no further development in the SA draft act.

There followed a discussion on the new International Hull Clauses released by the IUA on 5 Nov 2003 and made available to us by David Taylor.

Simon Beale reported that the new clauses appear to have been well received by the market, but it remains to be seen if they can be sold. He confirmed that the process of the IUA in preparing these clauses was influenced by the work of the group, and by the call for reform in the London market – particularly in relation to warranties. The IUA has all but removed reference to the English 'warranty' from the hull clauses. The navigational limits clause is no longer referred to as a warranty, and the consequences of its breach are now spelled out – in a way similar to the change of class/management clauses. The effect of a breach of navigational limits clauses is now *suspension* of cover for the duration of the breach (even in relation to loss or damage not caused by the breach of warranty) but cover is restored on remedy of the breach.

We believe, and were assured by Simon, that we can take some heart, and not a little credit for this development.

We then discussed methods of reform.

There was some discussion on the feasibility of the group making any recommendations for legislative intervention (in the case of countries having no marine insurance act) or legislative reform in countries where legislation is already in place. The prime contender for reform would be the English Marine Insurance Act, 1906, not least because of the number of international policies that are written with English law being the law of choice, but also because many countries follow English law.

Although he welcomed the change of approach of the International Hull Clauses, John raised his usual call that it should not be left to the market to remedy what lawyers recognise to be bad law. Malcolm reiterated his view that he would prefer to see court and market correction to legislative intervention.

It was recognised that members of the group should be able to have differing views, either on the content of any presentations put to the Vancouver conference, or on the way forward.

All however agreed that there was no prospect of preparing any formal international instrument to table at Vancouver.

What was proposed for the conference was the following:

1. John will prepare a 'wrap-up' paper dealing with the work of the group, summarising the papers, and particularly the recommendations in relation to the four issues researched. Malcolm has kindly made available his Bordeaux paper which had similar aims. John will circularise a draft of his wrap-up paper to the group in the new year for input. The paper will point to ways in which problem areas have been addressed (especially since the group began its activities-for example the 2003 clauses), and may well still make recommendations for reform, legislative or otherwise. If the group is not unanimous on any recommendation, members would be at liberty to put up contrary views. Clearly, if a view is that of a minority, it would be put forward as a personal view rather than a view of the group.
2. John pointed out that the research papers are already complete. Although not yet on the CMI website, they will be put up on the site as soon as Prof Berlingieri can organise the update with the site managers. The final paper which John is to prepare will not be ready for publication in the Vancouver 1 Yearbook (due date end of 2003) as John will only be able to spend time on it in the new year. The paper will however be ready for circulation to member associations well before the conference, and will be made available to registrants.
3. John will look into the costs of putting all the group's research material, including the questionnaires and their replies and the papers, onto a searchable CD Rom for sale at the Vancouver conference. This aspect will be discussed with all the authors.

The meeting was held at the offices of Shaw & Croft whose hospitality was much appreciated.

John Hare

November 2003

OIL POLLUTION FROM SHIPS REVIEW OF THE CIVIL LIABILITY AND FUND CONVENTIONS

COLIN DE LA RUE*

Introduction

In modern times few maritime casualties have had such widespread public effects as oil spills; few aspects of maritime commerce have attracted so much public attention; and in few has it been so important to adopt a uniform legal approach.

The international system of compensation for oil pollution from tankers, established by the Civil Liability and Fund Conventions, is widely regarded as having worked very well over the years. Given the number and magnitude of claims which oil spills can bring in their wake, and the emotive atmosphere which often surrounds them, the amount of litigation has been remarkably small. The available funds have been sufficient for full payment of proper claims in all but a small handful of cases.

Contracting states have grown to a very significant number, and support is not limited to governments but includes the shipping and oil industries which ultimately provide the funds required. All share a common interest in a clear uniform system for dealing efficiently with claims and apportioning the cost in a satisfactory manner.

Whilst the current system may therefore be considered a success, its viability in future may depend on adaptation to any changes in society's needs. Some 20 years have passed since the last revision – the substantive changes in the 1992 Civil Liability and Fund Conventions having been agreed originally in 1984. The possible need for improvements was brought firmly onto the political agenda in Europe by the *Erika* incident in 1999, and has had to be addressed in turn by the wider international community. The *Prestige* disaster in 2002 has added further impetus to this debate.

The greater public attention to oil spills which has been aroused in Europe has led to a number of proposals from the European Union on various matters relating to maritime safety and pollution from ships. Some of these proposals have been controversial and have brought a new dimension to debates not only at the IOPC Fund but also at the IMO (as for example in recent debates concerning the accelerated phase-out of single-hull tankers). In this political climate it has been found necessary to consider what allowances, if any, should be made for pressures on some governments to accommodate domestic public opinion, even if this is not universally shared elsewhere.

* Chairman, CMI Working Group.

Concerns that Europe might introduce its own separate laws led to a decision in April 2000 by the Assembly of the International Oil Pollution Compensation Fund 1992 to establish an Intersessional Working Group to review the current regime and consider any improvements that should be made.

It is clear that if the Conventions are revised then the opportunity should be taken to address all issues on which changes could usefully be made. The Executive Council of the CMI decided in 2003 that a CMI International Working Group (IWG) should be established to participate in the Fund's work and in any revision of the Conventions. Colin de la Rue was appointed Chairman, with Jean-Serge Rohart as Vice-Chairman and John O'Connor as Rapporteur.

The IOPC Fund's Review of the Conventions

The Fund's Working Group – its Third Intersessional Working Group (WGR.3) – is chaired by Mr Alfred Popp QC of Canada. It is open to all member states and other organisations with observer status. At the time of writing (January 2004) it has met on five occasions, most recently in February 2003, and is next due to meet in February 2004.

At an early stage it was agreed that a need had been demonstrated for higher compensation. This has been introduced in the form of a 50% increase in the limits set by the 1992 Conventions (under an existing tacit amendment procedure), and in the optional third tier fund established by the Supplementary Fund Protocol of 2003.

In addition the Fund's Working Group has considered a wide range of other issues. These include:

- (a) shipowners' liability and related issues;
- (b) environmental damage;
- (c) non-submission of oil reports;
- (d) refinement of the contribution system;
- (e) clarification of the definition of "ship";
- (f) uniform application of the Conventions;
- (g) alternative dispute resolution procedures;
- (h) admissibility of claims for fixed costs;
- (i) applicability of the Conventions to the EEZ and similar designated areas;
- (j) various issues of a treaty law nature.

Although various points have been aired in relation to these and other topics, no agreement has been reached that the Conventions should be revised. There is a belief that the widespread consensus on the present system should not lightly be cast aside. It is recognised that there are various improvements which might be considered appropriate, not only in some of the areas listed above, but also on a variety of other specific points where issues have arisen. However it is also generally felt that the Conventions should be revised only if this is necessary to make changes of fundamental importance.

The only proposals which have been treated as having such importance are those which have been made in relation to shipowners' liability. Accordingly, at the last meeting of the Fund's Working Group, in February

2003, the debate was structured to focus primarily on these proposals, since it is these which are most likely to determine whether a revision of the Conventions takes place. The main pressure for change in this area has come from a group of states which argue for amendments on one or more of the following main issues:

- (i) the level of the shipowner's limitation amount and its relationship with the liability funded by oil receivers;
- (ii) the test of conduct barring the shipowner's right of limitation; and
- (iii) channelling of liability.

The main argument voiced in support of these proposals is that the compensation regime should incorporate more effective sanctions and incentives to encourage shipowners and charterers to operate only the highest quality tonnage and to observe the highest standards of safety. This school of thought is represented particularly by Spain and France, and may be supported to an extent by other states in the EU and elsewhere. The oil industry, speaking through OCIMF, is also a proponent of this position.

Others believe that the current system has on the whole been very successful and are reluctant to disturb it. They point out that the current system was not designed to promote safety or prevent pollution, these being objectives which in their view are properly left to SOLAS, MARPOL and similar regimes. Many states, together with the shipping industry, argue that the compensation increases introduced since the *Erika* are sufficient improvements, and that any further changes would be likely to do more harm than good.

At the end of the Fund's last meeting no agreement had been reached that the Conventions should be revised. It was agreed that interested delegations would pursue informal discussions with a view to facilitating progress. A short meeting was fixed for October 2003, at the same time as the Fund Assembly, to review the progress of such informal discussions. In the event that meeting was cancelled for lack of time, and without any clear information becoming available as to what discussions, if any, have taken place.

It was also agreed that the Director would undertake a study, in co-operation with the P&I Clubs, of the cost of past oil spills. The intention is to examine the manner in which this has been apportioned between the shipping and oil industries, and to take this information into account in deciding whether the CLC limit should be further increased. It is expected that this study will be ready by February 2004, and that it will cover about 7,000 oil spills. This number of spills, and their total cost to the shipping industry, may prove to be greater than some people expected.

As a result of the meeting in February 2004 it should become clearer whether the political will exists to revise the Conventions.

Role of the CMI

Background

The CMI produced the first draft of CLC and collaborated closely with IMCO in the work which led to the 1969 Convention. The need for a uniform

international system of compensation for oil pollution had been demonstrated by the world's first major oil spill, the *Torrey Canyon* disaster in 1967. The incident also highlighted public law issues relating to the powers of intervention of the coastal state. Soon after these events the CMI established an International *Torrey Canyon* Sub-Committee and Working Group, chaired by Lord Devlin, to work in co-operation with IMCO on the private law aspects.

A preliminary draft convention was prepared and adopted (with modifications) at the CMI Conference in Tokyo in April 1969. It was then referred to the IMCO Legal Committee for consideration the following month. Several provisions were adopted with little or no change, but the Committee remained divided on a number of issues which were addressed in an alternative IMCO draft. The CMI and IMCO drafts were then submitted to an International Legal Conference on Marine Pollution Damage held in Brussels on 10-28 November that year.

Dr Albert Lilar, President of the CMI, was elected President of the Conference. The draft conventions dealing with private law issues of compensation were examined by a Committee of the Whole under the chairmanship of Dr Walter Müller, Secretary-General of the CMI and President of the Swiss Maritime Law Association. From the work of this Committee emerged CLC 69, which ultimately gained the support of 100 contracting states. This support was due in large part to the complementary Fund Convention 1971, and to the work of the International Oil Pollution Compensation Fund which it established. The 1971 Conference which led to the Fund Convention of that year was likewise presided over by Dr Lilar.

Review of Conventions

The CMI's role on this occasion will inevitably be different from the part it played in developing the original regime. In the interim the Secretariat and governing bodies of the Funds have gained over 25 years' experience in operating the compensation system in over 120 incidents. In modern times, as an observer delegation at the Fund, the CMI is just one of many participants in its debates. The CMI should nonetheless be able to add value to its discussions.

The CMI has access, for example, to the experience of legal practitioners with first-hand knowledge of a range of problems which have arisen under the Conventions in various legal systems. These include issues both under CLC and under the Fund Convention. The CMI Working Group is also aware of issues which arise under CLC alone, and on which suggested improvements may be particularly valuable, as these will not necessarily affect the Fund or be at the forefront of its attention. In some areas there is a desire to achieve greater uniformity in the interpretation or application of the Conventions in member states, and here the CMI may be able to assist in suggesting modified texts. It may also have a role in areas where improvements are envisaged without the need for a revision of the Conventions – for example, in examining the scope in different jurisdictions for greater use of alternative dispute resolution procedures.

First, however, it remains to be decided whether a revision should take

place or not. This depends on further discussion of the issues relating to shipowners' liability and is the main subject for consideration by the Fund's Working Group in February 2004. Until that decision has been taken, it is not clear what further work will be involved in the Fund's review of the Conventions, and it has been felt premature for the CMI to undertake any detailed activity.

Conclusion

The law and practice of oil pollution from ships has developed largely in response to landmark cases, and this pattern is set to continue with the *Erika* and *Prestige* incidents.

It is not yet clear whether the current review of the international compensation regime will result in a revision of the Civil Liability and Fund Conventions at this point in their history. If a revision takes place, the CMI will have much to contribute by way of suggested improvements and comments on other proposals. If there is no revision, avenues may still be explored for promoting greater uniformity by other means, without amending the Conventions.

It is expected that the future course of the Fund's work will become clear by the time of the CMI Conference in Vancouver. Further debates on this subject will have taken place at the IOPC Fund in the interim, in February and possibly also in May. It is hoped that the Fund Director, Mr Måns Jacobsson, will be able to attend in Vancouver and brief the Conference on the latest developments.

Whatever direction the Fund's review may have taken by then, it is likely that efforts to maintain and enhance the appeal of the compensation system will be an ongoing project. The Conference will provide an excellent opportunity to consider in further detail the contribution which the CMI can make to this important work.

**SUMMARY OF CURRENT NATIONAL LAW APPLICABLE
TO THE JURISDICTIONAL ISSUES RE CRIMINAL
OFFENCES COMMITTED ON BOARD FOREIGN-FLAGGED
SHIPS, AS DERIVED FROM THE RESPONSES TO THE
QUESTIONNAIRE BY CMI NATIONAL MEMBER ASSOCIATIONS
MARCH, 2004**

The Comité is aware that since its previous submission to the Legal Committee concerning this subject, there have been a number of responses and submissions by Governments. As to these the CMI is of the view that they cannot usefully be combined with the responses of its National Member Associations, which in some cases differ in part with their governments' views. This summary is therefore limited to and based upon the responses of the CMI National Member Associations of Maritime Law.

Without regard to the 1988 SUA (Rome) Convention, there seems to be broad agreement to the following propositions:

- 1) Any State having personal jurisdiction over a suspect charged with an act constituting a "universal crime" under customary international law, regardless of nationality or the *locus delicti*, is obliged either to bring the suspect to trial for that crime or to transfer/extradite to another State that undertakes to bring the suspect to trial. The most common example is piracy.
- 2) A State party to a treaty or convention for suppression of specified criminal acts (*e.g.*, the Single Convention and Protocol on Narcotic Drugs, 1961) may (or is obliged to) prosecute or extradite a suspect, in accordance with the requirements of the convention.
- 3) In the absence of party status to a convention, a State's national law may nevertheless categorize certain acts as universal crimes (*e.g.*, child abduction) and enable prosecution or extradition of a suspect over whom it has personal jurisdiction, regardless of nationality or the *locus delicti*.
- 4) A State's national law may enable the prosecution (or transfer/extradition) of a suspect for categorized acts regardless of the *locus delicti* where:
 - a) the suspect is a national or permanent resident/domiciliary of that State;
 - b) the victim is a national or permanent resident/domiciliary of that State; or
 - c) the victim is an officer, employee, agency or instrumentality of that State.
- 5) A State's national law will usually enable the prosecution of a foreign national suspect over whom it has personal jurisdiction for a serious criminal offence under its law committed on board a foreign-flag ship in or bound for its ports or internal waters, or engaged on an otherwise innocent passage

Summary of Current National Laws applicable to the Jurisdictional Issues

through its territorial sea or other waters under national jurisdiction.

6) A State's national law may enable the prosecution of a foreign national suspect over whom it has personal jurisdiction for a serious criminal offence under its law committed on board a foreign-flag ship within its EEZ or archipelagic waters, or within an adjacent international strait, if the coastal State can reasonably assert that the crime and/or its consequences either has had a direct adverse impact upon the coastal State or has disturbed the good order or peace and tranquillity of the waters in question.

The issue of removal or reception and detention, prosecution or extradition of a suspect from a foreign-flag ship for commission of a serious criminal offence on board such ship on the high seas is more complicated.

- (A) If the receiving State is a party to SUA and it is clear from the Master's request that the offence or continued presence of the offender(s) on board endangers the safe navigation of the ship, then removal/reception/detention should be accomplished by the receiving State.
- (B) If the receiving State is a party to SUA and it is *not* clear from the Master's request that the offence or continued presence of the offender(s) on board endangers the safe navigation of the ship, then the question of removal/reception/detention by the receiving State will not be decided until its responsible officers have boarded the ship and made a preliminary investigation.
- (C) If the receiving State is a party to SUA and it is clear from the Master's request that the offence or continued presence of the offender(s) on board *does not* endanger the safe navigation of the ship, then removal/reception/detention may be declined by the receiving State.
- (D) If the receiving State is *not* a party to SUA but it is clear from the Master's request that the offence or continued presence of the offender(s) on board endangers the safe navigation of the ship, then removal/reception/detention may nevertheless be accomplished by the receiving State if permitted by its national law.

The Comité plans a further submission to the Legal Committee based upon the exchanges of views of the Members at its 38th International Conference, to be held in Vancouver, BC, from 31 May to 4 June 2004. As a matter of information, the paper to be discussed by the Conference Committee on Maritime Security is annexed.

Respectfully submitted,

FRANK. L. WISWALL
Vice-President of the CMI

COMITÉ MARITIME INTERNATIONAL**VANCOUVER CONFERENCE 2004****WORKING PAPER FOR THE COMMITTEE ON
MARITIME SECURITY RE
CRIMINAL OFFENCES COMMITTED ON
FOREIGN FLAGGED SHIPS**

The basic issue for consideration is whether there presently exist adequate provisions in customary and/or conventional international law to deal with situations arising out of criminal acts committed on board foreign-flagged ships – *i.e.*, ships flying a flag other than that of the coastal or port State which is presented with such a situation. Each of the following scenarios will be briefly considered by the Committee:

- (A) A violent criminal act has been committed on board a container ship while in transit through the coastal State's EEZ (*i.e.*, on the high seas) –
 - The suspect is in confinement and neither the vessel nor the crew are in danger, but the Master requests the coastal State to assist by removing the suspect from the vessel; alternatively,
 - The suspect is armed and remains at large on board and in the opinion of the Master poses a danger to the vessel and crew; the Master sends a distress call picked up by the coastal State.
- (B) Same as (A) above, but the vessel is an oil tanker.
- (C) Same as (A) above, but the vessel is a passenger ship.
- (D) Same as (A – C) above, but the vessel is in transit through the territorial sea of the coastal State.
- (E) Same as (A – C) above, but the vessel subsequently enters the territorial sea bound for a port of the coastal State.
- (F) Same as (A – C) above, but the vessel is in a port of the coastal State at the time the criminal act is committed.
- (G) Same as (F) above, but the criminal act is a theft not involving violence; there has been a long series of thefts on board, but only now has the suspect been identified.

This subject first arose in the IMO Legal Committee in 2002. In document LEG 85/10, the Delegation of Japan referred to an incident involving the *M/V TAJIMA*, a Panamanian-flag ship with a mixed Japanese/Philippine crew. It was alleged that the Japanese second officer was killed by two Philippine seafarers while the vessel was on the high seas. The Master placed the suspects in custody on board until the ship made a cargo call in Japan. Questions have arisen as to the appropriate conduct of the coastal/port State where there are alleged criminal offences on foreign flagged ships and, in particular, whether on the stated facts of the *TAJIMA* case there was an offence committed under Article 3(1)(b) of SUA 1988. The

Summary of Current National Laws applicable to the Jurisdictional Issues

Legal Committee was also informed of a number of other cases of crime committed on the high seas, but no clear view emerged as to the law(s) to be applied. It was agreed that the issues should be examined, to address not only crimes against ship's officers but also against crew and passengers where safety of navigation might not be directly endangered, especially when suspects are not nationals of the State where the ship will next call.

For this reason the Legal Committee, in response to a suggestion by the CMI that it might assist in gathering relevant information regarding current practice, agreed that the Comité would develop a questionnaire, in consultation with the IMO Secretariat, and would circulate this to its constituent national Member Associations of maritime law in order to gather information about existing national laws which may be relevant to the issues under discussion; this was done in January, 2003, and a gratifying number of responses in varying detail have been received from both governments and CMI Member Associations of Maritime Law.

In August of 2003 the CMI submitted to the Legal Committee an interim report appending a condensed synopsis of the responses so far received from its individual Member Associations to the questions posed, and concluding that while the SUA Convention was not applicable to the facts of the *TAJIMA* case there are a substantial number of States that would act under national and customary international law in a manner similar to what would be required under the SUA Convention if it were applicable. An update to the CMI's 2003 report will be available in Vancouver prior to the Committee meeting on this subject.

The purpose of the exchange of views at the Vancouver CMI Conference in the Committee on Maritime Security is to conclude with a recommendation as to four alternative courses of action:

1. On the basis that the present regime of international law is adequate, recommend no action and leave further developments to national law.
2. On the basis that international law offers no clear solution and that there is disuniformity in national law, recommend that:
 - CMI co-operate with the Legal Committee in drafting further amendments to the SUA Convention designed to deal with the problem of criminal acts committed on board foreign-flag ships; or
 - CMI co-operate with the Legal Committee in drafting a new international convention dealing with the problem of criminal acts committed on board foreign-flag ships; or
 - CMI draft a model national law dealing with the problem of criminal acts committed on board foreign-flag ships.

**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
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	(r)	2.VI.1930
<i>(denunciation - 30. VI. 1983)</i>		
Dominican Republic	(a)	23.VII.1958
Finland	(a)	12.VII.1934
<i>(denunciation - 30.VI.1983)</i>		
France	(r)	23.VIII.1935
<i>(denunciation - 26.X.1976)</i>		
Hungary	(r)	2.VI.1930
Madagascar	(r)	12.VIII.1935
Monaco	(r)	15.V.1931
<i>(denunciation - 24.I.1977)</i>		
Norway	(r)	10.X.1933
<i>(denunciation - 30.VI. 1963)</i>		
Poland	(r)	26.X.1936
Portugal	(r)	2.VI.1930
Spain	(r)	2.VI.1930
Sweden	(r)	1.VII.1938
<i>(denunciation - 30.VI.1963)</i>		
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
<i>(denunciation - 16.VII.1993)</i>		
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.

Denmark*	(a)	I.VII.1938
<i>(denunciation – 1.III.1984)</i>		
Dominican Republic	(a)	2.XII.1930
Ecuador	(a)	23.III.1977
Egypt	(a)	29.XI.1943
<i>(denunciation – 1.XI.1997)</i>		
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
<i>(denunciation – 1.XI.1997)</i>		
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>		
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
<i>(denunciation – 18.III.2002)</i>		
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 États 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 États 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 à 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° 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° de l'article 1°.

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

**Internationd 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
Gabon	(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*

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
Namibia	(a)	14.III.2000
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

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

Australia
Belgium

(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
Privileges 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

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Albania (accession)	6.IV.1994	5.VII.1994	
Algeria (accession)	14.VI.1974	19.VI.1975	3.VIII.1999
Antigua and Barbuda (accession)	23.VI.1997	21.IX.1997	14.VI.2001
Australia (ratification)¹	7.XI.1983	5.II.1984	15.V.1998
Bahamas (accession)	22.VII.1976	20.X.1976	15.V.1998
Bahrain (accession)	3.V.1996	1.VIII.1996	15.V.1998
Barbados (accession)	6.V.1994	4.VIII.1994	7.VII.1999
Belgium (ratification)¹	12.I.1977	12.IV.1977	6.X.1999
Belize (accession)	2.IV.1991	1.VII.1991	27.XI.1999
Benin (accession)	1.XI.1985	30.I.1986	
Brazil (ratification)	17.XII.1976	17.III.1977	
Brunei Darussalam (accession)	29.IX.1992	28.XII.1992	31.I.2003
Cambodia (accession)	28.XI.1994	26.II.1995	
Cameroon (ratification)	14.V.1984	12.VIII.1984	15.X.2002
Canada (accession)	24.I.1989	24.IV.1989	29.V.1999
Chile (accession)	2.VIII.1977	31.X.1977	
China² (accession)¹	30.I.1980	29.IV.1980	5.I.2000
Colombia (accession)	26.III.1990	24.VI.1990	
Costa Rica (accession)	8.XII.1997	8.III.1998	
Côte d'Ivoire (ratification)	21.VI.1973	19.VI.1975	
Croatia (succession)	—	8.X.1991	30.VII.1999
Cyprus (accession)	19.VI.1989	17.IX.1989	15.V.1998
Denmark (accession)	2.IV.1975	19.VI.1975	15.V.1998
Djibouti (accession)	1.III.1990	30.V.1990	17.V.2002
Dominican Republic (ratification)	2.IV.1975	19.VI.1975	
Ecuador (accession)	23.XII.1976	23.III.1977	
Egypt (accession)	3.II.1989	4.V.1989	
El Salvador (accession)	2.I.2002	2.IV.2002	
Equatorial Guinea (accession)	24.IV.1996	23.VII.1996	
Estonia (accession)	1.XII.1992	1.III.1993	
Fiji (accession)	15.VIII.1972	19.VI.1975	30.XI.2000
Finland (ratification)	10.X.1980	8.I.1981	15.V.1998

CLC 1969

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
France (ratification)	17.III.1975	19.VI.1975	15.V.1998
Gabon (accession)	21.I.1982	21.IV.1982	31.V.2003
Gambia (accession)	1.XI.1991	30.I.1992	
Georgia (accession)	19.IV.1994	18.VII.1994	
Germany ³ (ratification) ¹	20.V.1975	18.VIII.1975 ⁴	15.V.1998
Ghana (ratification)	20.IV.1978	19.VII.1978	
Greece (accession)	29.VI.1976	27.IX.1976	15.V.1998
Guatemala (acceptance) ¹	20.X.1982	18.I.1983	
Guyana (accession)	10.XII.1997	10.III.1998	
Honduras (accession)	2.XII.1998	2.III.1999	
Iceland (ratification)	17.VII.1980	15.X.1980	10.II.2001
India (accession)	1.V.1987	30.VII.1987	21.VI.2001
Indonesia (ratification)	1.IX.1978	30.XI.1978	
Ireland (ratification)	19.XI.1992	17.II.1993	15.V.1998
Italy (ratification) ¹	27.II.1979	28.V.1979	8.X.2000
Japan (accession)	3.VI.1976	1.IX.1976	15.V.1998
Jordan (accession)	14.X.2003	12.I.2004	
Kazakhstan (accession)	7.III.1994	5.VI.1994	
Kenya (accession)	15.XII.1992	15.III.1993	7.VII.2001
Kuwait (accession)	2.IV.1981	1.VII.1981	
Latvia (accession)	10.VII.1992	8.X.1992	
Lebanon (accession)	9.IV.1974	19.VI.1975	
Liberia (accession)	25.IX.1972	19.VI.1975	15.V.1998
Luxembourg (accession)	14.II.1991	15.V.1991	
Malaysia (accession)	6.I.1995	6.IV.1995	
Maldives (accession)	16.III.1981	14.VI.1981	
Malta (accession)	27.IX.1991	26.XII.1991	6.I.2001
Marshall Islands (accession)	24.I.1994	24.IV.1994	15.V.1998
Mauritania (accession)	17.XI.1995	15.II.1996	
Mauritius (accession)	6.IV.1995	5.VII.1995	6.XII.2000
Mexico (accession)	13.V.1994	11.VIII.1994	15.V.1998
Monaco (ratification)	21.VIII.1975	19.XI.1975	15.V.1998
Mongolia (accession)	3.III.2003	1.VI.2003	
Morocco (accession)	11.IV.1974	19.VI.1975	25.X.2001
Mozambique (accession)	23.XII.1996	23.III.1997	26.IV.2003
Netherlands (ratification)	9.IX.1975	8.XII.1975	15.V.1998
New Zealand (accession)	27.IV.1976	26.VII.1976	25.VI.1999
Nicaragua (accession)	4.VI.1996	2.IX.1996	
Nigeria (accession)	7.V.1981	5.VIII.1981	24.V.2003
Norway (accession)	21.III.1975	19.VI.1975	15.V.1998
Oman (accession)	24.I.1985	24.IV.1985	15.V.1998
Panama (ratification)	7.I.1976	6.IV.1976	11.V.2000
Papua New Guinea (accession)	12.III.1980	10.VI.1980	23.I.2002
Peru (accession) ¹	24.II.1987	25.V.1987	
Poland (ratification)	18.III.1976	16.VI.1976	21.XII.2000
Portugal (ratification)	26.XI.1976	24.II.1977	
Qatar (accession)	2.VI.1988	31.VIII.1988	20.XI.2002

CLC 1969

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Republic of Korea (accession)	18.XII.1978	18.III.1979	15.V.1998
Russian Federation⁵ (accession)¹	24.VI.1975	22.IX.1975	20.III.2001
Saint Kitts and Nevis (accession)¹	14.IX.1994	13.XII.1994	
Saint Vincent and the Grenadines (accession)	19.IV.1989	18.VII.1989	9.X.2002
Sao Tome and Principe (accession)	29.X.1998	27.I.1999	
Saudi Arabia (accession)¹	15.IV.1993	14.VII.1993	
Senegal (accession)	27.III.1972	19.VI.1975	
Serbia and Montenegro (succession)	—	27.IV.1992	
Seychelles (accession)	12.IV.1988	11.VII.1988	23.VII.2000
Sierra Leone (accession)	13.VIII.1993	11.XI.1993	4.VI.2002
Singapore (accession)	16.IX.1981	15.XII.1981	31.XII.1998
Slovenia (succession)	—	25.VI.1991	19.VII.2001
South Africa (accession)	17.III.1976	15.VI.1976	
Spain (ratification)	8.XII.1975	7.III.1976	15.V.1998
Sri Lanka (accession)	12.IV.1983	11.VII.1983	22.I.2000
Sweden (ratification)	17.III.1975	19.VI.1975	15.V.1998
Switzerland (ratification)	15.XII.1987	14.III.1988	15.V.1998
Syrian Arab Republic (accession)¹	6.II.1975	19.VI.1975	
Tonga (accession)	1.II.1996	1.V.1996	10.XII.2000
Tunisia (accession)	4.V.1976	2.VIII.1976	15.V.1998
Tuvalu (succession)	—	1.X.1978	
United Arab Emirates (accession)	15.XII.1983	14.III.1984	
United Kingdom (ratification)	17.III.1975	19.VI.1975	15.V.1998
Vanuatu (accession)	2.II.1983	3.V.1983	18.II.2000
Venezuela (accession)	21.I.1992	20.IV.1992	22.VII.1999
Yemen (accession)	6.III.1979	4.VI.1979	

Number of Contracting States: 45

The Convention applies provisionally in respect of the following States:

Kiribati
Solomon Islands

¹ With a declaration, reservation or statement.

² Applied to the Hong Kong Special Administrative Region with effect from 1.VII.1997. Effective date of denunciation: 5.I.2000.

³ On 3.X.1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded to the Convention on 13.III.1978.

⁴ In accordance with the intention expressed by the Government of the Federal Republic of Germany and based on its interpretation of article XV of the Convention.

⁵ As from 26.XII.1991 the membership of the USSR in the Convention is continued by the Russian Federation.

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.

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

**Contracting States
as at 2.IX.2003**

	Date of deposit of instrument	Date of entry into force	Effective date of denunciation
Albania (accession)	6.IV.1994	5.VII.1994	
Antigua and Barbuda (accession)	23.VI.1997	21.IX.1997	
Australia (accession)	7.XI.1983	5.II.1984	
Bahamas (acceptance)	3.III.1980	8.IV.1981	
Bahrain (accession)	3.V.1996	1.VIII.1996	
Barbados (accession)	6.V.1994	4.VIII.1994	
Belgium (accession)	15.VI.1989	13.IX.1989	
Belize (accession)	2.IV.1991	1.VII.1991	
Brunei Darussalam (accession)	29.IX.1992	28.XII.1992	
Cambodia (accession)	8.VI.2001	6.IX.2001	
Cameroon (accession)	14.V.1984	12.VIII.1984	
Canada (accession)	24.I.1989	24.IV.1989	
China⁴ (accession)¹	29.IX.1986	28.XII.1986	22.VIII.2003
Colombia (accession)	26.III.1990	24.VI.1990	
Costa Rica (accession)	8.XII.1997	8.III.1998	
Cyprus (accession)	19.VI.1989	17.IX.1989	
Denmark (accession)	3.VI.1981	1.IX.1981	
Egypt (accession)	3.II.1989	4.V.1989	
El Salvador (accession)	2.I.2002	2.IV.2002	
Finland (accession)	8.I.1981	8.IV.1981	
France (approval)	7.XI.1980	8.IV.1981	
Georgia (accession)	25.VIII.1995	23.XI.1995	
Germany (ratification)²	28.VIII.1980	8.IV.1981	
Greece (accession)	10.V.1989	8.VIII.1989	
Iceland (accession)	24.III.1994	22.VI.1994	
India (accession)	1.V.1987	30.VII.1987	
Ireland (accession)	19.XI.1992	17.II.1993	15.V.1998
Italy (accession)	3.VI.1983	1.IX.1983	
Japan (accession)	24.VIII.1994	22.XI.1994	
Kuwait (accession)	1.VII.1981	29.IX.1981	

CLC Protocol 1976

	Date of deposit of instrument	Date of entry into force	Effective date of denunciation
Liberia (accession)	17.II.1981	8.IV.1981	
Luxembourg (accession)	14.II.1991	15.V.1991	
Maldives (accession)	14.VI.1981	12.IX.1981	
Malta (accession)	27.IX.1991	26.XII.1991	6.I.2001
Marshall Islands (accession)	24.I.1994	24.IV.1994	
Mauritania (accession)	17.XI.1995	15.II.1996	
Mauritius (accession)	6.IV.1995	5.VII.1995	
Mexico (accession)	13.V.1994	11.VIII.1994	
Netherlands (accession)	3.VIII.1982	1.XI.1982	
Nicaragua (accession)	4.VI.1996	2.IX.1996	
Norway (accession)	17.VII.1978	8.IV.1981	
Oman (accession)	24.I.1985	24.IV.1985	
Peru (accession)	24.II.1987	25.V.1987	
Poland (accession)¹	30.X.1985	28.I.1986	
Portugal (accession)	2.I.1986	2.IV.1986	
Qatar (accession)	2.VI.1988	31.VIII.1988	
Republic of Korea (accession)	8.XII.1992	8.III.1993	
Russian Federation³ (accession)¹	2.XII.1988	2.III.1989	
Saudi Arabia (accession)²	15.IV.1993	14.VII.1993	
Singapore (accession)	15.XII.1981	15.III.1982	
Spain (accession)	22.X.1981	20.I.1982	
Sweden (ratification)	7.VII.1978	8.IV.1981	
Switzerland (accession)¹	15.XII.1987	14.III.1988	
United Arab Emirates (accession)	14.III.1984	12.VI.1984	
United Kingdom (ratification)¹	31.I.1980	8.IV.1981	15.V.1998
Vanuatu (accession)	13.I.1989	13.IV.1989	
Venezuela (accession)	21.I.1992	20.IV.1992	
Yemen (accession)	4.VI.1979	8.IV.1981	

Number of Contracting States: 55

¹ With a notification under article V(9)(c) of the Convention, as amended by the Protocol.

² With a declaration.

³ As from 26.XII.1991 the membership of the USSR in the Protocol is continued by the Russian Federation.

⁴ Applies to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

States which have denounced the Protocol

	Date of receipt of denunciation	Effective date of denunciation
Australia	22.VI.1988	[date of entry into force of 1984 CLC Protocol]
Ireland	15.V.1997	15.V.1998
United Kingdom	12.V.1997	15.V.1998
Malta	6.I.2000	6.I.2001

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,
27 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 27 novembre 1992
Entrée en vigueur: 30 May 1996

	Date of deposit of instrument	Date of entry into force
Algeria (accession)	11.VI.1998	11.VI.1999
Angola (accession)	4.X.2001	4.X.2002
Antigua and Barbuda (accession)	14.VI.2000	14.VI.2001
Argentina (accession)²	13.X.2000	13.X.2001
Australia (accession)	9.X.1995	9.X.1996
Bahamas (accession)	1.IV.1997	1.IV.1998
Bahrain (accession)	3.V.1996	3.V.1997
Barbados (accession)	7.VII.1998	7.VII.1999
Belgium (accession)	6.X.1998	6.X.1999
Belize (accession)	27.XI.1998	27.XI.1999
Brunei Darussalam (accession)	31.I.2002	31.I.2003
Bulgaria (accession)	28.XI.2003	28.XI.2004
Cambodia (accession)	8.VI.2001	8.VI.2002
Cameroon (accession)	15.X.2001	15.X.2002
Canada (accession)	29.V.1998	29.V.1999
Cape Verde (accession)	4.VII.2003	4.VII.2004
Chile (accession)	29.V.2002	29.V.2003
China (accession)¹	5.I.1999	5.I.2000
Colombia (accession)	19.XI.2001	19.XI.2002
Congo (accession)	7.VIII.2002	7.VIII.2003
Comoros (accession)	5.I.2000	5.I.2001
Croatia (accession)	12.I.1998	12.I.1999
Cyprus (accession)	12.V.1997	12.V.1998
Denmark (ratification)	30.V.1995	30.V.1996
Djibouti (accession)	8.I.2001	8.I.2002
Dominica (accession)	31.VIII.2001	31.VIII.2002
Dominican Republic (accession)	24.VI.1999	24.VI.2000
Egypt (accession)	21.IV.1995	30.V.1996
El Salvador (accession)	2.I.2002	2.I.2003
Fiji (accession)	30.XI.1999	30.XI.2000

CLC Protocol 1992

	Date of deposit of instrument	Date of entry into force
Finland (acceptance)	24.XI.1995	24.XI.1996
France (approval)	29.IX.1994	30.V.1996
Gabon (accession)	31.V.2002	31.V.2003
Georgia (accession)	18.IV.2000	18.IV.2001
Germany (ratification)¹	29.IX.1994	30.V.1996
Ghana (accession)	3.II.2003	3.II.2004
Greece (ratification)	9.X.1995	9.X.1996
Grenada (accession)	7.I.1998	7.I.1999
Guinea (accession)	2.X.2002	2.X.2003
Iceland (accession)	13.XI.1998	13.XI.1999
India (accession)	15.XI.1999	15.XI.2000
Indonesia (accession)	6.VII.1999	6.VII.2000
Ireland (accession)²	15.V.1997	16.V.1998
Italy (accession)	16.IX.1999	16.IX.2000
Jamaica (accession)	6.VI.1997	6.VI.1998
Japan (accession)	24.VIII.1994	30.V.1996
Kenya (accession)	2.II.2000	2.II.2001
Latvia (accession)	9.III.1998	9.III.1999
Liberia (accession)	5.X.1995	5.X.1996
Lithuania (accession)	27.VI.2000	27.VI.2001
Madagascar (accession)	21.V.2002	21.V.2003
Malta (accession)	6.I.2000	6.I.2001
Marshall Islands (accession)	16.X.1995	16.X.1996
Mauritius (accession)	6.XII.1999	6.XII.2000
Mexico (accession)	13.V.1994	30.V.1996
Monaco (ratification)	8.XI.1996	8.XI.1997
Morocco (ratification)	22.VIII.2000	22.VIII.2001
Mozambique (accession)	26.IV.2002	26.IV.2003
Namibia (accession)	18.XII.2002	18.XII.2003
Netherlands (accession)	15.XI.1996	15.XI.1997
New Zealand (accession)²	25.VI.1998	25.VI.1999
Nigeria (accession)	24.V.2002	24.V.2003
Norway (ratification)	3.IV.1995	30.V.1996
Oman (accession)	8.VII.1994	30.V.1996
Panama (accession)	18.III.1999	18.III.2000
Papua New Guinea (accession)	23.I.2001	23.I.2002
Philippines (accession)	7.VII.1997	7.VII.1998
Poland (accession)	21.XII.1999	21.XII.2000
Portugal (accession)	13.XI.2001	13.XI.2002
Qatar (accession)	20.XI.2001	20.XI.2002
Republic of Korea (accession)²	7.III.1997	16.V.1998
Romania (accession)	27.XI.2000	27.XI.2001
Russian Federation (accession)	20.III.2000	20.III.2001
Samoa (accession)	1.II.2002	1.II.2003
St. Vincent and the Grenadines (accession)	9.X.2001	9.X.2002
Seychelles (accession)	23.VII.1999	23.VII.2000
Sierra Leone (accession)	4.VI.2001	4.VI.2002
Singapore (accession)	18.IX.1997	18.IX.1998

CLC Protocol 1992

	Date of deposit of instrument	Date of entry into force
Slovenia (accession)	19.VII.2000	19.VII.2001
Spain (accession)	6.VII.1995	6.VII.1996
Sri Lanka (accession)	22.I.1999	22.I.2000
Sweden (ratification)	25.V.1995	30.V.1996
Switzerland (accession)	4.VII.1996	4.VII.1997
Tonga (accession)	10.XII.1999	10.XII.2000
Trinidad and Tobago (accession)	6.III.2000	6.III.2001
Tunisia (accession)	29.I.1997	29.I.1998
Turkey (accession)²	17.VIII.2001	17.VIII.2002
United Arab Emirates (accession)	19.XI.1997	19.XI.1998
United Kingdom (accession)³	29.IX.1994	30.V.1996
United Republic of Tanzania (accession)	19.XI.2002	19.XI.2003
Uruguay (accession)	9.VII.1997	9.VII.1998
Vanuatu (accession)	18.II.1999	18.II.2000
Venezuela (accession)	22.VII.1998	22.VII.1999
Viet Nam (accession)	17.VI.2003	17.VI.2004

Number of Contracting States: 94

¹ China declared that the Protocol will also be applicable to the Hong Kong Special Administrative Region.

² With a declaration.

³ The United Kingdom declared its accession to be effective in respect of:
 The Bailiwick of Jersey
 The Isle of Man
 Falkland Islands*
 Montserrat
 South Georgia and the South Sandwich Islands
 Anguilla)
 Bailiwick of Guernsey)
 Bermuda)
 British Antarctic Territory)
 British Indian Ocean Territory) with effect from 20.2.98
 Pitcairn, Henderson,
 Ducie and Oeno Islands)
 Sovereign Base Areas of
 Akrotiri and Dhekelia on Cyprus)
 Turks & Caicos Islands)
 Virgin Islands)
 Cayman Islands)
 Gibraltar) with effect from 15.5.98
 St Helena and its Dependencies)

* 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).

*CLC Protocol 1992**Fund 1971*

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 decembre 1971
Entrée en vigueur: 16 octobre 1978

Cessation: 2.XII.2002

Contracting States at time of cessation of Convention

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Albania (accession)	6.IV.1994	5.VII.1994	
Algeria (ratification)	2.VI.1975	16.X.1978	3.VIII.1999
Antigua and Barbuda (accession)	23.VI.1997	21.IX.1997	14.VI.2001
Australia (accession)	10.X.1994	8.I.1995	15.V.1998
Bahamas (accession)	22.VII.1976	16.X.1978	15.V.1998
Bahrain (accession)	3.V.1996	1.VIII.1996	15.V.1998

*Fund 1971**Fonds 1971*

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Barbados (accession)	6.V.1994	4.VIII.1994	7.VII.1999
Belgium (ratification)	1.XII.1994	1.III.1995	6.X.1999
Benin (accession)	1.XI.1985	30.I.1986	
Brunei Darussalam (accession)	29.IX.1992	28.XII.1992	31.I.2003
Cameroon (accession)	14.V.1984	12.VIII.1984	15.X.2002
Canada (accession)¹	24.I.1989	24.IV.1989	29.V.1999
China²	—	1.VII.1997	5.I.2000
Colombia (accession)	13.III.1997	11.VI.1997	
Côte d'Ivoire (accession)	5.X.1987	3.I.1988	
Croatia (succession)	—	8.X.1991	30.VII.1999
Cyprus (accession)	26.VII.1989	24.X.1989	15.V.1998
Denmark (accession)	2.IV.1975	16.X.1978	15.V.1998
Djibouti (accession)	1.III.1990	30.V.1990	17.V.2002
Estonia (accession)	1.XII.1992	1.III.1993	
Fiji (accession)	4.III.1983	2.VI.1983	30.XI.2000
Finland (ratification)	10.X.1980	8.I.1981	15.V.1998
France (accession)	11.V.1978	16.X.1978	15.V.1998
Gabon (accession)	21.I.1982	21.IV.1982	
Gambia (accession)	1.XI.1991	30.I.1992	
Germany (ratification)¹	30.XII.1976	16.X.1978	15.V.1998
Ghana (ratification)	20.IV.1978	16.X.1978	
Greece (accession)	16.XII.1986	16.III.1987	15.V.1998
Guyana (accession)	10.XII.1997	10.III.1998	
Iceland (accession)	17.VII.1980	15.X.1980	10.II.2001
India (accession)	10.VII.1990	8.X.1990	21.VI.2001
Indonesia (accession)	1.IX.1978	30.XI.1978	26.VI.1999
Ireland (ratification)	19.XI.1992	17.II.1993	15.V.1998
Italy (accession)	27.II.1979	28.V.1979	8.X.2000
Japan (ratification)	7.VII.1976	16.X.1978	15.V.1998
Kenya (accession)	15.XII.1992	15.III.1993	7.VII.2001
Kuwait (accession)	2.IV.1981	1.VII.1981	
Liberia (accession)	25.IX.1972	16.X.1978	15.V.1998
Malaysia (accession)	6.I.1995	6.IV.1995	
Maldives (accession)	16.III.1981	14.VI.1981	
Malta (accession)	27.IX.1991	26.XII.1991	6.I.2001
Marshall Islands (accession)	30.XI.1994	28.II.1995	15.V.1998
Mauritania (accession)	17.XI.1995	15.II.1996	
Mauritius (accession)	6.IV.1995	5.VII.1995	6.XII.2000
Mexico (accession)	13.V.1994	11.VIII.1994	15.V.1998
Monaco (accession)	23.VIII.1979	21.XI.1979	15.V.1998
Morocco (accession)	31.XII.1992	31.III.1993	25.X.2001
Mozambique (accession)	23.XII.1996	23.III.1997	26.IV.2003
Netherlands (approval)	3.VIII.1982	1.XI.1982	15.V.1998
New Zealand (accession)³	22.XI.1996	20.II.1997	25.VI.1999
Nigeria (accession)	11.IX.1987	10.XII.1987	

*Fund 1971**Fonds 1971*

	Date of deposit of instrument	Date of entry into force or succession	Effective date of denunciation
Norway (ratification)	21.III.1975	16.X.1978	15.V.1998
Oman (accession)	10.V.1985	8.VIII.1985	15.V.1998
Panama (accession)	18.III.1999	16.VI.1999	11.V.2000
Papua New Guinea (accession)	12.III.1980	10.VI.1980	23.I.2002
Poland (ratification)	16.IX.1985	15.XII.1985	21.XII.2000
Portugal (ratification)	11.IX.1985	10.XII.1985	
Qatar (accession)	2.VI.1988	31.VIII.1988	20.XI.2002
Republic of Korea (accession)	8.XII.1992	8.III.1993	15.V.1998
Russian Federation (accession)⁴	17.VI.1987	15.IX.1987	20.III.2001
Saint Kitts and Nevis (accession)	14.IX.1994	13.XII.1994	
Seychelles (accession)	12.IV.1988	11.VII.1988	23.VII.2000
Sierra Leone (accession)	13.VIII.1993	11.XI.1993	4.VI.2002
Slovenia (succession)	—	25.VI.1991	19.VII.2001
Spain (accession)	8.X.1981	6.I.1982	15.V.1998
Sri Lanka (accession)	12.IV.1983	11.VII.1983	22.I.2000
Sweden (ratification)	17.III.1975	16.X.1978	15.V.1998
Switzerland (ratification)	4.VII.1996	2.X.1996	15.V.1998
Syrian Arab Republic (accession)¹	6.II.1975	16.X.1978	
Tonga (accession)	1.II.1996	1.V.1996	10.XII.2000
Tunisia (accession)	4.V.1976	16.X.1978	15.V.1998
Tuvalu (succession)	—	16.X.1978	
United Arab Emirates (accession)	15.XII.1983	14.III.1984	24.V.2002
United Kingdom (ratification)	2.IV.1976	16.X.1978	15.V.1998
Vanuatu (accession)	13.I.1989	13.IV.1989	18.II.2000
Venezuela (accession)	21.I.1992	20.IV.1992	22.VII.1999
Yugoslavia (ratification)	16.III.1978	16.X.1978	

Number of Contracting States: 24

Upon the entry into force of the 2000 Protocol to the FUND 1971 Convention, the Convention ceased when the number of Contracting States fell below 25.

¹ With a declaration, reservation or statement.

² Applies only to the Hong Kong Special Administrative Region.

³ Accession by New Zealand was declared not to extend to Tokelau.

⁴ As from 26.XII.1991 the membership of the USSR in the Convention is continued by the Russian Federation.

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.”

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 Création 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 (accession)
Australia (accession)
Bahamas (acceptance)
Barbados (accession)

Date of deposit of instrument	Date of entry into force	Effective date of denunciation
6.IV.1994	22.XI.1994	
10.X.1994	8.I.1995	
3.III.1980	22.XI.1994	
6.V.1994	22.XI.1994	

*Fund Protocol 1976**Protocole Fonds 1976*

	Date of deposit of instrument	Date of entry into force	Effective date of denunciation
Bahrain (accession)	3.V.1996	1.VIII.1996	
Belgium (accession)	1.XII.1994	1.III.1995	
Canada (accession)	21.II.1995	22.V.1995	
China³	—	1.VII.1997	
Colombia (accession)	13.III.1997	11.VI.1997	
Cyprus (accession)	26.VII.1989	22.XI.1994	
Denmark (accession)	3.VI.1981	22.XI.1994	
Finland (accession)	8.I.1981	22.XI.1994	
France (accession)	7.XI.1980	22.XI.1994	
Germany (ratification)¹	28.VIII.1980	22.XI.1994	
Greece (accession)	9.X.1995	7.I.1996	
Iceland (accession)	24.III.1994	22.XI.1994	
India (accession)	10.VII.1990	22.XI.1994	
Ireland (accession)	19.XI.1992	22.XI.1994	15.V.1998
Italy (accession)	21.IX.1983	22.XI.1994	
Japan (accession)	24.VIII.1994	22.XI.1994	
Liberia (accession)	17.II.1981	22.XI.1994	
Malta (accession)	27.IX.1991	22.XI.1994	6.I.2001
Marshall Islands (accession)	16.X.1995	14.I.1996	
Mauritius (accession)	6.IV.1995	5.VII.1995	
Mexico (accession)	13.V.1994	22.XI.1994	
Morocco (accession)	31.XII.1992	22.XI.1994	
Netherlands (accession)	1.XI.1982	22.XI.1994	
Norway (accession)	17.VII.1978	22.XI.1994	
Poland (accession)¹	30.X.1985	22.XI.1994	
Portugal (accession)	11.IX.1985	22.XI.1994	
Russian Federation² (accession)	30.I.1989	22.XI.1994	
Spain (accession)	5.IV.1982	22.XI.1994	
Sweden (ratification)	7.VII.1978	22.XI.1994	
United Kingdom (ratification)	31.I.1980	22.XI.1994	15.V.1998
Vanuatu (accession)	13.I.1989	22.XI.1994	
Venezuela (accession)	21.I.1992	22.XI.1994	

Number of Contracting States: 33

¹ With a declaration or statement.² As from 26.XII.1991 the membership of the USSR in the Protocol is continued by the Russian Federation.³ Applies only to the Hong Kong Special Administrative Region.**States which have denounced the Protocol**

	Date of receipt of denunciation	Effective date of denunciation
Ireland	15.V.1997	15.V.1998
United Kingdom	9.V.1997	15.V.1998
Malta	6.I.2000	6.I.2001

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,
27 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

	Date of deposit of instrument	Date of entry into force
Algeria (accession)	11.VI.1998	11.VI.1999
Angola (accession)	4.X.2001	4.X.2002
Antigua and Barbuda (accession)	14.VI.2000	14.VI.2001
Argentina (accession)¹	13.X.2000	13.X.2001
Australia (accession)	9.X.1995	9.X.1996
Bahamas (accession)	1.IV.1997	1.IV.1998
Bahrain (accession)	3.V.1996	3.V.1997
Barbados (accession)	7.VII.1998	7.VII.1999
Belgium (accession)	6.X.1998	6.X.1999
Belize (accession)	27.XI.1998	27.XI.1999

* The 1971 Fund Convention ceased to be in force on 24 May 2002 and therefore the Convention does not apply to incidents occurring after that date.

*Fund Protocol 1992**Protocole Fonds 1992*

	Date of deposit of instrument	Date of entry into force
Brunei Darussalam (accession)	31.I.2002	31.I.2003
Cambodia (accession)	8.VI.2001	8.VI.2002
Cameroon (accession)	15.X.2001	15.X.2002
Canada (accession)¹	29.V.1998	29.V.1999
Cape Verde (accession)	4.VII.2003	4.VII.2004
China (accession)²	5.I.1999	5.I.2000
Colombia (accession)	19.XI.2001	19.XI.2002
Comoros (accession)	5.I.2000	5.I.2001
Congo (accession)	7.VIII.2002	7.VIII.2003
Croatia (accession)	12.I.1998	12.I.1999
Cyprus (accession)	12.V.1997	12.V.1998
Denmark (ratification)	30.V.1995	30.V.1996
Djibouti (accession)	8.I.2001	8.I.2002
Dominica (accession)	31.VIII.2001	31.VIII.2002
Dominican Republic (accession)	24.VI.1999	24.VI.2000
Fiji (accession)	30.XI.1999	30.XI.2000
Finland (acceptance)	24.XI.1995	24.XI.1996
France (approval)	29.IX.1994	30.V.1996
Gabon (accession)	31.V.2002	31.V.2003
Georgia (accession)	18.IV.2000	18.IV.2001
Germany (ratification)¹	29.IX.1994	30.V.1996
Ghana (accession)	3.II.2003	3.II.2004
Greece (ratification)	9.X.1995	9.X.1996
Grenada (accession)	7.I.1998	7.I.1999
Guinea (accession)	2.X.2002	2.X.2003
Iceland (accession)	13.XI.1998	13.XI.1999
India (accession)	21.VI.2000	21.VI.2001
Ireland (accession)¹	15.V.1997	16.V.1998
Italy (accession)	16.IX.1999	16.IX.2000
Jamaica (accession)	24.VI.1997	24.VI.1998
Japan (accession)	24.VIII.1994	30.V.1996
Kenya (accession)	2.II.2000	2.II.2001
Latvia (accession)	6.IV.1998	6.IV.1999
Liberia (accession)	5.X.1995	5.X.1996
Lithuania (accession)	27.VI.2000	27.VI.2001
Madagascar (accession)	21.V.2002	21.V.2003
Malta (accession)	6.I.2000	6.I.2001
Marshall Islands (accession)	16.X.1995	16.X.1996
Mauritius (accession)	6.XII.1999	6.XII.2000
Mexico (accession)	13.V.1994	30.V.1996
Monaco (ratification)	8.XI.1996	8.XI.1997
Morocco (ratification)	22.VIII.2000	22.VIII.2001
Mozambique (accession)	26.IV.2002	26.IV.2003
Namibia (accession)	18.XII.2002	18.XII.2003
Netherlands (accession)	15.XI.1996	15.XI.1997
New Zealand (accession)¹	25.VI.1998	25.VI.1999
Nigeria (accession)	24.V.2002	24.V.2003
Norway (ratification)	3.IV.1995	30.V.1996

	Date of deposit of instrument	Date of entry into force
Oman (accession)	8.VII.1994	30.V.1996
Panama (accession)	18.III.1999	18.III.2000
Papua New Guinea (accession)	23.I.2001	23.I.2002
Philippines (accession)	7.VII.1997	7.VII.1998
Poland (accession)	21.XII.1999	21.XII.2000
Portugal (accession)	13.XI.2001	13.XI.2002
Qatar (accession)	20.XI.2001	20.XI.2002
Republic of Korea (accession)¹	7.III.1997	16.V.1998
Russian Federation (accession)	20.III.2000	20.III.2001
Saint Vincent and the Grenadines (accession)	1.II.2002	1.II.2003
Samoa (accession)	9.X.2001	9.X.2002
Seychelles (accession)	23.VII.1999	23.VII.2000
Sierra Leone (accession)	4.VI.2001	4.VI.2002
Singapore (accession)	31.XII.1997	31.XII.1998
Slovenia (accession)	19.VII.2000	19.VII.2001
Spain (accession)¹	6.VII.1995	16.V.1998
Sri Lanka (accession)	22.I.1999	22.I.2000
Sweden (ratification)	25.V.1995	30.V.1996
Tonga (accession)	10.XII.1999	10.XII.2000
Trinidad and Tobago (accession)	6.III.2000	6.III.2001
Tunisia (accession)	29.I.1997	29.I.1998
Turkey (accession)¹	17.VIII.2001	17.VIII.2002
United Arab Emirates (accession)	19.XI.1997	19.XI.1998
United Kingdom (accession)³	29.IX.1994	30.V.1996
United Republic of Tanzania (accession)	19.XI.2002	19.XI.2003
Uruguay (accession)	9.VII.1997	9.VII.1998
Vanuatu (accession)	18.II.1999	18.II.2000
Venezuela (accession)	22.VII.1998	22.VII.1999

Number of Contracting States 86

¹ With a declaration.

² China declared that the Protocol will be applicable only to the Hong Kong Special Administrative Region.

³ The United Kingdom declared its accession to be effective in respect of:

The Bailiwick of Jersey

The Isle of Man

Falkland Islands*

Montserrat

South Georgia and the South Sandwich Islands

Anguilla)

Bailiwick of Guernsey)

Bermuda)

British Antarctic Territory)

British Indian Ocean Territory)

Pitcairn, Henderson,

Ducie and Oeno Islands)

with effect from 20.2.98

*Fund Protocol 1992**Protocole Fonds 1992*

Sovereign Base Areas of Akrotiri and)	
Dhekelia on Cyprus)	
Turks & Caicos Islands)	
Virgin Islands)	
Cayman Islands)	
Gibraltar)	with effect from 15.5.98
St Helena and its Dependencies)	

* 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

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”.

NUCLEAR 1971

**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 à la
Responsabilité Civile dans
le Domaine du**
**Transport Maritime
de matières nucléaires
(NUCLEAR 1971)**

Signée à Bruxelles,
le 17 décembre 1971

Entrée en vigueur: 15 juillet 1975

Argentina	(a)	18.V.1981
Belgium	(r)	15.VI.1989
Denmark ⁽¹⁾	(r)	4.IX.1974
Dominica	(a)	31.VIII.2001
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
Latvia	(a)	25.I.2002
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.

⁽¹⁾ Shall not apply to the Faroe Islands.

NUCLEAR 1971

PAL 1974

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".

**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

	Date of deposit of instrument	Date of entry into force
Argentina (accession)¹	26.V.1983	28.IV.1987
Bahamas (accession)	7.VI.1983	28.IV.1987
Barbados (accession)	6.V.1994	4.VIII.1994
Belgium (accession)	15.VI.1989	13.IX.1989
China⁵ (accession)	1.VI.1994	30.VIII.1994
Croatia (accession)	12.I.1998	12.IV.1998
Dominica (accession)	31.VIII.2001	29.XI.2001
Egypt (accession)	18.X.1991	16.I.1992
Equatorial Guinea (accession)	24.IV.1996	23.VII.1996
Estonia (accession)	8.X.2002	6.I.2003
Georgia (accession)	25.VIII.1995	23.XI.1995
Greece (acceptance)	3.VII.1991	1.X.1991
Guyana (accession)	10.XII.1997	10.III.1998
Ireland (accession)	24.II.1998	25.V.1998
Jordan (accession)	3.X.1995	1.I.1996
Latvia (accession)	6.XII.2001	6.III.2002
Liberia (accession)	17.II.1981	28.IV.1987
Luxembourg (accession)	14.II.1991	15.V.1991
Malawi (accession)	9.III.1993	7.VI.1993

PAL 1974

	Date of deposit of instrument	Date of entry into force
Marshall Islands (accession)	29.XI.1994	27.II.1995
Poland (ratification)	28.I.1987	28.IV.1987
Russian Federation² (accession)¹	27.IV.1983	28.IV.1987
Spain (accession)	8.X.1981	28.IV.1987
Switzerland (ratification)	15.XII.1987	14.III.1988
Tonga (accession)	15.II.1977	28.IV.1987
Ukraine (accession)	11.XI.1994	9.II.1995
United Kingdom (ratification)³	31.I.1980	28.IV.1987
Vanuatu (accession)	13.I.1989	13.IV.1989
Yemen (accession)	6.III.1979	28.IV.1987

Number of Contracting States: 29⁴

¹ With a declaration or reservation.

² As from 26.XII.1991 the membership of the USSR in the Convention is continued by the Russian Federation.

³ 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**

Montserrat

Pitcairn

Saint Helena and Dependencies

⁴ On 3.X.1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded to the Convention on 29.VIII.1979.

⁵ Applies to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

* 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).

** Ceased to apply to Hong Kong with effect from 1.VII.1997.

Declarations, Reservations and Statements

Argentina⁽¹⁾

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):

[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.

⁽¹⁾ 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”.

PAL Protocol 1976

**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: 30 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: 30 avril 1989

	Date of deposit of instrument	Date of entry into force
Argentina (accession)¹	28.IV.1987	30.IV.1989
Bahamas (accession)	28.IV.1987	30.IV.1989
Barbados (accession)	6.V.1994	4.VIII.1994
Belgium (accession)	15.VI.1989	13.IX.1989
China⁵ (accession)	1.VI.1994	30.VIII.1994
Croatia (accession)	12.I.1998	12.IV.1998
Dominica (accession)	31.VIII.2001	29.XI.2001
Estonia (accession)	8.X.2002	6.I.2003
Georgia (accession)	25.VIII.1995	23.XI.1995
Greece (accession)	3.VII.1991	1.X.1991
Ireland (accession)	24.II.1998	25.V.1998
Latvia (accession)	6.XII.2001	6.III.2002
Liberia (accession)	28.IV.1987	30.IV.1989
Luxembourg (accession)	14.II.1991	15.V.1991
Marshall Islands (accession)	29.XI.1994	27.II.1995
Poland (accession)	28.IV.1987	30.IV.1989
Russian Federation² (accession)³	30.I.1989	30.IV.1989
Spain (accession)	28.IV.1987	30.IV.1989
Switzerland (accession)³	15.XII.1987	30.IV.1989
Tonga (accession)	18.IX.2003	17.XII.2003
Ukraine (accession)	11.XI.1994	9.II.1995
United Kingdom (ratification)^{3, 4}	28.IV.1987	30.IV.1989
Vanuatu (accession)	13.I.1989	30.IV.1989
Yemen (accession)	28.IV.1987	30.IV.1989

Number of Contracting States: 24

¹ With a reservation.

² As from 26.XII.1991 the membership of the USSR in the Protocol is continued by the Russian Federation.

³ With a notification under article II(3).

PAL Protocol 1976

- 4 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**
Montserrat
Pitcairn
Saint Helena and Dependencies
- 5 Applies to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

* With a reservation made by the Argentine Republic and a communication received from the United Kingdom.

** Ceased to apply to Hong Kong with effect from 1.VII.1997.

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”.

*PAL Protocol 1990**LLMC 1976*

**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

**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

Croatia (accession)
Egypt (accession)
Spain (accession)
Tonga (accession)

Date of deposit of instrument

12.I.1998
18.X.1991
24.II.1993
18.IX.2003

Number of Contracting States: 4

**Convention on
Limitation of Liability
for maritime claims
(LLMC 1976)**

Done at London, 19 November 1976
Entered into force: 1 December 1986

**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

Australia (accession)
Bahamas (accession)
Barbados (accession)
Belgium (accession)^{1, 2}
Benin (accession)
China⁹
Croatia (accession)
Denmark (ratification)

Date of deposit of instrument	Date of entry into force
20.II.1991	1.VI.1991
7.VI.1983	1.XII.1986
6.V.1994	1.IX.1994
15.VI.1989	1.X.1989
1.XI.1985	1.XII.1986
—	1.VII.1997
2.III.1993	1.VI.1993
30.V.1984	1.XII.1986

LLMC 1976

	Date of deposit of instrument	Date of entry into force
Dominica (accession)	31.VIII.2001	1.XII.2001
Egypt (accession)	30.III.1988	1.VII.1988
Equatorial Guinea (accession)	24.IV.1996	1.VIII.1996
Estonia (accession)	23.X.2002	1.II.2003
Finland (ratification)	8.V.1984	1.XII.1986
France (approval)^{1, 2}	1.VII.1981	1.XII.1986
Georgia (accession)	20.II.1996	1.VI.1996
Germany³ (ratification)^{1, 2}	12.V.1987	1.IX.1987
Greece (accession)	3.VII.1991	1.XI.1991
Guyana (accession)	10.XII.1997	1.IV.1998
India (accession)	20.VIII.2002	1.XII.2002
Ireland (accession)¹	24.II.1998	1.VI.1998
Japan (accession)¹	4.VI.1982	1.XII.1986
Latvia (accession)	13.VII.1999	1.XI.1999
Liberia (accession)	17.II.1981	1.XII.1986
Marshall Islands (accession)	29.XI.1994	1.III.1995
Mauritius (accession)	17.XII.2002	1.VI.2003
Mexico (accession)	13.V.1994	1.IX.1994
Netherlands (accession)^{1, 2}	15.V.1990	1.IX.1990
New Zealand (accession)⁵	14.II.1994	1.VI.1994
Norway (ratification)⁴	30.III.1984	1.XII.1986
Poland (accession)⁶	28.IV.1986	1.XII.1986
Sierra Leone (accession)	26.VII.2001	1.XI.2001
Spain (ratification)	13.XI.1981	1.XII.1986
Sweden (ratification)⁴	30.III.1984	1.XII.1986
Switzerland (accession)^{2, 6}	15.XII.1987	1.IV.1988
Tonga (accession)	18.IX.2003	1.I.2004
Trinidad and Tobago (accession)	6.III.2000	1.VII.2000
Turkey (accession)	6.III.1998	1.VII.1998
United Arab Emirates (accession)	19.XI.1997	1.III.1998
United Kingdom (ratification)^{1, 7, 8}	31.I.1980	1.XII.1986
Vanuatu (accession)	14.IX.1992	1.I.1993
Yemen (accession)	6.III.1979	1.XII.1986

Number of Contracting States: 41

The Convention applies provisionally in respect of: Belize

¹ With a declaration, reservation or statement.

² With a notification under article 15(2).

³ On 3.X.1990 the German Democratic Republic acceded to the Federal Republic of Germany. The German Democratic Republic had acceded 1, 6 to the Convention on 17.II.1989.

⁴ With a notification under article 15(4).

⁵ 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;”.

⁶ With a notification under article 8(4).

- ⁷ The United Kingdom declared its ratification to be effective also in respect of:
- Bailiwick of Jersey
 - Bailiwick of Guernsey
 - Isle of Man
 - Belize*
 - Bermuda
 - British Virgin Islands
 - Cayman Islands
 - Falkland Islands**
 - 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
- | | | |
|--|---|-----------------------|
| Anguilla |) | |
| British Antarctic Territory |) | notification received |
| British Indian Ocean Territory |) | 4.II.1999 |
| South Georgia and the South Sandwich Islands |) | |
- ⁸ With notifications under articles 8(4) and 15(2).
- ⁹ Applies only to the Hong Kong Special Administrative Region.

* Has since become the independent State of Belize to which the Convention applies provisionally.

** 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).

*** Ceased to apply to Hong Kong with effect from 1.VII.1997.

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)".

LLMC 1976

German Democratic Republic

The instrument of accession of the German Democratic Republic was accompanied by the following reservation (in the German language):

[Translation]

Article 2, paragraph 1(d) and (e)

“The German Democratic Republic notes that for the purpose of this Convention there is no limitation of liability within its territorial sea and internal waters in respect of the removal of a wrecked ship, the raising, removal or destruction of a ship which is sunk, stranded or abandoned (including anything that is or has been on board such ship). Claims, including liability, derive from the laws and regulations of the German Democratic Republic.”

Article 8, paragraph 1

“The German Democratic Republic accepts the use of the Special Drawing Rights merely as a technical unit of account. This does not imply any change in its position toward the International Monetary Fund”.

Federal Republic of Germany

The instrument of ratification of the Federal Republic of Germany was accompanied by the following declaration (in the German language):

[Translation]

“...that the said Convention shall also apply to Berlin (West) with effect from the date on which it enters into force for the Federal Republic of Germany”.

“In accordance with art. 18, par. 1 of the Convention, the Federal Republic of Germany reserves the right to exclude the application of art. 2, par. 1(d) and (e) of the Convention”

Japan

The instrument of accession of Japan was accompanied by the following statement (in the English language):

“...the Government of Japan, in accordance with the provision of paragraph 1 of article 18 of the Convention, reserves the right to exclude the application of paragraph 1(d) and (e) of article 2 of the Convention”.

Netherlands

The instrument of accession of the Kingdom of the Netherlands contained the following reservation:

“In accordance with article 18, paragraph 1 of the Convention on limitation of liability for maritime claims, 1976, done at London on 19 November 1976, the Kingdom of the Netherlands reserves the right to exclude the application of article 2, paragraph 1(d) and (e) of the Convention”.

United Kingdom

The instrument of accession of the United Kingdom of Great Britain and Northern Ireland contained reservation which states that the United Kingdom was “Reserving the right, in accordance with article 18, paragraph 1, of the Convention, on its own behalf and on behalf of the above mentioned territories, to exclude the application of article 2, paragraph 1(d); and to exclude the application of article 2, paragraph 1(e) with regard to Gibraltar only”.

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".

LLMC 1976

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.

I. Limits of liability for claims in respect of loss of life or personal injury other than those in respect of passengers of a ship, arising on any distinct occasion:

1. for a ship 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 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

LLMC 1976

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

LLMC 1976

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.

**Protocol of 1996 to amend
the convention on
Limitation of Liability
for maritime claims, 1976**

(LLMC PROT 1996)

Done at London, 2 May 1996
Entry into force: 13 May 2004

Australia (accession)
Denmark (ratification)
Finland (acceptance)
France
Germany (ratification)
Malta
Norway (ratification)¹
Russian Federation (accession)¹
Sierra Leone (accession)
Tonga (accession)
United Kingdom (ratification)¹

Number of Contracting States: 9

¹ With a reservation or statement

**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 2 mai 1996
Entrée en vigueur: 13 mai 2004

8.X.2002
12.IV.2002
15.IX.2000
7.I.2004
3.IX.2001
13.II.2004
17.X.2000
25.V.1999
1.XI.2001
18.IX.2003
11.VI.1999

**International Convention on
Salvage, 1989
(SALVAGE 1989)**

Done at London: 28 April 1989
Entered into force: 14 July 1996

**Convention Internationale de
1989 sur l'Assistance
(ASSISTANCE 1989)**

Signée à Londres le 28 avril 1989
Entrée en vigueur: 14 juillet 1996

Australia (accession)¹
Canada (ratification)¹
China⁴ (accession)¹
Croatia (accession)¹
Denmark (ratification)
Dominica (accession)

Date of deposit of instrument	Date of entry into force
8.I.1997	8.I.1998
14.XI.1994	14.VII.1996
30.III.1994	14.VII.1996
10.IX.1998	10.IX.1999
30.V.1995	14.VII.1996
31.VIII.2001	31.VIII.2002

*Salvage 1989**Assistance 1989*

	Date of deposit of instrument	Date of entry into force
Egypt (accession)	14.III.1991	14.VII.1996
Estonia (accession)¹	31.VII.2001	31.VII.2002
France (accession)	20.XII.2001	20.XII.2002
Georgia (accession)	25.VIII.1995	25.VIII.1996
Germany (ratification)¹	8.X.2001	8.X.2002
Greece (accession)	3.VI.1996	3.VI.1997
Guinea (accession)	2.X.2002	2.X.2003
Guyana (accession)	10.XII.1997	10.XII.1998
Iceland (accession)	21.III.2002	21.III.2003
India (accession)	18.X.1995	18.X.1996
Iran (Islamic Republic of) (accession)¹	1.VIII.1994	14.VII.1996
Ireland (ratification)¹	6.I.1995	14.VII.1996
Italy (ratification)	14.VII.1995	14.VII.1996
Jordan (accession)	3.X.1995	3.X.1996
Kenya (accession)	21.VII.1999	21.VII.2000
Latvia (accession)	17.III.1999	17.III.2000
Lithuania (accession)¹	15.XI.1999	15.XI.2000
Marshall Islands (accession)	16.X.1995	16.X.1996
Mauritius (accession)	17.XII.2002	17.XII.2003
Mexico (ratification)¹	10.X.1991	14.VII.1996
Netherlands (acceptance)^{1,2}	10.XII.1997	10.XII.1998
New Zealand (accession)	16.X.2002	16.X.2003
Nigeria (ratification)	11.X.1990	14.VII.1996
Norway (ratification)¹	3.XII.1996	3.XII.1997
Oman (accession)	14.X.1991	14.VII.1996
Romania (accession)	18.V.2001	18.V.2002
Russian Federation (ratification)¹	25.V.1999	25.V.2000
Saudi Arabia (accession)¹	16.XII.1991	14.VII.1996
Sierra Leone (accession)	26.VII.2001	26.VII.2002
Sweden (ratification)¹	19.XII.1995	19.XII.1996
Switzerland (ratification)	12.III.1993	14.VII.1996
Syrian Arab Republic (accession)¹	19.III.2002	19.III.2003
Tonga (accession)	18.IX.2003	18.IX.2004
Tunisia (accession)¹	5.V.1999	5.V.2000
United Arab Emirates (accession)	4.X.1993	14.VII.1996
United Kingdom (ratification)^{1,3}	29.IX.1994	14.VII.1996
United States (ratification)	27.III.1992	14.VII.1996
Vanuatu (accession)	18.II.1999	18.II.2000

Number of Contracting States: 44

¹ With a reservation or statement² With a notification

³ The United Kingdom declared its ratification to be effective in respect of:
 The Bailiwick of Jersey
 The Isle of Man
 Falkland Islands*
 Montserrat

South Georgia and the South Sandwich Islands

Hong Kong** as from 30.V.1997

Anguilla

British Antarctic Territory

British Indian Ocean Territory

Cayman Islands

Pitcairn, Henderson, Ducie and Oeno Islands

St Helena and its Dependencies

Turks and Caicos Islands

Virgin Islands

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) with effect from 22.7.98

⁴ Applies to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

* 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).

** Ceased to apply to Hong Kong with effect from 1.VII.1997.

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]

*Salvage 1989**Assistance 1989*

“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. 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”.

⁽¹⁾ The depositary received the following communication dated 27 February 1992 from the Embassy of Israel:

“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.”

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”.

**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.

	Date of deposit of instrument	Date of entry into force
Angola (accession)	4.X.2001	4.I.2002
Antigua and Barbuda (accession)	5.I.1999	5.IV.1999
Argentina (ratification)¹	13.VII.1994	13.V.1995
Australia (accession)	6.VII.1992	13.V.1995
Bahamas (accession)	4.X.2001	4.I.2002
Brazil (ratification)	21.VII.1998	21.X.1998
Bulgaria (accession)	5.IV.2001	5.VII.2001
Canada (accession)	7.III.1994	13.V.1995
Cape Verde (accession)	4.VII.2003	4.X.2003
Chile (accession)	15.X.1997	15.I.1998
China (accession)	30.III.1998	30.VI.1998

¹ With a reservation.

Oil pollution preparedness 1990

	Date of deposit of instrument	Date of entry into force
Comoros (accession)	5.I.2000	5.IV.2000
Croatia (accession)	12.I.1998	12.IV.1998
Denmark (ratification)	22.X.1996	22.I.1997
Djibouti (accession)	19.I.1998	19.IV.1998
Dominica (accession)	31.VIII.2001	30.XI.2001
Ecuador (ratification)	29.I.2002	29.IV.2002
Egypt (ratification)	29.VI.1992	13.V.1995
El Salvador (accession)	9.X.1995	9.I.1996
Finland (approval)	21.VII.1993	13.V.1995
France (approval)	6.XI.1992	13.V.1995
Georgia (accession)	20.II.1996	20.V.1996
Germany (ratification)	15.II.1995	15.V.1995
Greece (ratification)	7.III.1995	7.VI.1995
Guinea (accession)	2.X.2002	2.I.2003
Guyana (accession)	10.XII.1997	10.III.1998
Iceland (ratification)	21.VI.1993	13.V.1995
India (accession)	17.XI.1997	17.II.1998
Iran (Islamic Republic of)(accession)	25.II.1998	25.V.1998
Ireland (accession)	26.IV.2001	26.VII.2001
Israel (ratification)	24.III.1999	24.VI.1999
Italy (ratification)	2.III.1999	2.VI.1999
Jamaica (accession)	8.IX.2000	8.XII.2000
Japan (accession)	17.X.1995	17.I.1996
Kenya (accession)	21.VII.1999	21.X.1999
Latvia (accession)	30.XI.2001	28.II.2002
Liberia (accession)	5.X.1995	5.I.1996
Lithuania (accession)	23.XII.2002	23.III.2003
Madagascar (accession)	21.V.2002	21.VIII.2002
Malaysia (accession)	30.VII.1997	30.X.1997
Malta (accession)	21.I.2003	21.IV.2003
Marshall Islands (accession)	16.X.1995	16.I.1996
Mauritania (accession)	22.XI.1999	22.II.2000
Mauritius (accession)	2.XII.1999	2.III.2000
Mexico (accession)	13.V.1994	13.V.1995
Monaco (accession)	19.X.1999	19.I.2000
Morocco (ratification)	29.IV.2003	29.VII.2003
Netherlands (ratification)	1.XII.1994	13.V.1995
New Zealand (accession)	2.VII.1999	2.X.1999
Nigeria (accession)	25.V.1993	13.V.1995
Norway (ratification)	8.III.1994	13.V.1995
Pakistan (accession)	21.VII.1993	13.V.1995
Peru (accession)	24.IV.2002	24.VII.2002
Poland (ratification)	12.VI.2003	12.IX.2003
Republic of Korea (accession)	9.XI.1999	9.II.2000
Romania (accession)	17.XI.2000	17.II.2001
Senegal (ratification)	24.III.1994	13.V.1995
Seychelles (accession)	26.VI.1992	13.V.1995
Singapore (accession)	10.III.1999	10.VI.1999
Slovenia (accession)	31.V.2001	31.VIII.2001

Oil pollution preparedness 1990

	Date of deposit of instrument	Date of entry into force
Spain (ratification)	12.I.1994	13.V.1995
Sweden (ratification)	30.III.1992	13.V.1995
Switzerland (accession)	4.VII.1996	4.X.1996
Syrian Arab Republic (accession)	14.III.2003	14.VI.2003
Thailand (accession)	20.IV.2000	20.VII.2000
Tonga (accession)	1.II.1996	1.V.1996
Trinidad and Tobago (accession)	6.III.2000	6.VI.2000
Tunisia (accession)	23.X.1995	23.I.1996
United Kingdom (accession)	16.IX.1997	16.XII.1997
United States (ratification)	27.III.1992	13.V.1995
Uruguay (signature by confirmation)	27.IX.1994	13.V.1995
Vanuatu (accession)	18.II.1999	18.V.1999
Venezuela (ratification)	12.XII.1994	13.V.1995

Number of Contracting States: 73

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.

Angola (accession)

4.X.2001

Morocco (accession)

19.III.2003

Russian Federation (accession)¹

20.III.2000

Tonga (accession)

18.IX.2003

¹ With a reservation.

**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'editeur / 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
Bangladesh	(a)	24.VII.1975
Barbados	(a)	29.X.1980
Belgium	(r)	30.IX.1987
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 ⁽¹⁾	(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
Guatemala	(r)	3.III.1976
Guinea	(a)	19.VIII.1980
Guyana	(a)	7.I.1980
Honduras	(a)	12.VI.1979
India	(r)	14.II.1978
Indonesia	(r)	11.I.1977
Iraq	(a)	25.X.1978

⁽¹⁾ Applied to the Hong Kong Special Administrative Region with effect from 1.VII.1997.

*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
Qatar	(a)	31.X.1994
Romania	(a)	7.I.1982
Russian Federation	(A)	28.VI.1979
Saudi Arabia	(a)	24.V.1985
Serbia and Montenegro	(d)	12.III.2001
Senegal	(r)	20.V.1977
Sierra Leone	(a)	9.VII.1979
Slovakia	(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
United Kingdom	(a)	28.VI.1985
United Republic of Tanzania	(a)	3.XI.1975
Uruguay	(a)	9.VII.1979
Venezuela	(S)	30.VI.1975
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
Jordan	(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
Syrian Arab Republic	(a)	16.X.2002
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.

Burundi
Chile
Georgia
Lebanon
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.

(a) 4.IX.1998
(r) 7.IV.1982
(a) 21.III.1996
(a) 1.VI.2001
(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

Albania
Algeria
Angola
Antigua and Barbuda
Argentina
Armenia
Australia
Austria
Bahamas
Bahrain
Bangladesh
Barbados
Belgium
Belize
Benin
Bolivia
Bosnia and Herzegovina
Botswana
Brazil
Brunei Darussalam

23.VI.2003
11.VI.1996
5.XII.1990
2.II.1989
1.XII.1995
9.XII.2002
5.X.1994
14.VII.1995
29.VII.1983
30.V.1985
27.VII.2001
12.X.1993
13.XI.1998
13.VIII.1983
16.X.1997
28.IV.1995
12.I.1994
2.V.1990
22.XII.1988
5.XI.1996

UNCLOS 1982

Bulgaria	15.V.1996
Cameroon	19.XI.1985
Canada	7.XI.2003
Cape Verde	10.VIII.1987
Chile	25.VIII.1997
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
Finland	21.VI.1996
France	11.IV.1996
Gabon	11.III.1988
Gambia	22.V.1984
Georgia	21.III.1996
Germany	14.X.1994
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
Hungary	5.II.2002
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
Kiribati	24.II.2003
Korea, Republic of	29.I.1996

UNCLOS 1982

Kuwait	2.V.1986
Lao People's Democratic Republic	5.VI.1998
Lebanon	5.I.1995
Lituania	12.XI.2003
Luxembourg	5.X.2000
Madagascar	22.VIII.2002
Malaysia	14.X.1996
Maldives	7.IX.2000
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, Federated States of	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
Nicaragua	3.V.2000
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
Qatar	7.XII.2002
Romania	17.XII.1996
Russian Federation	12.III.1997
Samoa	14.VIII.1995
St. Kitts and Nevis	7.I.1993
St. Lucia	27. III.1985
St. Vincent and the Grenadines	1.X.1993
Sao Tomé and Príncipe	3.XI.1987
Saudi Arabia	24.IV.1996
Senegal	25.X.1984
Serbia and Montenegro	12.III.2001
Seychelles	16.IX.1991
Sierra Leone	12.XII.1994

*UNCLOS 1982**Registration of ships 1986*

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, United Republic of	30.IX.1985
The Former Yugoslav Republic of Macedonia	19.VIII.1994
Togo	16.IV.1985
Tonga	2.VIII.1995
Trinidad and Tobago	25.IV.1986
Tunisia	24.IV.1985
Tuvalu	8.XII.2002
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
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.

Bulgaria
Egypt
Georgia
Ghana
Haiti
Hungary
Iraq
Ivory Coast
Libyan Arab Jamahiriya
Mexico
Oman

**Convention des Nations
Unies sur les Conditions d'
Immatriculation des navires**

Genève, 7 février 1986
Pas encore entrée en vigueur.

(a)	27.XII.1996
(r)	9.I.1992
(a)	7.VIII.1995
(a)	29.VIII.1990
(a)	17.V.1989
(a)	23.I.1989
(a)	1.II.1989
(r)	28.X.1987
(r)	28.II.1989
(r)	21.I.1988
(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**

Done at Vienna 19 April 1991
Not yet in force.

Georgia
Egypt

(a) 21.III.1996
(a) 6.IV.1999

Convention des Nations Unies sur la Responsabilité des exploitants de terminaux transport dans le commerce international

Signée à Vienne 19 avril 1991
Pas encore entrée en vigueur.

International Convention on Maritime liens and mortgages, 1993

Done at Geneva,
6 May 1993
Entry into force: 5 September 2004

Estonia
Monaco
Nigeria
Russian Federation
Saint Vincent and the Grenadines
Spain
Syrian Arab Republic
Tunisia
Ukraine
Vanuatu

Convention Internationale de 1993 su les Privilèges et hypothèques maritimes

Signée à Genève
le 6 mai 1993
Entrée en vigueur: 5 septembre 2004

(a) 7.II.2003
(a) 28.III.1995
(a) 5.III.2004
(a) 4.III.1999
(a) 11.III.1997
(a) 7.VI.2002
(a) 8.X.2003
(r) 2.II.1995
(a) 27.II.2003
(a) 10.VIII.1999

International Convention on Arrest of Ships, 1999

Done at Geneva,
12 March 1999
Not yet in force.

Bulgaria
Estonia
Latvia
Spain
Syrian Arab Republic

Convention Internationale de 1999 sur la saisie conservatoire des navires

Fait à Genève
le 12 Mars 1999
Pas encore en vigueur.

(r) 27.VII.2000
(a) 11.V.2001
(a) 7.XII.2001
(a) 7.VI.2002
(a) 16.X.2002

**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

Belarus	(a)	18.VIII.1998
France	(r)	23.IX.1991
Hungary	(a)	7.V.1996
Italy	(r)	29.XI.1993
Latvia	(a)	6.VIII.1997
Nigeria	(r)	25.X.1994
Panama	(r)	26.III.1997
Russian Federation	(a)	3.VI.1998
Uzbekistan, Republic of	(a)	6.VII.2000

**CONFERENCES
OF THE
COMITE MARITIME INTERNATIONAL**

Conferences of the Comité 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 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.

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.

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.