person or body designated in the bill of lading would have to submit their choice of a place to the claimant who could reject the place submitted. This power by the plaintiff might well complicate the process of selection of an appropriate person and place.

23. The requirement in draft proposal E that the arbitration proceedings must be held in a contracting State is found in both paragraph 1 (arbitration clause) and paragraph 3 (agreement after dispute has arisen). Discussion of this requirement and its possible drawbacks is to be found in paragraph 9 above.

E. *Some comparisons between draft proposal D and draft proposal E*

24. Draft proposal D, above, limits the choice of a specific place that a person or body designated in the bill of lading may make, but provides that such a selection is binding. Under draft proposal E the choice made by such a person or body is merely one of many among which the claimant may choose.

25. It may be argued that the flexibility that draft proposal E gives in making it possible for the claimant to choose the principal place of business of the carrier (paragraph 1 (*b*)) or the place designated in the contract (paragraph 1 (*d*)), is no greater than that of draft proposal D. Under draft proposal D if the claimant wishes to have the arbitration proceedings brought at the carrier's principal place of business he can presumably gain the carrier's agreement to this when the dispute arises. He could also presumably gain the carrier's agreement to any other place which the carrier would have chosen if he were free to do so.

F. *Provision which would confine recourse to arbitration to cases where the parties agreed to arbitration after the dispute arose*

26. A provision whose purpose is to confine recourse to arbitration to cases where the parties agreed to arbitration after the dispute arose was presented to the Working Group. It reads as follows:

[Draft proposal F]

"Notwithstanding the provision of the preceding paragraph, after the cocurrence of an event giving rise to a claim the parties may agree on a jurisdiction where legal action may be commenced or submit the case to arbitration for a final decision in accordance with the rules of this Convention." [24]

27. Draft proposal F was meant to be read in conjunction with the draft provision on choice of forum clauses. This draft proposal would bring about the invalidity of all arbitration clauses in bills of lading.[25]

[24] Report of the Working Group, para. 56.

[25] See report of the Secretary-General, para. 132, which discusses the widespread favour enjoyed by arbitration as an efficient and inexpensive process for the settlement of disputes. It should be noted that this draft proposal would also effect such clauses in charter parties when they are incorporated into bills of lading.

4. *Report of the Secretary-General, second report on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1)* *

CONTENTS

* 21 March 1973.

GENERAL INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its fifth session (1972) decided that its Working Group on International Legislation on Shipping should continue its work under the terms of reference set forth in the resolution the Commission has adopted at its fourth session.[1] This resolution concluded that:

> "The rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968), should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations."

The Commission's resolution also listed, in subparagraphs (*a*) to (*i*) of paragraph 2, a series of areas which "among others, should be considered for revision and amplification". [2]

2. The Working Group at its third and fourth (special) sessions used as its working document the report by the Secretary-General on "responsibility of ocean carriers for cargo: bills of lading".[3] At these sessions, the Working Group examined and reached decisions on the following topics: the period of carrier's responsibility (before and during loading, during and after discharge); responsibility for deck cargoes and live animals; clauses of bills of lading confining jurisdiction over claims to a selected forum; approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier.[4]

3. The Working Group, at its third session, decided that the fifth session should be devoted to a consideration of the remaining topics listed in the resolution adopted by UNCITRAL at its fourth session.[5] These remaining topics are: unit limitation of liability, trans-shipment, deviation, the period of limitation, definitions under article 1 of the Convention and elimination of invalid clauses in bills of lading. The Secretary-General was requested "to prepare a report setting forth proposals, indicating possible solutions" with respect to these topics.[6] To provide material needed in the preparation of the report, the Secretary-General was also requested "to invite comments and suggestions from governments and from international and intergovernmental organizations active in the field".[7] Accordingly, a questionnaire was prepared and circulated to governments and to the organizations described in the above-quoted decision.[8]

4. The present report was prepared in response to the above request by the Working Group and is submitted for consideration at the fifth session of the Working Group. The report includes references to numerous replies to the above-mentioned questionnaire [9] and also draws on the report on bills of lading of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD), which was placed before the UNCTAD and UNCITRAL Working Groups.[10]

5. The Working Group at its fourth session concluded that "the subjects which are most closely related to the basic question of carrier's responsibility should be taken up first". Accordingly, priority should be given to unit limitation of liability, trans-shipment and deviation.[11] The

---

[1] Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972), *Official Records of the General Assembly, Twenty-seventh session, Supplement No. 17* (A/8717) (herein referred to as UNCITRAL, report on the fifth session (1972)), para. 51, UNCITRAL Yearbook, vol. III: 1972, part one, II, A; report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 19 (herein referred to as UNCITRAL, report of the fourth session (1971), UNCITRAL Yearbook, vol. II: 1971, part one, II, A). The resolution adopted at the fourth session of the Commission quoted from the resolution of the United Nations Conference on Trade and Development (UNCTAD) Working Group on International Shipping Legislation on the subject: report of the UNCTAD Working Group on International Shipping Legislation on its second session (TD/B/C.4/86).

[2] The areas listed in the resolution adopted at the fourth session of the Commission are as follows:

"(*a*) Responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;

"(*b*) The scheme of responsibilities and liabilities, and rights and immunities, incorporated in articles III and IV of the Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;

"(*c*) Burden of proof;

"(*d*) Jurisdiction;

"(*e*) Responsibility for deck cargoes, live animals and trans-shipment;

"(*f*) Extension of the period of limitation;

"(*g*) Definitions under article 1 of the Convention;

"(*h*) Elimination of invalid clauses in bills of lading;

"(*i*) Deviation, seaworthiness and unit limitation of liability."

[3] A/CN.9/63/Add.1, UNCITRAL Yearbook, vol. III: 1972, par two, IV, annex (herein referred to as the first report by the Secretary-General on responsibility of ocean carriers for cargo). At the fourth session of the Working Group, two working papers prepared by the Secretariat were submitted: "Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier" (A/CN.9/WG.III/WP.6); "Arbitration clauses" (A/CN.9/WG.III/WP.7). These working papers are reproduced in this volume, part two, IV, 2 and 3 above.

[4] Report of the Working Group on International Legislation on Shipping on the work of its third session (Geneva, 31 January to 11 February, 1972) (A/CN.9/63, UNCITRAL Yearbook, vol. III: 1972, part two, IV) (herein referred to as report of the Working Group, third session); report of the Working Group on International Legislation on shipping on the work of its fourth (special) session (Geneva, 25 September to 6 October 1972) (A/CN.9/74, reproduced in this volume, part two, IV, 1, above) (herein referred to as report of the Working Group, fourth session).

[5] Report of the Working Group, third session, para. 73.

[6] *Ibid.*, para 74.

[7] *Ibid.*, para. 75.

[8] A copy of the questionnaire appears as an appendix following part six of the present report.

[9] It is expected that additional replies will be received subsequent to the preparation of this report. Copies of the replies in their original languages will be available to the members of the Working Group.

[10] Document TD/B/C.4/ISL/6/Rev.1 (United Nations publication, Sales No. 72.II.D.2).

[11] Report of the Working Group, fourth session, para. 55.

order of presentation in the present report takes account of this decision. The present report is presented under the following headings:

Part one: Unit limitation of liability
Part two: Trans-shipment
Part three: Deviation
Part four: The period of limitation
Part five: Definitions under article 1 of the Convention
Part six: Elimination of invalid clauses in bills of lading.

PART ONE: UNIT LIMITATION OF LIABILITY

A. *Introduction*

1. This part of the report responds to the decision of the Commission, made in response to the recommendation of this Working Group, to consider "unit limitation of liability".[1] The legal instruments requiring examination are the International Convention for the Unification of Certain Rules relating to Bills of Lading [2] and the 1968 Protocol to amend that Convention.[3]

1. *The limitation rule contained in the 1924 Brussels Convention*

2. Article 4 (5) of the Brussels Convention states that:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading . . .".[4]

3. It will be noted that this provision establishes a maximum carriers' liability of "100 pounds sterling per package or unit" of goods lost or damaged; carriers may not stipulate for lower limitation amounts.[5] It applies unless the bill of lading establishes a higher limitation amount, or unless the "nature and value" of the goods are declared by the shipper and inserted in the bill of lading", an option that is rarely used.

4. The limitation rule contained in article 4 (5) of the Brussels Convention consists of two elements: (*a*) the quantitative basis of calculation, i.e. the number of "packages" or "units" and (*b*) the monetary limitation amount. Each of these elements has raised problems.

5. (*a*) The first element, embodied in the expression, "package or unit", has proved to be difficult to apply to many types of cargoes. This problem and possible means of resolving it will be explored more fully in section B (para. 10 *et seq., infra*). (*b*) The monetary limitation amount [6] of "100 pounds sterling" has remained unchanged for 49 years, despite inflation and currency devaluations that have eroded its current value to a fraction of its original value.[7] Accordingly, when the Brussels Convention came under re-examination by the CMI during the 1960s, there was broad support for an amendment raising the limitation amount stipulated in article 4 (5).

2. *The limitation rule contained in the 1968 Brussels Protocol*

6. The amendment developed by the CMI is contained in Article 2 (*a*) of the 1968 Brussels Protocol,[8] which

---

[1] See the general introduction, above, at para. 3 and foot-note 2.

[2] Hereinafter cited as the "Brussels Convention". League of Nations *Treaty Series*, vol. CXX, p. 157, No. 2764, reproduced in the Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3). The substantive provisions of this Convention are often referred to as the "Hague Rules".

[3] 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 (hereinafter cited as "the Brussels Protocol" or merely "the Protocol"). This Protocol was adopted by the 12th session of the Brussels Diplomatic Conference on Maritime Law, 16-27 May 1967 and 19-24 February 1968, on the basis of a draft produced by the Comité Maritime International (hereinafter "CMI") at its 26th session, held in Stockholm in 1963, commonly known as the "Visby Rules". The Protocol is reproduced in the Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. II, chap. II, 1. Articles 2 and 3 of the Brussels Protocol, relating to limitation of liability, are set out in appendix II.

[4] Article 4 (5) continues:

"This declaration if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

"By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph pay be fixed, provided that such maximum shall not be less than the figure above-named.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading."

[5] See the third paragraph of article 4 (5) (note 4 above) and article 3 (8), which states that: "Any clause . . . lessening . . . liability otherwise than as provided in this Convention, shall be null and void and of no effect."

[6] Throughout this part of the report, the term "monetary amount" is used to indicate the monetary figure given in the limitation of liability provision, and the term "basis of calculation" is used to indicate the quantitative measurement of goods lost or damaged—whether "packages", "units", "weight", "volume" or some other measurement—by which the limitation amount is multiplied.

[7] A 4 per cent average rate of inflation over the 49-year period is a reasonable assumption. At that rate, the current value of 100 pounds sterling in 1924 is 683 pounds sterling; at a more conservative estimate of a 3 per cent average rate of inflation, the figure is 425 pounds sterling; at 2 per cent—a conservative estimate indeed—the current value equals 264 pounds sterling. See A. J. Merrett and Allen Sykes, *The Finance and Analysis of Capital Projects*, London 1963, p. 510. Most replies to the questionnaire concluded that the monetary limitation amount contained in article 4 (5) was unsatisfactory. The reply of the USSR pointed out that the monetary limitation amount is at present much lower in real terms than it was when established in 1924. On the other hand, the reply of Turkey concluded that the limitation amount in article 4 (5) was satisfactory.

[8] The Brussels Protocol contains other provisions with respect to limitation of liability, which will be considered at a later point in this report.

states that:

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of frs. 10,000 per package or unit or frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher."

7. Article 2 (*d*) of the Protocol adds the following clarification:

"(*d*) A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900' . . ." [9]

8. The Protocol's "package or unit" monetary limitation amount of 10,000 francs Poincaré equals approximately 307 pounds sterling ($US 799, or new French frs. 4,099); the "per kilo" amount of 30 francs Poincaré equals approximately .90 pounds sterling ($US 2.40 or French frs. 12.30). Thus significant elements of Protocol article 2 (*a*) include: (1) raising the monetary limitation "per package or unit" from 100 pounds sterling to 10,000 francs of defined gold content—a level approximately 2.5 times that of the 1924 Convention; (2) retention of the phrase "package or unit"; and (3) addition of an alternative ceiling of 30 francs per kilo of gross weight of goods lost or damaged.

9. In the paragraphs that follow, article 2 (*a*) of the Brussels Protocol will be examined more fully in the context of alternative approaches to the development of a limitation of liability rule.

[9] The monetary unit described in this subparagraph is widely known as the "franc Poincaré", and is hereinafter referred to by that term or by the shorter designation "franc P.".

At the official price of gold of $US 38 = 1 troy ounce of gold, by definition:

Fr. P. 1 = approx. $US .0799 (£ .03) (new French frs. 41)
Frs. P. 10,000 = $US 799 (£307) (French frs. 4,099)
Frs. P. 30 = $US 2.40 (£ .90) (French frs. 12.30)
Frs. P. 30/kg. = $US 1.09/lb. (£42/lb.) (French frs. 5.6/lb.)

At present, however, the official price and the market price of gold differ very significantly: on 20 September 1972 the market price of gold at Zürich was $US 65 an ounce. At the *market* price of gold, the values expressed in frs. Poincaré are as follows:

Fr. P. 1 = approx. $US .137 (£ .053) (French frs. .70)
Frs. P. 10,000 = $US 1,370 (£527) (French frs. 7,028)
Frs. P. 30 = $US 4.11 (£1.58) (French frs. 21.1)
Frs. P. 30/kg. = $US 1.87/lb. (£72/lb.) (French frs. 9.6/lb.)

The Protocol's drafters intended that national laws enacting the Protocol retain the statement of the limitation amount in francs Poincaré, instead of converting the equivalent of that amount into national currencies. This is indicated by the Protocol's deletion of the words "or the equivalent of that sum in other currency" that appear in article 4 (5) of the Brussels Convention, and by the sentence following the definition of "franc" (Poincaré) in article 2 (*d*) of the Protocol: "The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case". Moreover, the chairman of the Working Party on article 2 (1) at the 1967-1968 Diplomatic Conference reported that the limitation expressed in francs Poincaré was "an amount to which it will henceforth be necessary to refer in all countries which shall have signed and ratified the Protocol—since the possibility for the States to express this limitation in national currency no longer exists". "Report by Professor Van Ryn, Chairman of the Working Party on paragraph 1 of article 2 of the Visby Rules", in Conférence Diplomatique de Droit Maritime, Douzième Session (1ère phase), Bruxelles, 1967, p. 716.

B. *Alternative approaches to a limitation of liability rule*

10. This section analyses alternative approaches to a limitation of liability rule and considers these questions: (1) Does article 2 (*a*) of the Brussels Protocol provide a satisfactory structure for such a rule? (2) Can article 2 (*a*) be improved through clarifying amendments? (3) Would an approach different from that contained in Protocol article 2 (*a*) be preferable?

1. *The 1968 Brussels Protocol: alternative "package or unit" and "per kilo" rules*

11. As was noted above, article 2 (*a*) of the Protocol contains alternative limitation rules—one calculated "per package or unit" and the other calculated "per kilo"—and stipulates that the higher amount under those rules is to be applied. Apparently the "package or unit" rule is intended to apply to relatively light cargoes, and the "per kilo" rule to heavier ones. More specifically, if a package or unit weighs 334 kilos or more, the total limitation calculated under the "per kilo" rule exceeds frs. P. 10,000, and thus becomes the applicable limitation.

12. Nevertheless, certain interpretive difficulties in the operation of the Protocol's alternative rules may be foreseeable. For example, it is difficult to apply the words "package or unit" in article IV (5) of the Brussels Convention to the following types of cargoes: (1) items partially encased or crated (for example, tractors partially covered with planking or timber held together with steel bands); (2) large, uncrated items (for example automobiles, railroad locomotives or heavy machinery); (3) bulk cargoes (for example, grains and liquids); (4) unitized cargoes (such as those carried in containers). The problems presented by these four types of cargo will now be considered.

Cargo-type 1: partially encased items

13. With respect to cargo-type 1, the issue is whether a partially encased item of cargo is a "package "or whether it is a "unit". This may be of substantial importance because the word "unit" may mean either:

(*a*) The physical unit in which cargo is shipped (i.e. "shipping unit"); [10] or

(*b*) The unit of quantity, weight or volume on which the freight charges for the goods are calculated (i.e. "freight unit") [11]

[10] The "shipping unit" is specifically designated in the Italian Code of Navigation, article 423, which uses the term "unit of cargo" ("unite di carico"), the same is probably indicated by the words "package or other unit of cargo" contained in the Scandinavian Maritime Code which applies to the carriage of goods by sea with respect to Denmark, Finland, Norway and Sweden.

[11] This concept can be further subdivided into: (1) the unit described in a particular bill of lading as the basis for the calculation of freight, i.e. the "*declared freight unit*"; or (2) the unit customarily used for the calculation of freight for goods of the same type, i.e. the "*customary freight unit*". The United States Carriage of Goods by Sea Act, article 4 (5), explicitly adopts the "customary freight unit" by establishing a limitation "per package . . . or in the case of goods not shipped in packages, per customary freight unit". Article 105 of the Swiss Maritime Code also used the words "freight unit". See also article 165 of the Merchant Shipping Code of the USSR.

14. If "unit" means *shipping* unit (alternative (*a*) above), problems presented by the phrase "package or unit" are minimized, because both terms designate a single, physically distinct object. The limitation of liability for such an object would be calculated either on the basis of one "package or [shipping] unit", or on the basis of the number of kilos of the object's gross weight, depending upon whether its weight exceeded 334 kilos.

15. On the other hand, a "*freight unit*" (alternative (*b*) above) is based not on the physical divisibility of the cargo item, but on a measurement such as the ton, kilo or cubic metre. Consequently, the limitation of liability often will vary greatly depending upon whether it is measured in "packages" or in "*freight* units".[12] For example, a 30-ton, partially covered locomotive may be one "package" or 30 "freight units" (where freight is charged by the ton). In such a case, the limitation under the Protocol may be:

(1) "*Per package or unit*"

(*a*) 10,000 francs P. for 1 "package"; or

(*b*) 300,000 francs P. for 30 "freight units" at 10,000 francs per "unit"; or

(2) "*Per kilo*": Approximately 818,160 francs P. for 30 tons of weight at 30 francs per kilo.

16. Thus, in cases involving partially covered or encased cargoes, the words "package or unit" in article 2 (*a*) of the Brussels Protocol may lead to disputes on the following points: (1) whether an item of cargo constitutes one "package", one "shipping unit", or several "freight units"; (2) whether the "package or unit" or the "per kilo" rule yields a higher limitation of liability. The large number of ways of preparing cargo for shipment make prediction difficult.[13]

Cargo-types 2 and 3: large, uncrated items and bulk cargoes

17. Cargo-types (2) and (3), noted above, give rise to fewer alternative interpretations. An uncrated railroad locomotive (type 2) can not readily be called a "package"; such is even more difficult with respect to a tanker load of oil (type 3). Consequently, courts generally have applied the term "unit" to such cargoes. However, the question remains as to whether these cargoes should be calculated in "*shipping* units" or "*freight* units", with the attendant difficulties described above.

Cargo-type 4: containers

18. Questions have arisen in many jurisdictions concerning the application of the words "package or unit" to containerized cargo. Should the container be considered the single relevant "package" or "unit" for purposes of the limitation of liability provisions, regardless of the number of items inside? Or should the limitation amount apply to *each item of cargo* inside the container? These questions are not resolved by the basic limitation provision in article 2 (*a*) of the Protocol. Instead, article 2 (*c*) contains a special provision designed to clarify the point, which states:

> "(*c*) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned; except as aforesaid such article of transport shall be considered the package or unit." [14]

19. This article has given rise to the question whether the container itself should be counted a "package or unit" in addition to the items inside, when the number of "packages" or "units" are "enumerated in the Bill of Lading . . .".[15]

20. The question of whether the container itself should be counted as a "package or unit" could be resolved by amending the text of the Brussels Protocol's article 2 (*c*). Such an amendment is set forth below: (words to be added are italicized; words to be deleted are in square brackets; optional words are in parentheses):

---

[12] See, for example, *Mitsubishi International Corp.* v. *S.S Palmetto State*, 311 F. 2d 382 (1962), where a roll of steel weighing 32 ½ tons but fully boxed and completely enclosed in a wooden case was damaged to the extent of $31,000, and was held to be a "package" under article IV(5) of the United States' Carriage of Goods by Sea Act, with the result that the shipowner's liability was limited to $500. Had this cargo not been held to be a "package", the limitation of liability would have been measured in "freight units", which presumably would have been tons, so that the total limitation would have been 32 ½ times $500, or $16,250. Compare *Gulf Italia Co.* v. *American Export Lines*, 263 F. 2d 135 (1959), where it was held that a tractor weighing 34.6 tons constituted 34.6 "freight units", with a limitation amount of 34.6 × $500 or $17,300, instead of one "package" with a limitation amount of $500. See also René Rodière. *Traité général de droit maritime*, Paris, 1968, p. 302.

[13] The issue of whether an item of cargo is a "package" or a "freight unit" is a fertile source of dispute and litigation. For some close questions, see *Gulf Italia Company* v. *American Export Lines, Inc.*, op. cit., where a caterpillar tractor was prepared for shipment by putting waterproof papering over some of its parts, and by partially encasing the superstructure with wooden planking; however the tread portions of the tractor were uncovered and the tractor was not attached to a skid. Held: that the tractor did not constitute a "package". However, in *Aluminios Pozuelo Ltd.* v. *S. S. Navigator*, 277 F. Supp. 1008 (1967), a press weighing 6,200 pounds and bolted to a skid approximately twice the size of the base of the press was held to be a "package".

[14] The reply of the Federal Republic of Germany called this provision "the best solution that can be obtained". The reply of Australia stated that this provision constitutes a "distinct improvement", which should be "retained in any further amendment of the Hague Rules". The reply of Czechoslovakia considered this provision to be a "satisfactory solution for the time being". On the other hand, the reply of Sweden, while conceding that article 2 (*c*) was "a step forward", stated that it was "unnecessarily complicated and gives rise to certain difficulties of interpretation".

[15] A further point left unresolved by article 2 (*c*) is whether carriers should be allowed to impose additional *ad valorem* freight charges when the items inside a container are individually valued. See John L. DeGurse, Jr., "The Container Clause in article 4 (5) of the 1968 Protocol to the Hague Rules", 2, *Journal of Maritime Law and Commerce* 131, October 1970.

Draft amendment of article 2 (*c*)

"Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport plus *the article of transport itself* (when such article is supplied by the shipper) shall be deemed the number of packages or units for the purpose of this paragraph [as far as these packages or units are concerned]; except as aforesaid such article of transport shall be considered the package or unit."

This proposal is reflected in the proposed draft limitation rule, set out at paragraph 59 below.[16]

21. A special provision relating to containers is necessary only if the "package or unit" alternative limitation rule is retained. If a limitation rule based only on weight is adopted, then the provision contained in article 2 (*c*) of the Brussels Protocol and quoted above would lose its significance. For this reason, the entire provision on containers has been placed in parenthesis (meaning that it is optional) in the proposed draft limitation rule, set out below.

22. To summarize, despite the Protocol's alternative "per kilo" limitation rule, it would presumably still be necessary to determine the number of "packages" or "units" in many cases, in order to know whether the "package or unit" or the "per kilo" rule produced the higher (and hence the applicable) total limitation. This would present the interpretive difficulties described above with respect to the words "package or unit".[17] Accordingly, if the Working Group should decide that article 2 (*a*) of the Protocol provides a suitable basic structure for a limitation provision, it may wish to consider one or more of the clarifying amendments to that article set forth below.

23. Under the first of these clarifying amendments, the words "per package" might be made the primary basis of limitation, with a subsidiary limitation "per freight unit" for goods not shipped in "packages". Such a clarification might be achieved by amending article 2 (*a*) of the Protocol to read as follows:

Alternative I

". . . neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (*a*) frs. —— per package *or, in the case of goods not shipped in packages, per freight unit* or (*b*) frs. —— per kilo of gross weight of the goods lost or damaged, whichever is the higher". (Emphasis added.)

24. This text, which is used in the United States Carriage of Goods by Sea Act,[18] would resolve ambiguities with respect to whether the word "unit" means "freight" or "shipping" unit. However, use of the term "freight unit" may involve significant disadvantages. First, as was pointed out above, the term "freight unit" itself is somewhat ambiguous, since it could mean either the "customary" freight unit for a particular type of cargo, or the "actual" freight unit specified in the bill of lading.[19] Second, use of "freight unit" would cause the total limitation to fluctuate arbitrarily, according to whether the freight charges were calculated "per kilo", "per ton" or as a single, lump-sum freight for the entire cargo. Third, this method of calculating the limitation of liability might give carriers the opportunity to regulate their own limitations of liability by the manner in which they state their freight charges. Fourth, because freight charges frequently are based upon the weight of the goods, use of the "freight unit", in the many cases of goods not carried in "packages", would merely provide alternative limitation rules both based upon weight, such as, for example, "per ton" (the freight unit) and "per kilo" (the alternative limitation rule already stated in article 2 (*a*)).

25. For these reasons, the Working Group may find that use of the words "freight unit" in article 2 (*a*) is not a satisfactory solution to the interpretive problems of that article.

26. The words "or other shipping unit" might be added to article 2 (*a*) of the Protocol so that the limitation rule would state:

Alternative II-A

". . . neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of frs. —— per package *or other shipping unit* or frs. —— per kilo of gross weight of the goods lost or damaged, whichever is the higher."

27. Alternatively, the words "per package" might be deleted, so that the provision would state:

Alternative II-B

". . . in an amount exceeding the equivalent of frs. —— *per shipping unit* . . .".

28. Alternatives II-A and II-B would eliminate ambiguities with respect to the meaning of the word "unit". They would also clearly identify the "10,000 franc" alternative with a physically divisible item of cargo, as

[16] See also paras. 23-28.

[17] Several replies to the questionnaire expressed dissatisfaction with the words "package or unit". See the replies of Australia, Czechoslovakia, Norway, Sweden, the Federal Republic of Germany, Iraq and the USSR.

[18] 46 U.S.C. 1304 (5). The reply of Australia endorsed the words "customary freight unit" as appearing to provide a better basis of calculation than the present words "package or unit". On the other hand, the reply of Czechoslovakia, while noting that the words "package or unit were unsatisfactory", stated that the phrase "customary freight unit" has not resolved interpretive problems satisfactorily. The reply of the Federal Republic of Germany stated that the words "package or unit" were unsatisfactory, but added that article 2 (*a*) of the Protocol should remain as it is because there was apparently no more suitable formulation.

[19] See foot-note 11, above.

probably was intended by the drafters of article 2 (*a*).[20] If the basic structure of article 2 (*a*) is to be retained, with merely a clarifying amendment, then one of the two suggestions to employ the "shipping unit" concept, set out above, may be a suitable solution.

29. However, such a clarifying amendment, while helpful, may not go far enough toward meeting the requirements of an adequate limitation of liability rule. For example, it would not resolve the interpretive problems relating to containers,[21] which would still have to be treated in a separate provision. In addition, retaining the "package or unit" test would maintain the existing disparity between the rules on limitation of liability for sea carriage and those of other modes of transport.[22] Both these weaknesses represent a failure to deal in a single provision with two of the most current trends in shipping: containerization and combined or through transport.

30. Moreover, interpretive problems may arise, not from the words "package or unit", but instead from the structure of article 2 (*a*)'s alternative limitation rules. Take, for example, the loss or damage to a shipment under one bill of lading of several "packages" or "units" of differing weights. In such a case, it is not clear whether the "higher" amount under the two alternative limitation rules should apply to each individual "package" or "unit" or to the affected shipment considered as a whole. Thus, if a cargo of five "packages", one weighing 1,000 kilos and four weighing 150 kilos, should be lost or damaged, the following limitation figures appear to be possible under the Protocol:

(1) Frs. 50,000 (5 units at frs. 10,000 per unit);

(2) Frs. 70,000 (1,000 kilos × frs. 30 for 1 unit; frs. 10,000 per unit for 4 units).

31. If the "higher" alternative limitation rule is to be applied to the cargo as a whole, then alternative (1) "package or unit", would apply in the example given above; if the "higher" rule is to apply to each "unit" individually, then alternative (2) above would apply.

32. For the reasons given above, the Working Group may find that the problems arising under article 2 (*a*) of the Brussels Protocol cannot be resolved adequately merely by clarifying the existing language, and it may wish to consider other approaches to a limitation of liability rule.

2. *A limitation rule based upon weight only*

33. Three major transport conventions contain limitation provisions based only upon the weight of the goods lost or damaged. The relevant provisions of those conventions are as follows:

Warsaw Convention, art. 22 (2): "In the carriage of . . . goods, the liability of the carrier is limited to a sum of 250 francs per kilogramme . . .".[23]

CIM Convention

Article 31 (1): [in respect of total or partial *loss* of goods] "Compensation shall not . . . exceed 100 francs per kilogramme of gross weight short . . .".[24]

Article 33: [in the case of *damage* to goods] "the compensation shall not . . . exceed:

"(*a*) If the whole consignment has been damaged, the amount payable in the case of total loss;

"(*b*) If part only of the consignment has been damaged, the amount payable in the case of loss of the part affected."

CMR Convention

Articles 23 (3) and 25 (2) are the same as the above-quoted provisions of the CIM Convention, except for the monetary limit which is stated as "25 francs per kilogramme of gross weight short".[25]

34. Basing limitation on weight ("per kilo") would make the Brussels Convention conform with the bases used in other major transport conventions.[26] This approach would eliminate the ambiguous words "package or unit", and might achieve a better proportionality between the amount of freight payable and the carrier's maximum liability.[27] It would also resolve interpretive problems relating to containers, since the weight of the container would be the only relevant factor in calculating the total limitation.

35. In order to adopt a "per kilo" basis of limitation, the words "10,000 francs per package or unit or" might be deleted from article 2 (*a*) of the Brussels Protocol, so that the provision would read:

Alternative III-A

". . . neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in

[20] This conclusion appears to be justified by the fact that the "package or unit" alternative in article 2 (*a*) is designed to apply to light, valuable cargoes, more specifically to cargoes weighing less than 334 kilos and worth more than 30 francs P. per kilo. By this reasoning, what is important is the weight and worth of the physical object carried (the "shipping unit") and not the manner in which freight is calculated (the "freight unit").

[21] See para. 18, above.

[22] All other major transport conventions use a "per kilo" rule for calculating the limitation of liability. For the exact wording of those conventions, see para. 33 below.

[23] Under subparagraph (4) of art. 22, "the sums mentioned above shall be deemed to refer to the French franc consisting of 65 ½ milligrammes gold of millesimal fineness 900′. These sums may be converted into any national currency in round figures."

[24] Art. 56 states that: "The amounts stated in francs in this Convention or the Annexes thereto shall be deemed to relate to the gold franc weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900′." This monetary unit, known as the franc "Germinal", is approximately five times more valuable than the franc "Poincaré" that is used in the Warsaw Convention and the Brussels Protocol. The limitation amount of 100 francs "Germinal" established in art. 31 (1) of the CIM Convention is worth approximately 496 francs "Poincaré".

[25] This subparagraph continues: "'Franc' means the gold franc weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900′."

[26] A limitation system based only upon weight was proposed in the replies of Norway and Sweden. A limitation based upon weight or "cubic dimension" was endorsed by Australia with respect to bulk cargoes.

[27] Ordinarily, freight is charged per weight or volume measurement of the goods, rather than per package or unit. E. Selvig, "The Unit Limitation of Carriers' Liability", in K. Grönfors, ed., *Six Lectures on the Hague Rules*, Stockholm, 1965, p. 119.

connexion with the goods in an amount exceeding the equivalent of frs. ——— per kilo of gross weight of the goods lost or damaged".[28]

36. It must be recognized that a limitation based solely on the weight of "the goods lost or damaged" does not wholly avoid problems of classification. For example, suppose that a bag of grain weighing 100 kilos is torn and loses 30 kilos in the course of shipment. Should the limitation of liability be computed on the basis of the "loss" of part (30 kilos) or on the basis of "damage" to the entire package (100 kilos)? Similar questions might arise (e.g.) in a shipment of a carton containing 10 typewriters, each of which weights 10 kilos. If the carton is broken and 3 typewriters are lost, should the limitation of liability be based on: (*a*) the "loss" of 3 typewriters (30 kilos) or (*b*) "damage" to the entire carton (100 kilos)? Other variations could arise, as where 10 separate packages are shipped under one bill of lading and 3 packages are lost, or where part of a bulk shipment (e.g. grain carried loose in a hold) is lost or damaged.

37. Under alternative III-A above, which is based on the language of article 2 (*a*) of the 1968 Brussels Protocol, the concept of "damage" to "goods" could provide a basis for approaching these problems. A bag of grain that has been torn and that has lost some of its contents has been "damaged" for commercial purposes; consequently, the limitation on liability probably should be based on the total weight of the bag. On the other hand, if a part of a bulk shipment of grain is lost or damaged the commercial value of the balance of the shipment has not been impaired.

38. It would be helpful if the approach for solving such problems could be more clearly indicated in the text of the legislative provision. To this end, consideration might be given to a draft based on the provisions of the CIM and CMR Conventions (*supra*) which distinguish between loss and damage. Such a draft might provide:

Alternative III-B

". . . neither the carrier nor the ship shall in any event be or become liable:

(*a*) In respect of *total or partial loss* of the goods in an amount exceeding the equivalent of frs. ——— per kilo of gross weight *short*;

(*b*) In respect of *damage* to the goods:

(i) If the whole consignment has been damaged, the amount payable in case of total loss;

(ii) If part only of the consignment has been damaged, the amount payable in the case of loss of the part affected.

39. Should a "per kilo" limitation rule be adopted, the Working Group might wish to consider the addition of a provision establishing a specified minimum liability. A provision stating that "the minimum gross weight of such goods shall be deemed to be . . . kilos" has been suggested in the replies to the Secretariat's questionnaire.[29] It will be noted that such a provision would have special significance in relation to a light-weight shipment of goods of relatively high value, and would enable the shipper to recover for actual loss or damage up to the minimum prescribed therein.

40. At present, the weight is not always indicated on the bill of lading; accordingly, if a limitation rule based only upon weight is adopted, a corresponding amendment to article 3 (3) (*b*) of the Brussels Convention might be desirable. Article 3 (3) (*b*) requires the carrier to issue, on demand of the shipper, a bill of lading showing "*either* the number of packages or pieces, *or* the quantity, or weight, as the case may be, as furnished in writing by the shipper" (emphasis added). The Working Group might wish to consider amending article 3 (3) (*b*) to state:

"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

". . .

"(*b*) the number of packages or pieces or the quantity, as the case may be, *and the weight*, as furnished in writing by the shipper." (Emphasis added.)

3. *Other approaches*

41. Proposals for limitation of liability rules containing other bases of calculation than those discussed above have gained support from time to time. Two examples of these proposals are set out below:

(a) *A limitation based upon "weight or volume"*

42. The CMI Sub-Committee on Bills of Lading considered a limitation system based upon "weight or volume" as one of the alternative ways of amending article 4 (5). In commenting upon the report of the Sub-Committee, one national maritime law association specifically endorsed this alternative and suggested the following draft provision for implementing it:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of . . . francs *per ton or per 40 cubic feet at the option of the claimant*, each franc consisting of 65.5 milligrammes of gold of millesimal fineness 900′, unless the nature and value of such goods have been

[28] During the 1967-1968 Brussels Diplomatic Conference, similar drafts were proposed, separately, by Finland, Norway and Sweden, on one hand, and by the United States on the other. See respectively, Diplomatic Conference on Maritime Law, XII Session (2nd Phase), Brussels, 1968, *Documents*, Vol. I, Doc. No. 4, 6.10.67; and Conférence Diplomatique de Droit Maritime, Douzième session (1ère phase), Bruxelles, 1967, *Procès-Verbaux, Documents préliminaires, Documents de travail*, p. 685.

[29] Inclusion of such a provision was supported in the reply of Norway to the Secretariat's questionnaire; the possibility of such a provision was raised in the reply of Sweden. A provision for a presumed minimum gross weight is contained in the Draft Convention on Combined Transports (TCM) (1971), article 10 (3). CTC IV/18, TRANS/374, annex II.

declared by the shipper before shipment and inserted in the bill of lading".[30] (Emphasis added.)

(b) *A limitation based upon the freight paid*

43. At the Hague Rules Conference in 1923, the French carriers proposed a limitation amount equal to 10 times the freight paid.[31] This basis was not discussed at the 1968 Diplomatic Conference.

4. *Summary of proposals for a basic limitation of liability rule*

44. The principal proposals for a basic limitation of liability rule, as discussed in the preceding paragraphs, are set out below. Words to be added are italicized; words to be deleted are contained in square brackets.

Alternative I

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (*a*) ——— per package or *in the case of goods not shipped in packages, per freight* unit or (*b*) ——— per kilo of gross weight of the goods lost or damaged, whichever is the higher." [32]

Alternative II

Variant A

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (*a*) ——— per package or *other shipping* unit or (*b*) ——— per kilo of gross weight of the goods lost or damaged, whichever is the higher." [33]

Variant B

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (*a*) ——— per [package or] *shipping* unit or (*b*) ——— per kilo of gross weight of the goods lost or damaged, whichever is the higher." [34]

Alternative III

Variant A

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of [frs. ——— per package or unit or] . . . per kilo of gross weight of the goods lost or damaged." [35]

Alternative III-B

Variant B

". . . neither the carrier nor the ship shall in any event be or become liable:

(*a*) In respect of *total or partial loss* of the goods in an amount exceeding the equivalent of frs. ——— per kilo of gross weight *short*;

(*b*) In respect of *damage* to the goods:

(i) If the whole consignment has been damaged, the amount payable in case of total loss;

(ii) If part only of the consignment has been damaged, the amount payable in the case of loss of the part affected.[36]

C. *Other points to consider in presenting a complete limitation rule*

45. In addition to the principal limitation of liability rule, the Working Group may wish to consider other points which relate to limitation of liability and which might be included in a complete text on that subject. A number of such points are listed and described briefly in this section.

1. *Definition of the relevant monetary unit*

46. Article 9 of the Brussels Convention provides that:

"The monetary units mentioned in this Convention are to be taken to be gold value.

"Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pound sterling into terms of their own monetary system in round figures . . .".

Apparently this provision was added to the Brussels Convention in order to promote uniformity among the limitation amounts in different national legislations. In fact, however, national limitation amounts vary widely, as is illustrated by the list of national limitation amounts in appendix I.

47. The Brussels Protocol provides a more precise definition of the relevant monetary unit than that con-

[30] Italian Maritime Law Association, comments on the report of the International Sub-Committee, International Maritime Committee, XXVI Conference, Stockholm, 1963, *Proceedings*, p. 130.

[31] See Rodière, op. cit., p. 417.

[32] Discussed at paras. 23-25 above.

[33] Discussed at paras. 26-31 above.

[34] *Ibid.*

[35] Discussed at paras. 35-37.

[36] Discussed at paras. 38-40 above.

tained in the Brussels Convention. Article 2 (*d*) of the Brussels Protocol states: [37]

"(*d*) A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900′. The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case." [38]

2. *Application of the limitation rules to servants and agents of the carrier*

48. Under article 4 (5) of the Brussels Convention, "neither the *carrier* nor the *ship*" is to be liable for more than the limitation amount in the absence of a declaration of value by the cargo owner. Article 1 (*a*) defines the "carrier" as *including* "the owner or the charterer who enters into a contract of carriage with a 'shipper' ". Thus the Brussels Convention does not expressly limit the liability of servants or agents of the carrier, and in many jurisdictions the courts have declined to extend the coverage of article 4 (5) to those parties by interpretation.[39]

49. Article 3 of the Brussels Protocol contains the following provisions, which would extend the application of the limitation of liability to servants and agents:

"2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entlted to invoke under this Convention.[40]

"3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention."[41]

This provision is retained in the proposed limitation of liability rule, set out *infra* at paragraph 59.

50. While the provision quoted above would add a useful clarification, it may be possible as a drafting matter to include servants and agents in the principal limitation rule, so that a separate rule for servants and agents would be unnecessary. Thus the basic limitation rule might state as follows:

". . . Neither the carrier or his servants and agents nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding . . .".

This drafting suggestion is incorporated in the proposal for a rounded limitation of liability rule, set out at paragraph 59 below. Should this method of drafting be adopted, it might be useful to retain article 3 (3) of the Brussels Protocol, quoted above, as a separate provision. This is done in the above-mentioned proposal.

3. *Effect of wilfully or recklessly caused loss or damage*

51. Uncertainties have arisen concerning the effect of extreme negligence or wilful misconduct of the carrier, his servants or agents on the limitation of liability provisions of article 4 (5).[42] The Brussels Protocol contains rules with respect to loss or damage caused recklessly or wilfully. Articles 2 (*e*) and 3 (4) of the Protocol provide:

"2 (e) — Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."[43]

". . .

"3 (4) . . . a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent

---

[37] Article 4 of the Brussels Protocol deletes the existing article 9 of the Brussels Convention.

[38] Cf. Warsaw Convention, article 22 (4), which also adopts the franc Poincaré; also CIM Convention, article 56, and CMR Convention, article 23 (3), which adopt instead the gold franc "Germinal", defined in both Conventions as "weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900′". Cf. also Hague Protocol, article XI (5): "Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of judgements." The reply of the Federal Republic of Germany stated that the date of conversion of the franc Poincaré into national currencies should not be left to national courts, but should instead be prescribed in the Convention as the date on which a claim arises.

[39] The dominant rule appears to be that the carrier may validly stipulate in his bill of lading that his servants and agents shall have the benefit of the limitation of liability (as well as the other provisions of the contract of carriage). However, in order to be effective, such a stipulation must state very clearly the carrier's intention to extend the limitation provision. See *Bernard Screen Printing* v. *Meyer Line*, 1971 A.M.C. 1887; cf. *Cabot Corporation* v. *S.S. Mormacswan*, 1971 A.M.C. 1130. See also U.S.A., *Robert C. Herd and Co.* v. *Krowill Machinery Corp.* (1959 A.M.C. 879; 79 S. Ct. 766; 359 U.S. 297; France: 1959 D.M.F. 587; C.A. Aix 18.3.1958. U.K.: *Midlands Silicones Ltd.* v. *Scruttons Ltd.* [1959] 1 Lloyd's Rep. 289, QB [1960] 1 Lloyd's Rep. 571 C.A. Australia: *Wilson* v. *Darling Island Stevedoring Company* [1956] 1 Lloyd's Rep. 346. See generally, Selvig, Unit Limitation, op. cit., 157 et seq.

[40] Cf. Article 25A (1) of the Warsaw Convention (added by article XIV (1) of the Hague Protocol), which extends the limitation of liability provision to a servant or agent "if he proves that he acted within the scope of his employment . . .".

[41] Article 25A (2) of the Warsaw Convention contains the same rule.

[42] These uncertainties have centred around the question of whether the words "in any event" should give carriers the right to limit their liability even in cases involving wilful or reckless conduct.

[43] Article 25 of the Warsaw Convention deprives the carrier of the right to limit his liability if damage is caused by his "wilful misconduct" or that of an agent acting within the scope of his employment. This provision is amended by article XIII of the Hague Protocol, which states that "the limitation of liability . . . shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result". Article 29 of the CMR Convention uses the term "wilful misconduct". Article 37 of the CIM Convention provides that in cases of "wilful misconduct or gross negligence . . . full compensation shall be payable for the damage proved not exceeding twice" the maximum that would otherwise be payable under limitation rules.

to cause damage or recklessly and with knowledge that damage would probably result." [44]

52. It will be noted that the above provisions distinguish between "an act or omission of the *carrier*" (article 2 (*e*)) and "an act or omission of the *servant or agent*" (article 3 (4)). Because of this distinction, it may be doubtful whether the limitation on the liability of the *carrier* would be applicable when damage is done intentionally by a *servant* or *agent*. As has been noted in the first report of the Secretary-General, a distinction between acts of "the carrier" and acts of its "servants and agents" is difficult to draw in the setting of modern business organizations, and appears to be inconsistent with current legal developments with respect to the responsibility of business entities. See first report of the Secretary-General (A/W.9/63/Add.1) * paras. 153-156, 163-166. The Working Group at its fourth session, in establishing affirmative, unified rules for the responsibility of the carrier, omitted provisions of the Hague Rules that draw a distinction between the "carrier" and his "servants or agents". Report on the fourth session, para. 28.

53. Under article 25 (2) of the Warsaw Convention, the carrier may not avail himself of various protective provisions, including those on limitation of liability, for specified wilful misconduct by "any agent of the carrier acting within the scope of his employment". Article XIII of the Hague Protocol to this Convention similarly removes the limits of liability for specified acts "of the carrier, his servants or agents". Under Article 29 (4) of the CMR Convention, the carrier may not avail himself of the provisions that exclude or limit his liability if wilful conduct or default "is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage, when such agents, servants, or other persons are acting within the scope of their employment. Cf. Articles 37 and 40 of the CIM Convention.

54. The Convention governing the liability of ocean carriers would be brought into conformity with the approach of other transport conventions by the following draft, which combines Articles 2 (*e*) and 3 (4) of the Brussels Protocol (new language is italicized):

> "Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier, *or of any of his servants or agents (within the course of his employment)*, done with intent to cause damage, or recklessly and with knowledge that damage would probably result. *Nor shall the servant or agent be entitled to the benefit of such provisions with respect to such an act or omission on his part.*"

55. One reply to the Secretariat's questionnaire recommended an "unbreakable" limitation rule, which would apply regardless of the cause of the loss or damage.[45] An "unbreakable" limitation would avoid the litigation and uncertainty that result from claims that the act or omission resulting in damage was done intentionally or recklessly. However, it is probable that such a rule could only be considered in the context of a relatively high monetary limitation amount. If the Working Group should approve this approach, a draft provision could be formulated in a future report in connexion with discussion of specific monetary limitations.

4. *An over-all ceiling upon carriers' liability*

56. Under the "per kilo" rule in article 2 (*a*) of the Protocol, there is no upper limit upon the amount to which the maximum liability can rise in cases involving exceptionally heavy cargoes. The lack of such an over-all limit was discussed at the 1968 Diplomatic Conference, where several delegations submitted proposals designed to establish such a limitation.[46]

57. These proposals eventually were rejected, however, principally on the grounds that they were unnecessary and redundant in view of the existence of the 1957 Convention on global limitation of liability,[47] and because they might unduly limit recoveries in some cases.[48]

58. The decision of the 1968 Diplomatic Conference to reject proposals for an over-all upper limit to carrier's liability was in conformity with the approach of other

---

* UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex.

[44] Article 25 (*a*) (3) of the Warsaw Convention deprives servants and agents of the limitation rules "if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result". Article 29 (2) of the CMR Convention deprives servants and agents of the right to limit their personal liabilities if it is proved that damage was caused by their "wilful misconduct".

[45] See the reply of Norway to the questionnaire on bills of lading.

[46] See, for example, proposal of Denmark, Federal Republic of Germany, Japan and the Netherlands, in Diplomatic Conference on Maritime Law, XII Session, 2nd Phase, Brussels, 1968, *Verbatim Reports*, vol. 21-2, p. 104.

[47] International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, signed at Brussels on 10 October 1957. This Convention allows the carrier to limit his liability to frs. 1,000 for each ton of the ship's tonnage in cases of property claims (frs. 3,000 per ton for claims resulting from loss of life and personal injury), unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner. This Convention supplements, and is not replaced by, the Brussels Convention.

[48] At the 1968 Diplomatic Conference, Sir Kenneth Diplock, head of the British delegation and member of the drafting Committee on Protocol article 2 (*a*), made the following comments regarding an over-all ceiling on carriers' liability: "We did produce a draft which set out... ceilings.... The scheme... was... too complicated to appeal to the majority of nations... and when the figure selected was the highest thought of, 200,000 francs, it became clear to those of us who voted against that proposal that it would cause injustice which might well make many nations refuse to adhere to the Convention. As a matter of arithmetic, at 30 francs per kilo the figure of 200,000 francs is reached at 6.6 tons. Already many containers carry 20 tons, and some carry over 30 tons. In the result, the amount of recovery of anyone with goods in a container not specifically enumerated as packages would depend upon the size of the container in which it happened to be placed. If it was a 6.6-ton container or less, he would get the full amount of 30 [francs per kilogram], if it was a 21-ton container he would only get one-third that amount. If it was a 33-ton container, he would only get one-fifth the amount.... That does not seem to make good sense from the shipper's point of view, or indeed from that of the carrier." See *Verbatim Reports*, vol. 21-2, pp. 151-152.

major transport conventions, all of which establish much higher "per kilo" limitation amounts and do not specify such upper limits. It may also be noted the proposals were to set an upper limit "per package or unit", and this would give rise to the ambiguities discussed above in connexion with those terms.

5. *Summary of proposals for a complete limitation of liability rule*

59. The various provisions that may be necessary to present a rounded limitation of liability rule are set out below in the form of a draft text. Optional words are in parentheses.

Alternative provisions are presented for subparagraph (*a*):

(*a*) Alternative I

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier *or his servants and agents*, nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of ——— per (package or other) *shipping* unit or ——— per kilo of gross weight of the goods lost or damaged, whichever is the higher.

Alternative II

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier *or his servants and agents* nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of ——— per kilo of gross weight of the goods lost or damaged."

(*b*) "A francs means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case."

(*c*)[49] ("Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport plus the *article of transport itself* (when such article is supplied by the shipper) shall be deemed the number of packages or units for the purpose of this paragraph [as far as these packages or units are concerned], except as aforesaid such article of transport shall be considered the package or unit.")

(*d*) The declaration mentioned in subparagraph (*a*) of this paragraph, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

(*e*) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in subparagraph (*a*) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that subparagraph.

(*f*) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier, or of any of his servants or agents (within the course of his employment), done with intent to cause damage, or recklessly and with knowledge that damage would probably result. Nor shall the servant or agent be entitled to the benefit of such provisions with respect to such an act or omission on his part.

(*g*) The aggregate of the amounts recoverable from the carrier, and from his servants and agents, shall in no case exceed the limit provided for in this Convention.

(*h*) Neither the carrier or his servants and agents nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

D. *Principles to consider in establishing a limitation amount*

60. Throughout this report the limitation amount has been left blank on the assumption that the question of specific amounts would be taken up at a future time. Nevertheless, the Working Group may wish to consider *principles* for establishing an appropriate limitation amount. This section indicates alternative principles for consideration by the Working Group.

1. *Restoration of the value of the original limitation amount in 1924*

61. The Brussels Convention established in 1924 a limitation amount of "100 pounds sterlings" per package or unit. As was noted above, [50] the real value of that amount has been severely eroded by inflation during the intervening 49 years, so that the current value of "100 pounds sterling" is only a fraction of the 1924 value.[51] It has been generally recognized that the Brussels Protocol's package or unit limitation amount of "frs. 10,000 Poincaré does *not* restore the original value of "100 pounds sterling". [52] Accordingly, the Working Group may wish to consider whether restoration of the 1924 value of 100 pounds sterling would be a suitable principle for establishing a new limitation amount.

[49] This provision appears in parentheses because it would be unnecessary if a limitation rule based only on weight—as is suggested in alternative II under (*a*) above—should be adopted.

[50] See para. 5 above.

[51] See foot-note 7 above.

[52] The chairman of the Working Party on Limitation of Liability at the 1968 Diplomatic Conference conceded that frs. 10,000 "... is 20 or 25 per cent *lower* than the 100 pounds in gold adopted in 1924, but it is certainly an appreciable improvement on the level to which the limit has in fact fallen in the different countries." Conférence Diplomatique de Droit Maritime, op. cit., 1967, p. 716.

2. *Comparison with other transport conventions*

62. A comparison of the limitation amounts in other major transport conventions would appear to furnish useful guidance. Such a comparison reveals that the Brussels Protocol's "per kilo" limitation amount is much lower than the "per kilo" limitation amounts of other transport conventions, as illustrated in the following table:

TABLE 1

Convention	*Limitation (frs. per kg.)*	*Percentage of Brussels Protocol amount*
Brussels Protocol	30	100
Warsaw Convention [a]	250	833
CIM Convention [b]	496	1,650
CIM Convention, Draft Revision [c]	238	825
CMR Convention [d]	123	414

[a] Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929, 137 League of Nations, Treaty Series 11, Article 22. There are certain qualifications and exceptions to the basic rules of all Conventions quoted herein.

[b] International Convention Concerning the Carriage of Goods by Rail (CIM), signed at Berne, 25 October 1952, United Nations, *Treaty Series*, vol. 241, article 31, p. 427. The actual amount stated in article 31 is "100 francs per kilogramme", but the franc is defined in article 56 as "the gold franc weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900". This monetary unit, sometimes called the "Franc Germinal", is approximately five times as valuable as the Franc Poincaré. To facilitate comparison, the CIM limitation amount of frs. 100 "Germinal" has been converted into Francs Poincaré in table 1 above. See also Protocol of 25 February 1961 and Protocol A of 29 April 1964, article 31.

[c] Draft amendments to the CIM Convention were adopted 7 February 1970 at the 7th Conference for Revision of the CIM Convention, held in Berne. See Office central des transports internationaux par chemin de fer, Berne, "Rapport de Gestion", 1970, p. 6. One of these amendments reduces the limitation amount from 100 to 500 francs "Germinal". The amendments drafted in 1970 have not yet come into force.

[d] Convention on the Contract for the International Carriage of Goods by Road (CMR), signed at Geneva, 19 May 1956, United Nations, *Treaty Series*, vol. 399, article 23, p. 210. Article 23 actually states a limitation amount of "25 francs per kilogram" but, like article 56 of the CIM Convention (see note 3 above), defines the franc as "the gold franc weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900". As was done with the CIM Convention, the CMR limitation amount of 25 francs "Germinal" has been converted into francs Poincaré in the above table, in order to facilitate comparison.

APPENDIX I

Limitation amounts "per package or unit" in selected countries

Country	*Limitation amount*	*Official equivalent in £ sterling*	*Rounded equivalent in US $*
Australia[a]	$400 Australian	47	122
Belgium	17,500 Belgian francs	150	370
Canada	$500 Canadian	192	500
Denmark	1,800 Danish kroner	99	257
Finland[b]	600 new Finnish marks	56	146
France	2,000 francs	150	390
Federal Republic of Germany	1,250 DM	149	388
Greece	8,000 drachmas	102	264
Ireland	£100	101	261
Italy	200,000 lire	131	340
Japan	100,000 yen	123	230
Netherlands	1,250 florins	148	385
Norway	1,800 Norwegian kroner	104	270
Portugal	12,500 escudos	138	359
Spain	5,000 pesetas	31	80
Sweden	1,800 Swedish kronor	145	378
Switzerland	2,000 Swiss francs	203	528
United Kingdom[c]	£100	100	260
United States	$500	192	500
USSR[d]	250 roubles	115	300

SOURCE OF EXCHANGE RATES: International Monetary Fund, *International Financial Statistics*, May 1972, p. 6.

[a] The Secretary-General has been advised that in 1957 an agreement was entered into in Australia between the major shipholders, insurers and shippers whereby the limitation amount was increased from £100 Australian to £200 Australian currency (now $400 Australian).

[b] For claimants domiciled in a foreign State, the limitation amount is 18,000 old Finnish marks in gold (about 1,800 new Finnish marks) if there is a reciprocal agreement between Finland and the foreign State in question that this higher limit will apply as between vessels belonging to the respective States.

[c] British cargo interests, shipowners and insurers concluded in 1950 an agreement that the limitation amount be increased to £200 "lawful money" (British Maritime Law Association Agreement of 1950—popularly known as the "Gold Clause Agreement"). This agreement governs all disputes arising between parties to it, provided that such disputes are heard in the United Kingdom.

[d] Crédit Suisse, *Bulletin*, April/May 1972, p. 31.

APPENDIX II

Texts of article 4 (5) of the 1924 Brussels Convention and articles 2 and 3 of the 1968 Brussels Protocol

A. *International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 26 August 1924*

4 (5) "Neither the carrier nor the ship shall in any event by or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

"This declaration, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

"By agreement between the carrier, master or agent of the carrier and the shipper, another maximum amount than that mentioned in this paragraph may be fixed provided that such maximum shall not be less than the figure above named.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature of value thereof has been knowingly misstated by the shipper in the bill of lading."

B. *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*

Article 2. Article 4, paragraph 5 shall be deleted and replaced by the following:

(*a*) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of frs. 10,000 per package or unit or frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(*b*) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and qualify.

(*c*) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of package or units for the purpose of this paragraph as far as these packages or units are concerned, except as aforesaid such article transport shall be considered the package or unit.

(*d*) A franc means a unit consisting of 67.5 milligrammes of gold of millesimal fineness 900′. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

(*e*) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(*f*) The declaration mentioned in subparagraph (*a*) of this paragraph, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

(*g*) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in subparagraph (*a*) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that subparagraph.

(*h*) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

Article 3. Between articles 4 and 5 of the Convention shall be inserted the following article 4 *bis*:

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention.

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

PART TWO: TRANS-SHIPMENT

A. *Introduction: types of bills of lading*

1. As has been noted in the general introduction to this report, the topics selected for examination by the Commission included the use of "trans-shipment" clauses in bills of lading.

2. "Trans-shipment" takes place when, during the transport of goods under a contract of carriage the carrier who contracted with the shipper (herein termed the "contracting carrier") transfers the goods to another carrier (herein termed the "on-carrier", or "successive carrier"). Trans-shipment may occur in various settings; it is important to distinguish between two different types of trans-shipment provisions.

3. The first type (often called a "through bill of lading" states a "Port of Discharge" at which it is specifically agreed that trans-shipment shall take place. For example, a consignor in Bombay who is sending goods to Tokyo may make a contract with a contracting carrier to carry goods in his vessel to Sydney, and at Sydney to trans-ship the goods with an on-carrier for the voyage from Sydney to Tokyo. Under such an arrangment, the face of the Bill of Lading would be filled in as follows: "Vessel: *S.S. Alicia*; Port of Loading: *Bombay*; Port of Discharge: *Sydney*; Final Destination: *Tokyo*."

4. Included among the printed provisions on the back of the bill of lading may be language such as the following:

"Whether expressly agreed behorehand or otherwise, the carrier shall be at liberty to carry the goods to their port of destination by the said or other vessels either belonging to the carrier or other.... When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's

port of discharge, *the Carrier acts as Forwarding Agent only.*

"The responsibility of the carrier shall be limited to the part of the transport performed by him on vessels under his managment and no claim will be acknowledged by the Carrier for damage or loss arising during any other part of the transport even though the freight for the whole transport has been collected by him." [1]

5. The significant feature of the above bill of lading is that the transfer of responsibility for carriage from the contracting carrier to an on-carrier at an intermediate point (e.g. at Sydney) was specifically provided for in the contract of carriage. It will be noted that the bill of lading provided that in connexion with this transfer of responsibility the contracting carrier acts only as agents for the owner of the goods in arranging for the forwarding of the goods. According to a leading authority in such a case "it appears that the port of discharge for trans-shipment must be considered as an alternative port of discharge under the contract; thenceforward the contract of carriage covered by the bill of lading, it is submitted, terminates and the Hague Rules cease to apply to the carrier who has was a party to it". [2]

6. The second type of bill of lading does not designate an intermediate port of discharge. For example, in a shipment of goods from Bombay to Tokyo, the blanks on the front of the bill of lading would be filled in as follows: "Vessel: *S.S. Alicia*; Port of loading: *Bombay*; Port of Discharge: *Tokyo*".

7. However, the terms of carriage set out on the back of the bill of lading usually include a clause to the effect that the carrier is entitled to trans-ship the goods. For example, the CONLINE bill of lading provides in section 6:

"*whether expressly arranged beforehand or otherwise*, the carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the carrier *or other*, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to trans-ship, land and store the goods either on shore or afloat and reship and forward the same at the carrier's expense but at the merchant's risk". [3]

8. Many bills of lading also contain language, usually within the clause authorizing trans-shipment, to the effect that the contracting carrier and each on-carrier is liable for loss or damage to the goods only while the goods are in his hands. There are a number of variations of this type of clause. The CONLINE bill includes the following:

"... The responsibility of the carrier shall be limited *to the part of the transport performed in his own vessel or vessels*, and the carrier shall not be liable for damage and/or loss arising during any other part of the transport, *even though the freight for the whole transport has been collected by him*" (Section 6).

9. A similar objective is reflected in clauses stating that the cargo is deemed to be delivered when the cargo leaves the contracting carrier's ship. An example of such a clause is the following:

"All responsibility of the carrier in any capacity shall altogether cease and the goods shall be deemed delivered by it under this bill of lading and this contract of carriage be deemed fully perfomed on actual or constructive delivery of the goods for any such person or on-carrier at port of discharge or elsewhere in case of an earlier substitution, trans-shipment or on-carriage." [4]

10. On the other hand, under at least one standard form bill of lading the contracting carrier expressly assumes liability for on-carriage under the following language:

"The goods or part thereof may be carried by the named or other vessels, whether belonging to the Line or others, and should circumstances in the opinion of the carrier, Master or Agent render trans-shipment desirable or expedient may be trans-shipped at any port or ports, place or places whatsoever, and while in course of trans-shipment may be placed or stored in craft or ashore and may be re-shipped or forwarded or returned by land and/or air *at carrier's option and expense, all as part of the contract voyage and all provisions of this Bill of Lading shall continue to apply.*" [5]

B. *Law and practice applicable to trans-shipment clauses*

11. There is at present no international legislation addressed directly to trans-shipment by ocean carriers. In the absence of specific provision in the Brussels Convention of 1924, recourse might be made in some situations to the general requirement in article 3 (2) that the carrier "shall properly and carefully... carry, keep, care for and discharge the goods carried", as buttressed by the provision of article 3 (8) nullifying contractual provisions that purport to reduce the liability of the carrier as set forth in the Convention. However, it does not appear that these provisions are used in any consistent manner to regulate trans-shipment by carriers under the typical trans-shipment clauses in bills of lading.

---

[1] CONLINE-THRU BILL, Liner terms approved by the Baltic and International Maritime Conference. UNCTAD Secretariat Report on Bills of Lading (TD/B/C.4/ISL/6/Rev.1), annex III, part B at section 6.

[2] Carver, Carriage by Sea (12th ed., 1971), pp. 276, 277.

[3] Here and elsewhere, unless otherwise noted, emphasis has been supplied. The standard trans-shipment clauses are summarized in the reply of Australia to the questionnaire at para. 9. Connected portions of the Conline bill of lading were quoted at para. 4, above. See UNCTAD Secretariat Report on Bills of Lading, op. cit. above, note 1.

[4] Gronfors, On-Carriage in Swedish Maritime Law, in Six Lectures on the Hague Rules (Gronfors, ed., 1967), p. 52.

[5] Transatlantic, Australian Homeward B/L 3 (*d*) (emphasis added). See Gronfors, *ibid.*, at p. 52. The approach of this standard bill of lading is specifically favoured in the Czechoslovakian reply to the questionnaire. This approach is reflected in draft proposals in part G, below.

12. Consequently it is generally assumed that trans-shipment clauses will be given effect to limit the carrier's responsibility to the part of the contract voyage during which the goods were on his vessel and before the trans-shipment of the goods to an on-carrier.[8]

13. Under existing practice when trans-shipment takes place the on-carrier either issues a bill of lading or gives the contracting carrier a clean receipt for the goods.[7] Usually the on-carrier issues its own bills of lading. A number of standard trans-shipment clauses, such as may be found in the ALAMAR and in the P and I standard bills of lading, specifically provide that upon trans-shipment the bill of lading of the contracting carrier shall cease to be effective and shall be replaced for the remaining portion of the carriage by that of the on-carrier. However, it is uncertain whether provisions in the on-carrier's bill of lading, which differ from the original bill of lading and which may operate to the detriment of the cargo owner, supersede the provisions of the original bill of lading. Such provisions of the bill of lading could include the clauses on choice of forum and the monetary amount applicable in determining the limitation of liability. An essential issue on which there appears to be no consistent practice is whether the convention remains applicable to the entire voyage or whether the application of the Convention is decided on the basis of the law applicable to each bill of lading issued during the carriage.[8]

14. The question of the responsibility for the transfer by lighter, or otherwise, from the ship of one carrier to the ship of the other and for storage ashore or on board a vessel until the on-carrier takes the goods aboard his vessel, does not appear to have been settled in practice.[9] In this connexion, some bills of lading simply state that the responsibility of the carrier shall be limited to the portion of the carriage performed in his vessels (CONLINE Bill of Lading). Under the present convention, it could be argued that under article 1 (e) the carrier's responsibility continues only until the goods are discharged from his ship, and that under article 7 the carrier could make any agreement "prior to the loading on, and subsequent to the discharge from the ship on which the goods are carried by sea". Other bills of lading, such as the P and I standard bill of lading, are more explicit in providing that during the trans-shipment the cargo owner shall bear the risk of loss or damage and that in addition he shall bear the cost of storage during the trans-shipment.[10]

C. *Problems arising under present law and practice*

15. Trans-shipment clauses respond to the interest of carriers: (1) to permit maximum flexibility with respect to the routing of their vessels and (2) to limit as narrowly as possible the period during which the carrier would be responsible for damage or loss to the goods.

16. On the other hand, the extent to which bills of lading respond to the above interests create problems for the cargo owner.[11]

17. Under present practice, when the bill of lading contains a typical trans-shipment clause, the cargo owner can only recover from the carrier in whose hands the goods were when the damage or loss occurred. However, the cargo owner often does not know where the loss or damage occured. In this situation, it has been suggested, he should bring actions against all the carriers involved in the carriage. Otherwise he will have to bring action against each carrier until responsibility is established.[12]

18. The cargo owner is also left with uncertainty with regard to loss or damage that may be claimed to have occurred during the trans-shipment of the goods from one carrier to another. Under existing clauses, the cargo owner may be forced to bring his claim against the owners of lighters, port authorities, and warehouse operations in the port of trans-shipment. The port of trans-shipment may be far from the cargo owner and ordinarily will have had no direct contact with, and may not even know, the parties involved in the trans-shipment.

19. As has been noted, it is not clear whether the provisions of an on-carrier's bill of lading supersede the original bill of lading. The cargo owner is not certain as to what law will be applied to regulate the on-carriage. The on-carriage bill of lading may be issued in a state which is not party to the Convention. In this event, provisions in the initial bill of lading stating that the contract of carriage ends on trans-shipment may lead to the conclusion that the "new" contract of carriage is not governed by the Convention.

D. *Provisions of conventions governing carriage by air, road and rail*

20. In considering legislative provisions to deal with the problems presented by trans-shipment, the following basic questions call for attention:

(*a*) To what point should the contracting carriage be responsible under the contract of carriage?

---

[6] Scrutton on Charter Parties (17th ed.), p. 418 states that a liberty to trans-ship does not come within the prohibition of article 3 (8) of the Hague Rules "*semble* provided that trans-shipment is reasonable and not inconsistent with proper carriage". Scrutton cites the English case of *Marcellino Gonzalez y Compania* v. *James Nourse Limited* (1936) 1 K. B. 565 for this proposition. It would appear that the problems relating to the validity of the trans-shipment clause are closely related to the most common adverse effect of trans-shipment, that is to say economic loss to the cargo owner due to delay.

[7] Tetley, Marine Cargo Claims (1965), p. 255.

[8] Knauth, Ocean Bills of Lading at pp. 229-230.

[9] See Powers, A Practical Guide to Bills of Lading (1966), 87. In the leading case in the United States, however, "The Lighter Sydney", 114 F. 2d. 72, the court relying on the Harter Act stated "the shipper had been issued a through bill of lading and after doing this the main carriers could not contract against their liability during transshipment".

[10] See annex III to the UNCTAD Secretariat Report on Bills of Lading.

[11] See the replies to the questionnaire from Australia, Austria, Chile, Czechoslovakia, Denmark, Federal Republic of Germany, Iraq, Khmer Republic, Sweden and Turkey.

[12] Tetley, op. cit. above, pp. 255-257.

(*b*) Should the on-carrier (more particulary, the final or "delivering" carrier) be responsible for loss or damage occuring prior to transshipment to him? Or should he be responsible only for loss or damage occurring during his leg of the carriage?

(*c*) Should the on-carrier's responsibility be governed by the terms of the initial contract of carriage and by the Convention?

21. Legislative solutions to these (and related) problems appear in international conventions applicable to carriage by air, by rail and by road. In these conventions, various problems are dealt with in one article, or in related articles that need to be read as a unit. Hence, the provisions of each convention dealing with this group of problems will be set forth below. Thereafter, separate attention will be given to each issue.

1. *Carriage by air: the Warsaw Convention*

22. The Convention for the implication of certain Rules relating to International Transportation by Air, 1929 (The Warsaw Convention)[13] provides in article 1 (3):

> "A carriage to be performed by several successive air carriers is deemed, for the purpose of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or a series of contracts...."

23. Article 30 of this Convention deals with the right of action with respect to passengers, luggage or goods "in the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1..." (quoted above). Paragraph 1 of this article continues that in the case of such carriage:

> "... each carrier who accepts passengers, luggage or goods is subject to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision".

24. With respect to responsibility for *goods* (as contrasted with passengers), a broader rule of responsibility is set forth in paragraph 3 of article 30, which provides:[14]

> "3. As regards... goods, the... consignor will have a right of action against the first carrier and the... consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss damage or delay took place. These carriers will be jointly and severally liable to... the consignor or consignee."

2. *Carriage by road: the CMR Convention*

25. The Convention on the Contract for the International Carriage of Goods by Road (CMR Convention)[15] includes the following:

> *Article 34:* "If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note."
>
> *Article 36:* "Except in the case of a counter-claim or a set-off raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred; an action may be brought at the same time against several of these carriers."

3. *Carriage by rail: CIM Convention*

26. The International Convention concerning the Carriage of Goods by rail (CIM) 1952 (CIM Convention)[16] includes the following:

> "*Article 26. Collective responsibility of railways*
>
> "1. The railway which has accepted goods for carriage with the consignment note shall be responsible for 'ensuring that carriage is effected' over the entire route up to delivery.
>
> "2. Each succeeding railway, by the act of taking over the goods with the original consignment note, shall participate in the performance of the contract of carriage in accordance with the terms of that document, and shall be subject to the resulting obligations...."
>
> *Article 43: Railways against whom an action may be brought. Jurisdiction*
>
> [Paragraphs 1 and 2 deal with action to recover sums paid under the contract of carriage and actions in respect of 'cash on delivery' charges.]
>
> "3. Other actions arising from the contract of carriage may only be brought against the forwarding railway, the railway of destination or the railway on which the cause of action arose...."

E. *Responsibility of the contracting carrier*

27. It will have been noted that the conventions governing carriage by air, road and rail hold the first (i.e. the contracting) carrier responsible for the carriage to the point of destination, even though parts of such

[13] League of Nations, *Treaty Series*, vol. CXXXVII, p. 13.

[14] Article 30 (3) applies the same rules to goods and to the luggage of a passenger. The references to luggage are omitted in the quotation of article 30 (3).

[15] United Nations, *Treaty Series*, vol. 399, No. 5742.

[16] United Nations, *Treaty Series*, vol. 241, No. 3442.

carriage may be performed by other carriers.[17] Under the Warsaw Convention (article 1 (3)), even if the parties contract for air carriage "under the form of... a *series* of contracts", the contract is deemed to be one undivided carriage "if it has been regarded by the parties as a *single operation*". By virtue of article 30 (3), as regards carriage of goods, the consignor apparently can hold the first carrier responsible for loss or damage during carriage by the succeeding carriers.

28. Under the Road (CMR) Convention (article 34) if "carriage governed by a single contract is performed by successive road carriers" each carrier "shall be responsible for the performance of the whole operation". And under article 36, the first carrier is responsible not only to the consignor (as in the Warsaw Convention), but also to the consignee.[18]

29. Similarly, under article 26 or the Rail (CIM) Convention: "The railway which has accepted goods for carriage with the consignment note shall be responsible for ensuring that carriage is effected over the entire route *up to delivery.*"

30. Making the first (or "contracting") carrier legally responsible to the shipper for loss or damage caused by an on-carrier does not, of course, mean that the contracting carrier will bear this loss. If the on-carrier caused the loss, he would be legally bound to indemnify the contracting carrier. And if a claim which is pressed against the contracting carrier reaches litigation, it would be normal for the contracting carrier to invite the on-carrier to assume the defence of the action.[19]

31. Consequently the issue is not who should bear the loss. Rather, the issue is establishing the most efficient mechanism to assure that the party who caused the loss should reimburse the cargo owner. In many cases the cargo owner cannot readily ascertain which of successive carriers was responsible for the loss.[20] Indeed, the question may be in dispute among the carriers. The carriers are normally in a better position to deal with this question than is the cargo owner. The conventions governing carriage by air, road and rail reflect the view that it is more efficient for such questions to be settled among the carriers than to force the cargo owner to choose between (1) bringing simultaneous actions against different defendants[21] and (2) running the risk that an initial action will fail on the ground that the wrong carrier was selected—possibly at a late date when evidence has become stale or the period of limitations has expired.

F. *Responsibility of the on-carrier; The delivering carrier*

32. It will be noted that the conventions governing carriage by air, road and rail also make "the last carrier" responsible to the cargo owner for loss or damage (to goods) even though this loss or damage may not have occurred during his leg of the transport.[22]

33. The underlying considerations are similar to those applicable to the responsibility of the initial (or contracting) carrier. In both situations, the issue is establishing the most efficient mechanism for transferring the loss to the carrier who is at fault. The last, or delivering, carrier in many cases stands in a particularly important spot in the chain of responsibility. Damage to goods usually comes to light only then the goods arrive destination and are examined by the consignee. When trans-shipment occurs, it is more likely that the port of delivery is a regular port-of-call for the final carrier than for the initial (contracting) carrier. In such situations, it would be more feasible for the consignee to press a claim (and, if necessary, institute action) against the delivering carrier than against the initial carrier or against an intermediate carrier.

34. The three transport conventions also provide that the rules of the convention remain in force until the point of delivery to the consignee. These conventions also provide that on-carriers take over the contract of carriage under the terms of the contract between the consignor and the contracting carrier. Thus, under article 30 (1) of the Warsaw Convention (quoted above in paragraphs 23), "each carrier who accepts goods... is deemed to be one of the contracting parties to the contract of carriage...". Under article 34 of the Road (CMR) Convention (quoted above in paragraph 25) each succeeding carrier becomes "a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note". A similar rule is established by article 26 (2) of the Rail (CIM) Convention (quoted above in paragraph 26).

---

[17] Subject to minor exceptions the conventions do not regulate carriage by different types of transit. Thus, the Warsaw Convention deals with successive *air* carriers.

[18] This provision would be relevant if the consignee chooses not to rely exclusively on the liability which the convention also imposes on "the last carrier" and on "the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred".

[19] The reply to the questionnaire by the International Union of Marine Insurance notes that the existence of a trans-shipment clause in the bill of lading has no effect on the rating of the cargo insurance and generally is not known to the cargo insurer. It is further noted that such a clause may influence the possibility of recourse action by the marine insurer against the carrier. However, as recoveries against carriers are performed only when negligence seems to be evident, and the amounts recovered represent only a very small portion of the claims paid, a trans-shipment clause has no major effect on the costs for cargo insurance. Compare the reply of Sweden, which suggests that trans-shipment practices affect the cost of insurance.

[20] The practical problems of securing redress from an on-carrier are discussed in the replies of Czechoslovakia and of the Khmer Republic.

[21] Such are the vagaries of litigation that, at least in some legal systems, it is possible for the action against carrier A to fail on the ground that carrier B was responsible, and for the action against carrier B (usually in a different jurisdiction) to fail on the ground that the responsible party is carrier A.

[22] Under article 30 (3) of the Warsaw Convention the last carrier is responsible to the "*consignee* who is entitled to delivery". No such limitation appears in article 36 of the Road (CMR) Convention or in article 43 (3) of the Rail (CIM) Convention.

G. *Alternative draft provisions*

1. *Definition of "port of discharge"*

35. Problems of trans-shipment under the Brussels Convention of 1924 could be dealt with in various ways. Indeed, the rules developed by the Working Group, at its third session, to regulate the period of the carrier's responsibility might overcome some of the problems presented by trans-shipment clauses.[23] Thus article 1 (*e*) on "carriage of goods" was revised to state:

> "(i) 'carriage of goods' covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage and at the port of discharge."

Paragraph (ii), as drafted by the Working Group, defined the point of delivery in a manner that might make it difficult to give effect to a trans-shipment clause.

36. However, the effect to be given trans-shipment clauses was not discussed by the Working Group at the third session, and it must be assumed that the revision of article I (*e*) does not embody a decision on this question. In any event, the problem of trans-shipment seems sufficiently important and complex to call for statutory provisions addressed specifically to this question.[24]

37. It will be noted that "carriage of goods", under the above definition prepared by the Working Group, continues while the goods are in the charge of the carrier at the port of loading, during the carriage "and at the *port of discharge*". Trans-shipment clauses would raise the question whether transfer of the goods to an on-carrier makes the port where that transfer occurs the "port of *discharge*". Therefore, it might be advisable to supplement the revision of article 1 (*e*) with a provision addressed to this question.

Draft definition of "port of discharge" under article 1 (e)

Alternative A

The "port of discharge" is the port of final destination specified in the contract of carriage.

Alternative B

The "port of discharge" is the port specified in the contract of carriage for termination of the carrier's obligations under the contract.

38. Alternative A is intended to bring this part of the Convention into line with the policy of the other transport conventions. Extending the contract of carriage to the "port of final destination specified in the contract of carriage" would continue the responsibility of the contracting carrier (and the applicability of the convention) even though the contract of carriage stated that at a specified intermediate port the carriage would be continued by a second carrier. (See the discussion of the through bill of lading at paragraphs 3-5, *supra*.) As has been indicated in part E (paragraphs 27-31), this is the result reached under other transport conventions.[25]

39. Alternative B would allow the contracting carrier's responsibility to come to an end at an intermediate port which is "specified in the contract of carriage for termination of the carrier's obligation under the contract". However, since the intermediate port must be "*specified* in the contract", alternative B would not give effect to a *general* clause that the carrier could terminate his responsibility by delivering the goods to a second carrier at a point the carrier would choose.[26]

40. An intermediate position, between that of Alternative A and Alternative B, is set forth in Alternative C, which follows. This draft takes account of the reply of the International Chamber of Shipping to the effect that legislation should not interfere with the contractual arrangment in through bills "since the shipper has full knowledge of the carriers who will ship his cargo". This reply contrasts bills of lading where there is a "named second carrier" with bills of lading where "the first carrier alone is named". For the latter situation, it was suggested that clarification of the carrier's responsibility might be considered. The second sentence in the following draft is addressed to this suggestion.

Alternative C

The "port of discharge" is the port of final destination specified in the contract of carriage. However a specified intermediate port shall be the port of discharge if the

---

[23] Report on third session (A/CN.9/63), para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[24] Amendment of the Brussels Convention to limit the effectiveness of trans-shipment clauses is suggested in the replies to the questionnaire from Australia, Austria, Chile, Czechoslovakia, Denmark, Federal Republic of Germany, Iraq, Khmer Republic, Norway, Sweden and Turkey. The reply of the USSR outlines provisions which might be adopted if the Working Group considers it necessary to formulate provisions on this question in a draft convention. Such provisions include the following: (1) The trans-shipment must be advisable and necessary under the circumstances; (2) The carrier must notify the cargo-owner; (3) In the course of the trans-shipment, the carrier must take due care of the goods; (4) The carrier must exercise due care with respect to delivery of the goods to the port of destination as soon as possible.

[25] Responsibility for the contracting carrier until the goods reach the port of destination was suggested in the replies of Austria, Chile, Czechoslovakia, the Federal Republic of Germany, Iraq, and the Khmer Republic.

[26] The reply of Norway to the questionnaire describes draft legislation, prepared in consultation with other Nordic countries, which includes provisions implementing the principle that the contracting carrier shall be liable for performance of the entire carriage from the port of departure to the port of carriage as determined by the contract. It is noted that, as a consequence, the contracting carrier would be vicariously liable for any carrier whose services he makes use of in the performance of the carriage. This reply notes that other principles embodied in the draft legislation include the following: the contracting carrier shall not be entitled to exempt himself from liability for loss or damage occurring while the goods are in the custody of another carrier except in cases where the parties have expressly agreed, or based their contract on the apparent assumption, that the carriage for the whole or a specified part shall be performed by another carrier. See also the reply of Sweden.

The draft provision of alternative B appears similar to this latter principle. However, the draft does not contain language based on circumstances in which the parties have based their contract on the "apparent assumption" that all or part of the carriage would be performed by another carrier. In the absence of the text of the draft legislation discussed in the Norwegian reply, it has been difficult to ascertain what language could express this thought with the requisite clarity.

contract of carriage provides for delivery of the goods at that port *to a named carrier.*

2. *Draft provisions on responsibility of initial and successive carriers.*

41. Clarifying the term "port of discharge" would not dispose of all the problems that arise on trans-shipment. It may therefore be advisable to consider draft provisions addressed directly to the responsibility of the first and succeeding carriers.

Alternative D

If the contract of carriage is performed by more than one carrier, the first carrier [and the last carrier] shall be responsible to the owner of the goods for performance of the contract of carriage. Any [intermediate] [succeeding] carrier shall be responsible for performance of that part of the contract of carriage undertaken by him.

42. The above draft is intended to embody the substance of the rules on responsibility set forth in article 36 of the road (CMR) Convention (quoted in paragraph 25) and in article 43 (3) of the Rail (CIM) Convention (quoted in paragraph 26). Considerations that underlie the approach of these conventions have been summarized in Part E (paras. 27-31) and Part F (paras. 32-34) of this study. The provision that the first (contracting) carrier "shall be responsible to the owner of the goods for performance of the contract of carriage" is designed to implement the suggestion made in replies to the questionnaire, that the contracting carrier should be vicariously for any other carrier whose services are employed in the performance of the carriage.[27]

43. Conformity with the approach of the other transport conventions would call for retention in the first sentence of the bracketed words "[and the last carrier]" and for the retention in the second sentence of the bracketed word "[intermediate]" rather than "succeeding". On the other hand, if the last carrier is not to be given the same responsibility as the contracting carrier, the bracketed words "[and the last carrier]" in the first sentence should be deleted; in the second sentence the bracketed word "[intermediate]" should be deleted and the word "succeeding" retained in its place.

[27] See the replies summarized in foot-notes 25 and 26, above

PART THREE: DEVIATION

A. Introduction

1. This part of the report responds to the request of the Working Group to consider the problems arising from the present formulation of the rule on deviation in the Brussels Convention of 1924.[1] Article 4 (4) of the Convention reads as follows:

> "4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

2. Criticism has been levelled at this provision of the Convention for not setting forth an adequate definition of deviation, the limits within which deviation is justified and the consequences of unjustified deviation. Various solutions to remedy the defects of the present text have been proposed by many of the Governments who have replied to the questionnaire on bills of lading. Other Governments have indicated their dissatisfaction with one or other parts of article 4 (4) of the Convention. The alternative approaches that have been suggested for dealing with deviation will be set out in this report, together with alternative proposals for modifying the present rules on the subject.

[1] See the general introduction to this report at para. 2.

B. *The "deviation" provision of the convention in the setting of the structure of the convention and customary provisions of the contract of carriage*

3. The relationship between the provision on "deviation" and the other rules of the Convention is complex. The consideration in this study of proposals for modification of article 4 (4) may be aided by a brief introduction to typical commercial and legal settings which bring article 4 (4) into play.

4. This provision, of course, becomes relevant only in the setting of a claim to a cargo owner that he has suffered loss or damage because or breach by the carrier of the contract of carriage or of the rules of the Convention. For example, the goods may have arrived in a damaged condition because of delays in transit that caused spoilage of the goods or caused economic loss because the goods were not available to meet the consignee's economic needs or to fulfil his contractual obligations. In such a case, the consignee's claim may be based on breach by the carrier of his obligation under article 3 (2) to "properly and carrefully... carry [and] care for... the goods...". Or the claim might be based on breach by the carrier of an express or (more likely) an implied undertaking in the contract as to the time for delivery. In response to these claims, the carrier might show that the delay resulted from a "reasonable deviation" which under article 4 (4) "shall *not* be deemed to be an *infringement or breach of the convention* or of the *contract of carriage*, and the carrier shall *not* be liable for *any loss or damage* resulting therefrom".

5. In other cases, the deviation may result in loss or damage because the ship may have run aground, or encountered a severe storm.

6. In still other cases, the goods may not be carried to the destination stated in the contract of carriage, but instead may be unloaded at an intermediate port. The delay while further transportation is found may cause the goods to spoil or deteriorate; or the consignee may be required to pay added expenses for storage at the intermediate port, or for transportation to the agreed destination. In such cases, also, the carrier may assert that delivery at a port other than the agreed destination was a "reasonable deviation" under article 4 (4) so that the carrier "shall not be liable for any loss or damage resulting therefrom".

7. Attempts to apply the concept of "deviation" face this basic difficulty: the contract of carriage usually specifies neither the route the ship shall follow nor the date of arrival. Instead, any undertaking by the carrier as to the route often must be based on customary practices for the ship or of the line—and in the setting of liner carriage such practices may include considerable flexibility as to routing.

8. In the consideration of proposals with respect to the "deviation" provisions of article 4 (4) it will also be helpful to bear in mind certain of the decisions reached by the Working Group at its fourth session (25 September-6 October 1972). At this session the Working Group decided that the 1924 Brussels Convention should be revised to state an affirmative rule of responsibility based on fault, and a unified rule on burden of proof. Both principles were embodied in the first subparagraph of the draft text, prepared by the Drafting Party and approved in substance by most members of the Working Group: [2]

> "1. The carrier shall be liable for all loss of or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [ ], unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or its consequences."

9. The Drafting Party also concluded that under the unified rule on responsibility and burden of proof, it would not be necessary to retain the "catalogue of exceptions", contained in the 14 paragraphs (*c*) through (*p*), which attempted to list circumstances in which the carrier would not be responsible. However, the Drafting Party recommended that paragraph (1) in this list, "saving or attempting to save life or property at sea", be "considered at the February 1973 session, in connexion with the consideration of deviation under article 4 (4), which also, *inter alia*, deals with saving or attempting to save life or property at sea".[3]

C. *The present legal rules and practice on deviation*

10. The present legal rules on deviation are derived from the case law of the national courts, article 4 (4) of the Convention and, in the case of certain countries, from national legislation, which either modifies article 4 (4) of the Convention or uses another approach to deal with deviation. In practice the drafters of bills of lading include clauses whose purpose is to reduce or even remove the possibility that the rules on deviation will be applied by defining the contractual route as widely as possible. These clauses will be considered below in connexion with the definition of deviation.

1. *Definition of deviation*

11. Deviation has generally been defined as a departure from the expected route for the voyage not provided for either by the contract of carriage or by trade customs. According to a leading textbook on the subject "in the absence of express stipulations to the contrary, the owner of a vessel, whether a liner or general ship or a ship chartered for a particular voyage, impliedly undertakes to proceed in that ship by a usual and reasonable route without unjustifiable departure from that route and without unreasonable delay. *Prima facie* the route is the direct geographical route; but evidence is admissible to prove what route is usual and reasonable for the particular ship at the material time, provided that it does not involve any inconsistency with the express words of the contract. A route may be a usual and reasonable route though followed only by ships of a particular line and though recently adopted." [4]

12. Bills of lading generally contain a clause variously called a "scope of voyage" or "deviation", clause whose purpose is to define the scope of the voyage sufficiently widely so that although the ship may depart from the direct or usual route, such a departure will be considered a part of the contractual route and therefore not a deviation. Such a "scope of the voyage clause" is set forth in Section 5 of the CONLINE Bill of Lading, which provides:

> "the contract is for liner service and the voyage herein undertaken shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding, thereto, the vessel may sail beyond the port of discharge or in a direction contrary thereto or depart from the direct or customary route. The vessel may call at any port for the purpose of the current voyage or of a prior or subsequent voyage. The vessel may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; (it) may, either with or without the goods

[2] Report on fourth session (A/CN.9/74, reproduced in this volume, part two, IV, 1, above), paras. 28, 36.

[3] *Ibid.*, para. 28 (b). See also paras. 23-25, 30. As to approval by the Working Group see para. 36.

[4] Scrutton on Charter parties and Bills of Lading, 17th ed. (1964), p. 259. See Gilmore and Black, the Law of Admiralty (1957), p. 156; Katsigeras, Le Déroutement en Droit Maritime Comparé (1970), pp. 8-11. Katsigeras distinguishes between nautical customs and trade customs, both of which are elements in determining the usual and reasonable route.

on board, and before or after proceeding towards the port of discharge, adjust compasses, dry-dock, go on ways or to repair yards, shift berths, undergo de-gaussing, wiping or similar measures, take fuel or stores, land stowaways, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or property, and all of the foregoing are included in the contract voyage." [5]

13. The P and I model bill of lading in its "voyage" clause, in addition to language similar to that set forth above, also provides that:

"... all such routes, ports, places, sailings and actions shall be deemed to be included within the contractual and intended voyage and any departure in pursuance of the liberties hereby conferred shall not be deemed a deviation in law; the liberties hereby conferred shall not be considered as restricted by any words in this Bill of Lading, whether written or printed or by any circumstances attending or preceding the shipment of the Goods or by the nature of the Goods or construed by reference to whether any departure pursuant to such liberties would or would not frustrate the object of this Bill of Lading, any custom or rule of law notwithstanding and notwithstanding unseaworthiness or unfitness of the vessel at the commencement or at any stage of the voyage." [6]

14. Although it would appear that "deviating" from the contractual voyage as contemplated in the "deviation clauses" above is hardly possible, courts have decided that such clauses must be restrictively interpreted and that such interpretation must be consistent with the requirement of article 3 (2) that the carrier shall properly care for the goods, and the restriction under article 3 (8) that any clause in the contract of carriage relieving the carrier of liability for loss or damage or lessening such liability shall be null and void. Generally the standard applied in deciding on the validity of "deviation" clauses has been their reasonableness taking into account the circumstances and the interest of the parties.[7]

15. The concept of deviation has also been used in cases where the cargo is discharged in a port other than the port of destination. However, bills of lading usually include a clause authorizing discharge of the goods in a port other than the port of destination. For example, the CONLINE liner bill of lading provides in sections 16 (*c*) and (*d*):

"(*c*) Should it appear that epidemics, quarantine, ice-labour troubles, labour obstructions, strikes, lock-outs, any of which on board or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or in any other safe and convenient port.

"(*d*) The discharge under the provisions of this clause of any cargo for which a bill of lading has been issued shall be deemed due fulfilment of the contract...."

16. The courts have generally considered such clauses to be valid. In a leading English case, when a ship, prevented by a strike from reaching the port of destination named in the contract, proceeded to a substituted port of discharge in accordance with a clause in the bill of lading, it was held that there was no "deviation" but only a "change of voyage".[8] It has been suggested that in these cases the essential point is that since the reason for the change in the voyage was specifically provided for in the contract, the change itself fulfils the contractual obligation of the carrier.[9]

2. *Deviation to save life or property at sea*

17. Article 4 (4) of the Brussels Convention provides that "any deviation in saving or attempting to save life or property at sea... shall not be deemed to be an infringement or breach of this convention or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom".

18. The carrier's freedom from liability when he deviates to save life at sea has given rise to no controversy. The freedom from liability in deviating to save property, when this action is not taken in connexion with the saving of life, has been criticized on the ground that it permits the carrier to gain substantial profit which is often accompanied by loss or damage to the goods on the ship.[10]

3. *Reasonable deviation*

19. Article 4 (4) of the Brussels Convention of 1924, provides that "... any *reasonable* deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom...".

20. Whether a deviation is reasonable or not has been left for the courts to decide on the basis of the facts in the specific case. No specific formulation of the definition of reasonable deviation has been made, but in the leading English case of *Stag Line* v. *Foscolo Mango and Co.* the following general criteria were set out:

"A deviation may and is often caused by fortuitous circumstances never contemplated by the original parties to the contract and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither; as for instance, where the presence of a passenger or a member of the ship or crew was urgently required after the voyage had begun, on a matter of material importance; or where some person

[5] See UNCTAD secretariat report on bills of lading, annex III.

[6] *Ibid.*

[7] See Gilmore and Black, the Law of Admiralty (1957), pp. 157-158.

[8] Renton *v.* Palmyra (*1955*), 2.LI.L Rep. 722, affirmed by House of Lords (1956), 2.LI.L Rep. 329. See Dor., op. cit. at p. 45.

[9] Katsigeras, op. cit., at p. 56.

[10] See Katsigeras, op. cit., at pp. 24-25.

on board was a fugitive from justice and there were urgent reasons for his immediate appearance. The true test seems to be, what departure from the contract voyage might a prudent person, controlling the voyage at the time, make and maintain having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interest of all parties concerned but without obligation to consider the interests of any as conclusive."[11]

21. In the above case, *Stag Line* v. *Foscolo Mango and Co.*, a bill of lading for goods shipped from Swansea to Constantinople gave "liberty to call at any ports in any order for bunkering or other purposes all as part of the contract voyage". When the vessel sailed from Swansea engineers were taken on board to test certain newly installed machinery. The ship deviated to St. Ives in order to land the engineers after their tests had been completed. It was held that the deviation did not come within the clause. The words "other purposes" should be construed in their context as meaning calls a port for some purpose having relation to the contract voyage. The engineers had been taken on board quite independently from any purposes connected with the contract voyage. The Court stated:

"The purposes intended are business purposes which would be contemplated by the parties as arising in carrying out the contemplated voyage of the ship. This might include in a contract other than a contract to carry a full and complete cargo a right to call at a port or ports on the geographical course to load or discharge cargo for other shippers. It would probably include a right to call for orders. But I cannot think that it would include a right such as was sought to be exercised in the present case to land servants of the shipowners or others who were on board at the start to adjust machinery, and were landed for their own and their owners' convenience because they could not be transferred to any ingoing vessel." [12]

22. Examples abound of judgements determining whether in a given situation the deviation by the carrier was reasonable or unreasonable. A few examples may suffice to give an idea of the variety of situations in which the courts are called upon to decide whether the deviation was reasonable. Deviation to take on fuel has given rise to much case law. If such deviation takes place on the usual route of the voyage envisaged it will generally be considered reasonable. On the other hand, where there was a deviation of four miles from the contracted and usual route for the purpose of filling the ship's bunkers to their capacity, since the shipowners wanted to ensure that the maximum quantity of fuel would be left over on the completion of the voyage so the fuel could be used by the ship in a new voyage, the deviation was considered to be unreasonable.[13] Deviation because of strikes, quarantine at the port of destination, and the outbreak of war necessitating rerouting have been considered reasonable.[14] However, discharge of cargo in Puerto Rico instead of Havana because of fear that the cargo would be confiscated was not considered to be reasonable, despite the inclusion of clauses in the bill of lading that, *inter alia*, permitted the carrier to discharge goods into a safe place in order to prevent seizure or detention; the court concluded that the political situation was well known when the bills of lading were signed.[15]

23. In cases of necessity a deviation will generally be considered to be reasonable; these might include storms, icebergs or other dangers of navigation, or injured seamen.[16] It has been held that "where a vessel sails in flagrant unseaworthy condition and is forced to return to port for repairs she is guilty of a deviation".[17] Generally, it would appear that a deviation which in itself might be considered to be reasonable becomes unreasonable if it was necessitated by a fault of the carrier.[18]

24. The rules on what is reasonable deviation are affected in some countries by legislation on the subject that either (1) attempt to set out limits for what is permissible deviation, or (2) approach the question of what is permissible deviation in another manner.

25. The United States Carriage of Goods by Sea Act sets out in Section 4 (4) the same language as Article 4 (4) of the Brussels Convention of 1924, with the addition of the following:

"... provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, *prima facie*, be regarded as unreasonable." [19]

26. A leading authority observes that "the rationale of the rule ... seems to be that the carrier ought not to be allowed to deviate with no other motive than the increase of his own revenues; thus, the proof required to overcome the *prima facie* unreasonableness of such a deviation would have to show something more than mere reasonableness from the point of view of the carrier.... Of course this proviso does not imply that any deviation, other than for the two purposes above is 'reasonable'; it simply makes it easier to establish unreasonableness in the named cases".[20]

27. In France the Law of 1966 which, in general, incorporates the rules of the Brussels Convention of 1924 does not mention deviation, except that the list

[11] *Stag Line* v. *Foscolo Mango and Co.* (1932), AC 328.

[12] *Id.* at 341.

[13] The Macedon (1955), LLL L Rep. 459.

[14] See Katsigeras, op. cit., pp. 40-41, Tetley, op. cit., at p. 206. (Carriers have been held liable for damage caused by delay due to deviation.) Scrutton, op. cit., at p. 266.

[15] The Ruth Ann, AMC 1962, p. 117.

[16] Scrutton, op. cit., at p. 267, Katisgeras, op. cit., at p. 41.

[17] Tetley, op. cit., at p. 206, citing cases.

[18] Katsigeras, op. cit., at p. 30, who cites a United States Supreme Court case and a House of Lords case.

[19] 46 USCA SECTIONS 1300-1315. The same provision is to be found in the laws of Liberia and the Philippines, see Katsigeras, op. cit., at p. 47.

[20] Gilmore and Black, op. cit., at pp. 158-159.

of exemptions from liability includes saving, or an attempt to save, lives or property at sea or deviation for such purpose.[21] Although the law itself does not mention deviation, the result under the French law is similar to that under Article 4 (4). Although the master of the ship must proceed by the usual route to the place of destination, the general rules of law permits certain deviations that are reasonable.[22]

4. *Burden of proof*

28. Under Article 4 (4) of the Convention, the burden of proof for proving the reasonableness of the deviation does not appear to be placed wholy on either the shoulders of the carrier or of the cargo owner. It has been pointed out that if there is a rule on burden of proof as to deviation, the rule *probably* is that (i) the carrier may present evidence that the voyage followed the customary pattern as to route and time and that the loss took place on that route; (ii) the cargo owner must present evidence that the deviation took place and (iii) the carrier must show that the deviation was reasonable.[23] Under the approach of the French law, discussed above at paragraph 27, the carrier will have to show that he did not commit a fault in deviating. This is essentially the same burden as proving that the deviation was reasonable.[24]

5. *Legal effect of deviation*

29. Two sharply different approaches are presently used in dealing with the legal effect of deviation.

30. The first approach is that of Article 4 (4) of the Brussels Convention of 1924 which has as its purpose the exculpation of the carrier from responsibility for the loss or damage to goods, under the standard set forth in the Convention for such responsibility, when he has deviated from the route to save lives and property or when he has effected a reasonable deviation.

31. The second approach, followed in the Common law countries, is that unjustified "deviation" [25] is a fundamental breach of the contract of carriage which deprives the carrier of the exemptions from liability set out in certain clauses of the bill of lading as well as from certain provisions of the Convention. Under English law, the carrier is considered to have responsibility of a *common carrier*, but his responsibility is limited by the limitation of liability rules of Article 4 (5) of the Brussels Convention of 1924.[26] In the United States an unjustified "deviation" renders the carrier an insurer of the goods; moreover, since he loses the protection of the bill of lading clauses and the rules of the Convention he will not be entitled to rely on Article 4 (5) of the Convention to limit the upper reach of his liability.[27]

D. *Proposed alternatives for dealing with "deviation"*

1. *Maintaining the present Convention rule on deviation with the addition of language specifying limits on what is reasonable deviation*

(a) *Substantive rule*

32. Under this proposed alternative Article 4 (4), the present rule of the Convention on deviation, would be maintained. In addition, however, language such as is found in the United States Carriage of Goods Act (Section 4 (4)) would be added to state specific limits on what is reasonable deviation.[28]

33. The proposed draft would read as follows:

Draft proposal A

Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom, provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, *prima facie*, be regarded as unreasonable.

The proviso would respond to the desire that the carrier ought not to be permitted to deviate for the sole purpose of increasing his profits.

(b) *Burden of proof rule*

34. It has been suggested that a positive rule on burden of proof should be introduced into the provision

---

[21] Law No. 66420, 18 June 1966, Art. 27 (i). The Italian *Codice della Navigazione* and the Laws of Lebanon, Syria, Indonesia and Surinam are to the same effect. See Katsigeras, op. cit., at p. 48.

[22] Rodière, *Traité général de droit maritime*, pp. 230, 231. Katsigeras, op. cit., at pp. 48-49.

[23] See Tetley, op. cit., at p. 209.

[24] Katsigeras, op. cit., at p. 49.

[25] In the United States and possibly in England (Scrutton, op. cit., at p. 260) the concept of deviation has been extended to deal with unjustified acts of the carrier where no change of route is involved. A leading authority in the United States has explained that the concept of deviation has been thus extended "on the theory that various forms of misconduct of the carrier are so serious as to amount to a departure from the whole course of the contract, with the consequence that the bills of lading protection is ousted, as in the case of deviation properly so called". Gilmore and Black, op. cit., at p. 161. Examples of such "deviation" from the contract are: carriage on deck (when carriage under deck is required), over-carriage, unreasonable delay. The consequences of these serious intentional breaches of the contract of carriage should, it would appear, be dealt with in a general rule on the consequences of intentional acts. In this connexion it would be relevant to examine Article 2 (*e*) of the Brussels Protocol of 1968 which removes the benefit of the limitation of liability "if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result".

[26] Chorley and Giles, Shipping Law (1970), p. 187.

[27] Gilmore and Black, op. cit., at pp. 156-160.

[28] See replies to the questionnaire from Turkey, Austria and Denmark. The reply from the Government of Denmark states: "The existing Danish legislation in this area which is based upon Article 4 (4) of the Brussels Convention of 1924 has not given rise to difficulties in practice and must on the whole be considered as satisfactory. For this reason it is not deemed necessary to change the convention in this respect, and it is feared that an attempt to define the limits within which deviation from the expected route of the ship will be permitted will raise great difficulties."

of deviation.[29] The general practice regarding burden of proof has been discussed above at paragraph 28. A positive rule on the burden of proof that would appear to be consistent with present practice would be the following:

Draft proposal B

The carrier shall bear the burden of proving that the deviation was reasonable.

This proposal should be examined in the light of the burden of proof rule adopted by the Working Group and set out above at paragraph 8.

2. *Setting forth a definition of deviation in the Convention*

35. Consideration has been given to the possibility of setting forth a definition of "deviation" in the Convention.[30] This examination has disclosed that a vital aspect of the central problem of deviation, in its practical application, is the question of responsibility for delay. Problems regarding delay, however, may result from circumstances other than deviation; consequently, it may be necessary to consider a general rule that gives effect to the time for delivery that is expected under the contract of carriage. The basic question of responsibility for delay has not been included in the specific topics for examination by the Working Group, and has not yet been studied. This topic, however, has been suggested for future work. It would seem appropriate to approach any future attempt to define "deviation" as part of the possible examination of the basic question of responsibility for delay.[31]

3. *No separate Convention provision on deviation and a Convention provision setting forth a general rule on the saving of life and property at sea.*

(a) *No separate Convention provision on deviation*

36. One approach would delete the provision on deviation set forth in Article 4 (4) of the Brussels Convention of 1924. Under this approach the carrier would be liable for the loss or damage resulting from deviation, if such deviation cannot be justified by the carrier, on the basis of the general standard of carrier liability. Thus, under the basic rule of liability adopted by the Working Group at its fourth session and quoted above at paragraph 3, the carrier is liable for all loss or damage to the goods "unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or its consequences". This approach is also suggested in the Norwegian reply to the questionnaire.[32]

(b) *Provision in the Convention setting forth a general rule on the saving of life and property at sea*

37. As has been set out above at paragraph 9 the Drafting Party of the Working Group, at the fourth Session of the Working Group, recommended that "saving or attempting to save life or property at sea" be "considered at the February 1973 session, in connexion with the consideration of 'deviation' under Article 4 (4), which also, *inter alia*, deals with saving or attempting to save life or property at sea".

38. The effect of the proposal to delete Article 4 (4), if combined with the elimination of paragraph (1) of the "Catalogue" of exceptions in Article 4 (2) of the Convention, would result in the absence of any rule regarding the saving of life or property at sea.

39. Retention of the rule with respect to the saving of *life* at sea has widespread approval. On the other hand, an unqualified immunity from liability for loss to the ship's cargo resulting from saving *property* has been criticized on the ground that its result could permit the shipowner to engage in the saving of property for his own profit and to the detriment of the cargo carried on his ship. It has been suggested in the Swedish reply to the questionnaire that the carrier should only undertake to save property at sea if it is reasonable to do so.

40. Alternative draft proposals, that would assume the deletion of Article 4 (4), might read as follows:

Draft proposal C

The carrier shall not be liable for loss or damage resulting from measures to save life and [from reasonable measures to save] property at sea.

Draft proposal D

The carrier shall not be liable for loss or damage resuling from reasonable measures to save life or property at sea.

---

[29] See reply to the questionnaire by the USSR and the UNCTAD Secretariat Report on Bills of Lading at para. 260.

[30] Such a proposal is supported in the reply of Czechoslovakia to the questionnaire.

[31] See paragraph 3 above for example of the basic relationship of delay to deviation.

[32] The Norwegian reply observes that, "it may be questioned whether in liner trade, the concept of deviation of the Convention Article 4 (4) add much to what already follows from the general rule as regards the duties of the carrier, including the duty of proper carriage, contained in its Article 3 (2). In the submission of the Norwegian Government the test of reasonable deviation and the test of proper carriage are for all practical purposes identical, both requiring that due regard be had to the cargo owner's interest in safe and expedient carriage of the goods to the destination, and both imposing liability on the carrier for failure to do so. The implication is that the provision as regards deviation could—as the more special one—be deleted as superfluous. On the other hand, in view of the importance of the problems involved, the carrier's duty of proper carriage should perhaps be expressed in a more explicit and accentuated form in the new rules on the carriage of goods by sea."

PART FOUR: THE PERIOD OF LIMITATION

A. *Introduction*

1. As was noted in the general introduction to this report, the programme of work on international shipping legislation developed at the fourth session of UNCITRAL included the topic "extension of the period of limitation".[1] The resolution adopted by UNCITRAL also established general objectives which included the "removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and carrier . . .". Consequently, the present study considers these objectives in the examination of the period of limitation for suit by the cargo-owner against the carrier.

2. The Brussels Convention of 1924, in article 3, paragraph 6, sets forth rules on two distinct issues: (1) the giving of notice to the carrier of loss or damage; and (2) a period of limitation for instituting suit against the carrier. This second issue, which is the subject of the present study, appears in the fourth subparagraph of article 3, paragraph 6, which provides:

"6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as descrived in the bill of lading.

"If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

"The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

"*In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.*

. . ."

3. The above provision on limitation in the 1924 Convention should be read with article 1, paragraphs 2 and 3 of the Brussels Protocol of 1968, which provides:

"2. In article 3, paragraph 6, subparagraph 4 shall be replaced by:

"Subject to paragraph 6 *bis* the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. *This period may, however, be extended if the parties so agree after the cause of action has arisen.*"

"3. In article 3, after paragraph 6, shall be added the following paragraph 6 *bis:*

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

It will be noted that the Protocol of 1968 would modify the rules of the 1924 Convention in two respects: (1) by explicitly authorizing agreements extending the period of limitation; (2) by assuring a limited period for indemnity actions. These issues will be discussed later in this study.

B. *Types of claims barred by limitation*

1. *Problems of construction with respect to the scope of the present rules*

4. The limitation provisions of the Brussels Convention of 1924 gave rise to serious problems of construction with respect to types of claims to be governed by those provisions. The Brussels Protocol of 1968 has alleviated but has not wholly solved these problems. The Working Group may wish to consider whether the scope of the limitation provisions can further be clarified.

5. The Brussels Convention of 1924 states that the carrier and the ship shall be discharged from "all liability in respect of *loss or damage . . .*" unless suit is brought within a prescribed period. (See the fourth subparagraph of article 3 (6), quoted above at para. 2.) The Brussels Protocol of 1968 would replace the above-quoted expression by: "all liability *whatsoever in respect of the goods . . .*". (See article 1 (2) of the Protocol, quoted above at para. 3.) In comparing these provisions, it will be noted that the Protocol adds the word "whatsoever"; the Protocol also deletes the words "loss or damage" and employs, instead, the expression "in respect of the goods". By these modifications the Protocol would broaden somewhat the scope of the limitation rules as set forth in the earlier Convention.

6. The words "loss or damage" in the Brussels Convention of 1924 carried the possible implication that the limitation rules were confined to claims based on physical loss or damage, and excluded claims for financial loss resulting from delay in delivery (where there was no "loss or damage" to *goods*).[2] Arguments for the narrow scope of the limitation provision are reinforced by the

[1] See the general introduction, at para. 2; UNCITRAL, report on the fourth session (1971), para. 19; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

[2] See: Carver, *Carriage by Sea*, vol. I, paras. 224-229; Manca, *International Maritime Law*, vol. II, p. 216; Scrutton, *Charter parties*, pp. 416-417; *See*: Commercio Transito Internationale *v.* Lykes Bros., 157 A.M.C. 1188 (limitation rule governs claims for delay); *Contra*: United Merchants and Manufact. *v.* U.S. Lines, 126 N.Y.S. 2d 560.

position of this provision in the Brussels Convention as one subparagraph in article 3, paragraph 6, which deals for the most part with the "notice of loss or damage" to be given to the carrier "before or at the time of the *removal of the goods* into the custody of the persons entitled to delivery". (These provisions of art. 3, para. 6 are quoted in para. 2 above.) Other provisions in article 3, paragraph 6, relate to whether the "loss or damage" is "apparent", and deal with the consequences of a "joint survey or inspection" of the goods. These references to physical "loss or damage" in the first three subparagraphs of paragraph 6 reinforce the argument that the fourth subparagraph, on limitation with respect to "loss or damage", deals with *physical* loss.

7. On the other hand, the rules of article 4 (2) setting forth exemptions from liability "for loss or damage" have not been so limited.[3] A broader scope is also given to article 3 (8), which bars contracts relieving the carrier "from liability for loss or damage to or in connexion with goods . . .".

8. Consideration of policy also favour a broad reading of the rules on limitation. The objectives of speedy settlement of claims, of certainty in legal relationships and of unification of law would scarcely be served by providing that claims for physical loss would be governed by the limitation rules of the Convention while closely related claims based on the contract of carriage (such as claims for delay) would be governed by the varying rules of national law.

9. As has been noted, the language of the Protocol of 1968—"discharged from all liability *whatsoever in respect of the goods*"—may broaden the scope of the rules on limitation. However, the concluding phrase "in respect of the *goods*" might be construed as preserving the implication of physical damage to *goods* (as contrasted with economic loss to the *owner*).

10. The basic period of limitation under article 46 (1) of the Rail (CIM) Convention governs "an action arising out of the contract of carriage". Under article 32 (1) of the Road (CMR) Convention the basic period applies to "an action arising out of carriage under this convention". In addition, both conventions refer specifically to the limitation period applicable to "partial loss, damage or *delay* in delivery".

2. *Possible clarification of the scope of the rules on limitation*

11. The Working Group may find it desirable to retain as much as possible of the language of article III, paragraph 6 of the Convention of 1924, as modified by the 1968 Protocol. For instance, the reference to discharge from liability of "the carrier *and the ship*" has special significance in relation to maritime actions that are brought *in rem* against the ship.

12. Alternative draft provisions, based on the language of the 1968 Brussels Protocol, but adapted to incorporate relevant language of the Road (CMR) Convention, are as follows:

Alternative A

(*a*) The carrier and the ship shall be discharged from all liability whatsoever *in respect of carriage of the goods* [*under this convention*] unless suit is brought. . . .

Alternative B

(*b*) The carrier and the ship shall be discharged from all liability whatsoever *arising out of the contract of carriage*, unless suit is brought. . . .

3. *Applicability of the period of limitation to arbitration*

13. It does not appear to be clear from the case law in many jurisdictions whether the expression "suit" as used in article 3 (6) (4) of the Brussels Convention is confined to an action at law or whether it also includes arbitration proceedings.[4] It is important for the claimant to know whether an arbitration clause (either contained in bills of lading or incorporated by reference) is subject to the period of limitation of the Brussels Convention.

14. The Working Group may wish to consider whether the draft provision should specify that the term "suit" includes arbitration proceedings.[5] A draft provision that supplements Alternative A, above, with a provision on arbitration is as follows:

Draft provision on the scope of the rules on limitation [6]

(*a*) The carrier and the ship shall be discharged from all liability whatsoever in respect of carriage of goods unless suit is brought *or arbitration* proceedings are initiated within [one year] of the commencement of the period of limitation.

4. *Claims based on tort or on wilful misconduct*

15. Neither the Brussels Convention of 1924 nor the 1968 Protocol include specific provisions in the limitation rules dealing with actions based on tort or on wilful misconduct. As has been noted, the 1968 Protocol broadened the language of the limitation rules to embrace "all liability *whatsoever* in respect of the goods". However, the concluding phrase "in respect of the *goods*" could be used as a basis for limiting the scope of the provision.

[3] See Scrutton at pp. 416-417, citing Adamastos Shipping Co. *v.* Anglo-Saxon Petroleum Co. (1959), A.C.

[4] Although "arbitration has, in modern times, been regarded as a legal proceeding . . .", see United Nations Secretariat memorandum on arbitral procedure, A/CN.4/35 of 21 November 1950, para. 85, p. 174, in *Yearbook of the International Law Commission*, vol. II, 1950.

[5] Many replies to the questionnaire endorsed the view that arbitral proceedings should be placed on an equal footing with judicial proceedings for the purpose of limitation of action. This is the general tenor of the replies of the Governments of Argentina, Australia, Czechoslovakia, Norway and Sweden. In this connexion the Government of Czechoslovakia suggests in its reply a possible provision which would read ". . . unless suit is brought or arbitration proceedings are initiated in accordance with the Rules governing the arbitration, within one year after delivery of the goods or . . .". On the other hand, the reply of the Government of Iraq observed that the term "suit" may be defined to exclude arbitration proceedings.

[6] This draft and proposals relating to other aspects of the period of limitation are consolidated in the Draft Provisions on the Period of Limitation in section G at para. 68, below.

16. The 1968 Protocol in article 3 provided that a new article 4 *bis* should be inserted between articles 4 and 5 of the Convention. The new article states:

> "The defences and limits of liability provided for in this Convention should apply in any action against the carrier in respect of *loss or damage to goods* covered by a contract of carriage, whether the action be founded in contract *or in tort*."

17. The Rail (CIM) and Road (CMR) Conventions contain specific provisions governing the limitation of actions based on wilful misconduct. Thus, both conventions establish a basic limitation period of one year, but provide that the period shall be *three* years: [7]

(*a*) *CIM*, article 46 (1) (*c*): in the case of "an action for loss or damage caused by wilful misconduct".

(*b*) *CMR*, article 32 (1): "in the case of wilful misconduct, or such default as in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct".

18. The treatment of claims based on wilful misconduct can be approached as either a question of (1) the scope of the limitation rules or (2) the length of the period.

19. With respect to the first question—the scope of the rules—as we have seen, both the Rail (CIM) and Road (CMR) Conventions do not exclude claims based on wilful misconduct from the limitation provisions. There are reasons of policy that support this approach. In practice, it may often be difficult to predict whether a court will conclude that the alleged conduct on which the claim is based could be characterized as "wilful misconduct", or at least "such default as . . . is *considered* as *equivalent* to wilful misconduct". Predictability and uniformity might be jeopardized if the varying rules of national law were applicable to such claims.

20. Litigation over the elusive bundary-line surrounding claims of "wilful misconduct" (and the temptation to avoid the barrier of the expired period of limitation by casting one's claim in such terms on the basis of doubtful or false evidence [8]) would be avoided if the same limitation period were applicable to all types of claims. Whether this approach would be unfair to claimants can best be decided in connexion with the length of the basic period of limitation,[9] which will be considered in section D of this study at paragraph 46, below.

[7] Cf. article 25 of the Warsaw Convention of 1929 on International Carriage by Air (general exclusion of provisions of the Convention which "exclude or limit" the carrier's liability). See also articles 2 (*e*) and 3 (4) of the Brussels Protocol of 1968 (removal of limitation of liability) discussed in part one of this report (Unit Limitation of Liability), section C (3), at para. 51.

[8] The ability, in practice, to appraise such evidence of course diminishes with the passage of time. It might be thought that the passage of time would make it more difficult to prove a false claim; however, there may be truth in the unpleasant saying of legal practice that "a liar's memory is always fresh".

[9] The adequacy of the basic limitation period is also affected by whether it would be possible to suspend the running of the period by a written claim. See section D (2), at paras. 51-53, below.

C. *Commencement of the period*

21. Under both the Convention of 1924 and the Protocol of 1968, the period of limitation commences "after delivery of the goods or the date when the goods should have been delivered".[10] To avoid litigation and the loss of rights, the day from which the period of limitation runs needs to be clearly defined; the question arises whether the present rule meets these objectives. Replies to the questionnaire indicated that consideration should be given to prescribing more definite starting points for the inception of the period of limitation.[11]

1. *The practical situation*

22. In considering the appropriate starting point for the period of limitation it would be helpful to take account of what happens in practice when a cargo-owner applies for delivery of his goods at or about the agreed or implied time for delivery in the contract of carriage.

23. In most cases, the entire shipment arrives in due time, and none of the goods is damaged. The situations in which claims arise include the following: (*a*) the entire consignment of goods covered by a bill of lading has arrived but all or part is damaged; (*b*) part or all of the consignment is missing; when only part is missing, some or all of the goods that are delivered may be damaged.

24. The situation described under (*a*) above does not ordinarily present serious difficulty with respect to the commencement of the period of limitation, since the period would clearly run from the date of "delivery" of the goods. This issue will be discussed further at paragraphs 26 *et seq.*, below.

25. The most serious problems arise under (*b*), when delivery of part or all of the goods covered by a bill of lading is delayed or the goods are lost,[12] since a substantial period (months, and occasionally a year or more [13]) may pass before the carrier provides the cargo-owner with definite information about the whereabouts and plans for delivery of the missing goods, or before the carrier definitely reports that the goods have been lost.[14] The issues with respect to the running of the period of limitation in this setting are explored in paragraphs 32 *et seq.*, *infra.*

[10] The use of the word "delivery" instead of "discharge" appears to be intentional, because discharge is used elsewhere in the Convention, for example, articles 2, 3 (2), 6 and 7. Tetley, Marine Cargo Claims, 1968. *Milikowsky Brothers* v. *Kapman's Bevrachtingsbedryf*, 1969, A.M.C. 111.

[11] See, e.g., the replies of Australia (para. 59), Czechoslovakia, Federal Republic of Germany, Iraq, Norway and Turkey. But cf. replies of Sweden and Austria.

[12] Loss or delay to goods may be caused by loss of, or accident to, the carrying ship, frustration of the voyage or deviation from the contractual itinerary. Goods are also frequently lost or delayed as a result of trans-shipment, misdelivery, overcarriage or pilferage.

[13] See UNCTAD report on bills of lading (United Nations publication, Sales No. 72.II.D.2), "Section C. How cargo claims arise and are settled", paras. 27-43; also Note in BIMCO Circular for December 1962, p. 10021.

[14] Information about the goods or acceptance or denial of a claim may be communicated to the cargo owner on different dates for different consignments relating to the same bill of lading.

2. *Analysis of the terms "delivery of the goods" and "date when the goods should have been delivered"*

(a) *"Delivery of the goods"*

26. Interpretation and application of this phrase does not appear to have caused serious problems.[15] In the preparation of a revised text, if the period of limitation should continue to commence from "delivery" of the goods, account must be taken of the definition of that term in paragraph (i) of article 1 (*e*), as prepared by the Working Group at its third session.[16] The proposed revision of article 1 (*e*) is as follows:

"(i) 'Carriage of goods' covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage, and at the port of discharge.

"(ii) For the purpose of paragraph (i), the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has *delivered the goods:*

"*a* by handing over the goods to the consignee; or

"*b* in cases when the consignee does not receive the goods, by placing them at the disposal of the consignee in accordance with the contract or with law or usage applicable at the port of discharge; or

"*c* by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

"(iii) In the provisions of paragraphs (i) and (ii), reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee."

27. In the draft provisions on the commencement of the period of limitation, which appears at paragraph 39, below,[17] specific reference is made to the provisions on the time of delivery by the carrier as set forth in subparagraphs *a* to *c* of paragraph (ii) of the above-quoted revision of article 1 (*e*).

28. It will be noted that this definition includes not only *a* "Handing over the goods to the consignee", but also, under paragraphs *b* and *c*, certain other acts of which the consignee may not necessarily have knowledge. The Working Group may wish to consider whether a prudent consignee would keep himself advised as to the disposition of the goods, or whether delivery under paragraphs *b* and *c* should start the period of limitation only when the consignee has knowledge, or when notice has been sent to him, as to these acts.

(b) *"Date when the goods should have been delivered"*

29. The interpretation and application of this clause have caused several problems, and two principal questions would appear to need clarification:

(1) What class of claims is governed by this clause?

(2) When does the period of limitation commence in respect of such claims?

30. With respect to the first question, writers have stated that the "date when the goods should have been delivered" is applicable when a cargo-owner sues for "the loss of the goods",[18] "in event of the total loss of goods",[19] or "non-delivery" of goods.[20] These general views support what would appear to be implied from the very words of the clause—that this provision is to be applied when goods *have not been delivered*, but fail to answer all of the problems that arise in practice. It appears to be reasonably clear from the case-law in most jurisdictions that the clause applies to claims for *total* loss of goods; but it is not so clear whether, and if so, how exactly, this language may also be applied to claims for loss of only part of the goods covered by a bill of lading.

31. The case-law also fails to give a clear answer to the second question: when does the period of limitation commence for lost or undelivered goods? The relevant jurisprudence is described as "mixed", and supports various approaches: (1) the carrier's declaration or advice of non-delivery; (2) delivery of most of the goods; (3) the date when arrival was expected.[21]

32. Besides the uncertainties as to the legal position, the cargo-owner may also face many practical difficulties when he claims for undelivered goods. As has been noted (para. 25, above), the cargo-owner cannot always assume that his missing goods are in fact irretrievably lost, or that they will not be delivered. Instead, after the expected time of delivery, the cargo-owner must await information from the carrier as to the fate of the goods. During this period he may have grounds to hope for eventual delivery, but cannot be sure of whether, or when, this may occur.

---

[15] See, e.g., cases cited in Tetley, op. cit., 198, and in Manca, International Maritime Law, vol. II, 238. See also *Western Gear Corporation* v. *States Marine Lines Inc.*, 362, Fed. Rep., 2d series (1966), 331: "Wherever there is an actual delivery of goods in performance by the carrier of its obligations under the contract of carriage, the time to sue runs from the date of delivery rather than from the date 'when the goods should have been delivered'."

[16] A/CN.9/63, paras. 14-15. "The replies of the Governments of Argentina, Czechoslovakia, Federal Republic of Germany and the USSR drew attention to the draft provision on article 1 (*e*)."

[17] This and other draft proposals are consolidated in the draft provisions on the period of limitation which appear in para. 68.

[18] Chorley and Giles Shipping Law, 176.

[19] Manca, op. cit., 238.

[20] Tetley, op. cit., 199.

[21] Tetley, op. cit., 199. The general trend of decisions appears to favour time running either from the date when the carrier has declared that he cannot deliver the goods or "from the date when the delivery of most of the shipment took place", op. cit., 200. It is an indication of the considerable uncertainty that prevails in identifying the inception point for the commencement of the period of limitation in cases of non-delivery of goods, that a leading authority states: "... the best rule for a claimant to follow is to sue within one year of the day the vessel or shipment should have arrived and not within one year of advice that delivery is impossible", Tetley, op. cit., p. 200. This advice is given despite the fact that in several jurisdictions the period of limitation actually commences from the date of advice that delivery is impossible, Tetley, op. cit., p. 200, foot-note 10.

33. During this period of uncertainty the cargo-owner is placed in a dilemma. He may not know whether the period of limitation, in respect of goods which he is still expecting, may already have commenced,[22] or whether the period will commence from the day he receives notification as to the fate of the goods, or from the day the claim may be denied or from the day when the goods are eventually delivered. These uncertainties expose the cargo-owner to two principal risks. First, he may unwittingly exhaust a substantial part (or all) of the period of limitation by remaining passive while awaiting information about his goods. Secondly, he may incur what might turn out to be unnecessary expenditure in commencing suit prematurely merely to keep the period alive, whereas it may not have been necessary for him to institute suit for this purpose had the law been clear.

34. The "date when the goods should have been delivered" thus fails to distinguish among various situations which may arise in practice. These include:

(*a*) Partial delivery of the goods when the balance of the consignment covered by the same bill of lading is still expected to be delivered.

(*b*) Partial delivery of the goods when it is known that the balance of the consignment covered by the same bill of lading will never be delivered.

(*c*) Delay in delivery of all the goods covered by the same bill of lading while delivery is still expected.

(*d*) Non-delivery when it is known that none of the goods will be delivered.

35. The "date when the goods *should have* been delivered" is particularly difficult to apply in the setting of ocean shipping, since the contract of carriage often does not specify a date at which the carrier is obliged to deliver the goods.

3. *Commencement of the limitation period in other transport conventions*

36. Some of the above problems with respect to the commencement of the limitation period have been faced in the other transport conventions. Particularly helpful is the distinction, mentioned above at paragraph 23, between (1) total loss of the goods and (2) partial loss, damage or delay. This distinction is drawn in article 46 of the International Convention concerning the Carriage of Goods by Rail (CIM) [23] and in article 32 of the Convention on the International Carriage of Goods by Road (CMR).[24]

37. Article 32 of the Convention on the contract for the international carriage of goods by road (CMR) provides:

"1. . . . The period of limitation shall begin to run:

"(*a*) In the case of partial loss, damage or delay in delivery, from the date of delivery;

"(*b*) In the case of total loss, from the thirtieth day after the expiry of the agreed time-limit or where there is no agreed time-limit from the sixtieth day from the date on which the goods were taken over by the carrier;

"(*c*) In all other cases, on the expiry of a period of three months after the making of the contract of carriage.

The day on which the period of limitation begins to run shall not be included in the period."

38. Article 46 of the International Convention concerning the Carriage of Goods by Rail (CIM) provides:

"2. The period of limitation shall begin to run:

"(*a*) In actions for compensation for partial loss, damage or delay in delivery: from the date of actual delivery;

"(*b*) In actions for compensation for total loss: from the thirtieth day after the expiry of the transit period;

" . . .

"(*h*) In all other cases: from the date when the right of action accrues.

"The day on which the period of limitation begins to run shall not be included in the period."

4. *Proposed draft provision on the commencement of the limitation period*

39. The Working Group may wish to prepare a draft provision on the commencement of the period of limitation which, like the Rail (CIM) and Road (CMR) conventions, distinguishes between (1) partial loss or damage or delay and (2) total loss of the goods covered by the contract of carriage. Such a draft provision is as follows:

Draft provision on commencement of the period [25]

(*b*) The period of limitation shall commence:

(i) In actions for compensation for [loss] [non-delivery] of part of the goods covered by the contract of carriage, for damage, or for delay in delivery: from the last date on which the carrier has deliv-

---

[22] As might be the case, for example, if events show that the expected goods cannot be delivered, since the period of limitation might then run from whatever might be the hypothetical or notional date held in a particular jurisdiction to signify "the date when the goods should have been delivered" in the ordinary course of events had the goods not been unavailable for delivery.

[23] International Convention concerning the carriage of goods by rail (CIM). Done at Berne, 25 October 1952. United Nations, *Treaty Series*, vol. 241.

[24] Convention on the contract for the international carriage of goods by road (CMR). Done at Geneva on 19 May 1956. United Nations, *Treaty Series*, vol. 399. Cf. Convention for the unification of certain rules relating to international carriage by air. Signed at Warsaw, 12 October 1929. League of Nations, *Treaty Series*, vol. CXXXVII. The Warsaw Convention of 1929 in article 29 provides that the limitation period shall be "reckoned from the date of arrival at destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped". In view of the relatively brief periods for air transit, the above general provision probably presents fewer serious problems in practice than arise in the case of carriage by sea or (to a lesser degree) by rail or by road.

[25] This draft, and proposals relating to other aspects of the period of limitation, are consolidated in the draft provisions on the period of limitation which are set forth in section G at paragraph 68, below.

ered any of such goods. The date of such delivery shall be determined on the basis of the provisions of subparagraphs (*a*)-(*c*) of paragraph (ii) of article [ ].[26]

(ii) In actions for compensation for [loss] [non-delivery] of all of the goods covered by the contract of carriage: from [the stated date for delivery or, in the absence of such a stated date,] the [ninetieth] day after the time the carrier has taken over the goods.[27]

The day on which the period of limitation begins to run shall not be included in the period.

40. Article 32 (1) of the Road (CMR) Convention (quoted in paragraph 37 above), and the similar provision in article 46 (2) of the Rail (CIM) Convention, distinguish between "partial *loss*" and "total *loss*" of the goods.

The above draft also uses this language, but suggests by bracketed language that the term "non-delivery" might be employed in place of "loss". Either term would appear to be satisfactory, but the expression "non-delivery" may more precisely express both the factual and legal situation.

41. The Road (CMR) and Rail (CIM) Conventions contrast "partial loss" and "total loss". The expression "*partial* loss" is presumably intended to embrace situations of *total* loss of *some* of the packages or units covered by the contract of carriage. However, since there might be room for doubt on this point, the above draft explicitly refers to loss (or non-delivery) "of part of the goods *covered by the contract of carriage*".

42. For partial loss, and for damage or delay, the Road (CMR) Convention provides that the limitation period shall run "from *the* date of delivery". This provision may give rise to doubt when parts of a single consignment arrive at different times—possibly as a result of trans-shipment or misdelivery of part of the goods. To avoid uncertainty, and the possible need for piecemeal litigation, the draft provides that the period shall commence "from the *last* date on which the carrier has delivered *any* of such goods" covered by the contract of carriage.

43. It will be noted that the phrase "in actions for compensation for" in subparagraphs (i) and (ii) of the draft is taken from article 46 (2) (*a*) and (*b*) of the Rail (CIM) Convention.

44. For cases of total loss under the Rail (CIM) Convention, the period commences "from the thirtieth day after the expiry of the *transit period*". The Road (CMR) Convention refers to "the thirtieth day after the expiry of the *agreed time-limit* or where there is no agreed time-limit from the sixtieth day from which the goods were taken over by the carrier". Under contracts for ocean carriage there may be neither a specified "transit period" (CIM) nor an "agreed time-limit" (CMR). Consequently, it would seem advisable (as in the CMR Convention) to provide an alternative point for the commencement of the period. The draft, consequently, provides in paragraph (ii) that where there is no stated date for delivery, the period will commence from "the [ninetieth] day after the time the carrier has taken over the goods". The latter expression, "the time the carrier has taken over the goods", is, of course, drawn from the rules of article 1 (*e*) on the commencement of the period of the carrier's responsibility, as drafted by the Working Group: report on third session (A/CN.9/63), * para. 14.

45. The Road (CMR) Convention provides that in cases of total loss, the period does not commence until 60 days from the date on which the carrier has taken over the goods. This 60-day period from the date the carrier has taken over the goods takes account of the period while the consignee is waiting for delivery, so that the period of limitation for non-delivery in most cases would not be shorter than the period of limitation for damage to goods that are delivered. Transit periods for ocean carriage and, more particularly, the periods of uncertainty in cases of misdelivery may be longer than that for road or rail carriage. The Working Group may wish to consider whether the 90-day period set forth in the draft is adequate.[28]

D. *The length of the period*

46. Establishment of the length of the period of limitation requires the conciliation of conflicting considerations.[29] On the one hand, the period must be adequate to allow investigation of claims, negotiations, and the bringing of legal proceedings. On the other hand, the period should not be so long that evidence of facts may be lost or blurred by the passage of time, and thereby undermine the certainty desired for commercial transactions.[30]

47. Article 3 (6) (4) of the Brussels Convention requires that the claimant bring his suit against the carrier or the ship for loss or damage of goods within one year after delivery of the goods or the date when they should have been delivered. This one-year period is left unchanged

---

[26] See the proposed revision of article 1 (*e*). Report on third session (A/CN.9/63), para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[27] The expression "the time the carrier has taken over the goods" is employed in the revision of article 1 (*e*) at paragraph (ii). *Ibid.*, para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

* UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[28] The adequacy of this period, like the adequacy of the basic period of limitation, may be effected by the decision of the Working Group as to whether a written claim would suspend the running of the period until the carrier rejects the claim. See section D (2) at paras. 51-53, below.

[29] Report of the Working Group on time limits and limitations (prescription) in the international sale of goods, on its third session, A/CN.9/73, UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3, para. 1 of Commentary on art. 8.

[30] Chorley and Giles, op. cit., 175-176: "Generally speaking, English law allows claims for damages to be made at any time within six years, but trade calls for a shorter period for businessmen must know for certain what claims may be made against them. Actions on many commercial contracts must, therefore be brought within a far shorter period, and the contract of affreightment is no exception. Clearly, a shipowner will want to make his own inquiries before vital evidence is lost, and to do so claims against him must be made promptly."

by article 1 (2) of the Brussels Protocol; however, provision is made to extend the period by mutual agreement of the parties to the dispute once the cause of action has arisen.

48. There are indications that a one-year period of limitation has not been found in practice to be generally satisfactory. Organized groups of carriers, shippers and insurers have concluded that a one-year limitation may in certain instances be an insufficient period of time for investigation of claims, for negotiation between parties and for other measures necessary before action can be brought against the carrier. As a consequence, an agreement of a private nature (commonly known as the "Gold Clause Agreement"), providing in effect for a two-year period, was negotiated between carriers, shippers, and insurers operating in major international ocean trades.[31]

49. Suggestions and proposals regarding the length of the period of limitation were made in a number of replies to the questionnaire. The replies of the Governments of Australia and Sweden indicate that consideration might be given to extending the period of limitation to two years to bring it in line with article 29 of the Warsaw Convention. The reply of the Government of Austria observes that in view of the fact that in most cases suits have to be brought in a foreign country, even another continent, a two-year period would be more appropriate. On the other hand, the replies of Argentina, Federal Republic of Germany, Iraq, Norway and Czechoslovakia indicate that the one-year period is generally satisfactory.

1. *The length of the period in other transport conventions*

50. The 1929 Warsaw Convention for International Carriage by Air provides (article 29) a basic limitation period of two years. The Road (CMR) and Rail (CIM) Conventions provide a basic period of one year. However, as we have seen (para. 17, above), both extend the period to three years for cases of wilful misconduct.

2. *Suspension of limitation period pending denial of claim*

51. Both the Road (CMR) and Rail (CIM) Conventions contain a further provision that may be of great practical significance to ameliorate problems presented by the shortness of the basic limitation period. Article 32 (2) of the Road (CMR) Convention provides:

> "A written claim shall suspend the period of limitation until such date as the carrier rejects the claim by notification in writing and returns the documents attached thereto. If a part of the claim is admitted the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim, or of the reply and of the return of the documents, shall rest with the party relying upon these facts. The running of the period of limitation shall not be suspended by further claims having the same object".

Substantially the same provision appears as article 46 (3) of the Rail (CIM) Convention.

52. The above provision would appear to have considerable merit to avoid ghasty litigation (or the loss of rights) when time is needed by the carrier to investigate a claim and respond thereto.[32] The making of a claim in writing appears to be a standard, and reasonable, step in the adjustment of transport losses (see article 3 (6) of the Brussels Convention of 1924), and it seems reasonable that a brief period of limitation should not be shortened or extinguished by the carrier's delay in rejecting the claim. Consequently, the Working Group may wish to consider the following draft provision, which is modelled closely on article 32 (2) of the Road (CMR) Convention and article 46 (3) of the Rail (CIM) Convention.

Draft provision suspending period pending action on claim

(*d*) A written claim shall supend the running of the period of limitation until such date as the carrier rejects the claim by notification in writing. If a part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim, or of the reply, shall rest with the party relying upon those facts. The running of the period of limitation shall not be suspended by further claims having the same object.

53. The above draft does not include the provision of the other transport conventions that the period remains in suspension until the carrier "returns the *documents* attached" to the claim. The papers that comprise the "documents" that must be presented in connexion with a claim are defined under article 41 of the Rail (CIM) Convention. On the other hand, no such definition appears in the Brussels Convention of 1924 or the 1968 Protocol. As a result, there may be grounds for dispute as to whether letters asserting or pressing the claim and various types of material submitted in support of the claim are "documents attached" to the claim which must be returned by the carrier to recommence the running of the period. For example, litigation could arise over whether an unreturned letter was a "document" attached to the claim, so that the period of limitation never expired. Such questions could undermine the predictability and stability of legal relationships which is an objective of the rules on limitation.

[31] "British Maritime Law Association Agreement, 1950 (Gold Clause Agreement)" dated London, Liverpool, Glasgow, 1 August 1950. "Explanatory Notes" dated 31 December 1954. Reprinted in Tetley, op. cit., at 313. The relevant provisions will be found in paragraphs 4 and 5 of the Agreement and the notes on clause 4 in the Explanatory Notes.

[32] The reply of the Government of Czechoslovakia discusses this question and points to the existing practice under the CMR and CIM Conventions. The reply suggests that the period of limitation should cease to run for a period of, say, three-six months from the moment the claim is made, unless a reply to the claim is given before the expiration of that time. On the other hand, the reply of the Government of Austria states that details regarding suspension or interruption of the period should be left to domestic law, unless an attempt is made to solve these questions in a simplified form in the Convention itself.

E. *Agreement modifying the period*

1. *Shortening of the period by agreement*

54. The period of limitation specified in the Brussels Convention cannot be shortened by agreement of the parties. Such an agreement is held in most jurisdictions to contravene the provisions of article 3 (8) of the Convention which denies effect to agreements which lessen the carrier's liability otherwise as provided by the Convention.[33]

2. *Extension of the period*

55. It is not unusual for parties to a dispute concerning loss or damage of cargo to stipulate a longer period of limitation for the institution of an action. An extension of the period of limitation may prevent the hasty institution of a suit close to the end of the period when the parties are still negotiating with a view to a settlement without legal proceedings. The claimant may ask for a waiver or an extension of the time allowed by the Convention when additional information must be obtained before the negotiations can be concluded. The practical need for agreements to extend the period of limitation is indicated by the "Gold Clause Agreement" to which reference has been made in paragraph 45, above.

56. Doubts have been expressed as to the validity of such agreements extending the limitation period.[34] However, such doubts appear to have been removed under the Brussels Protocol. Under article 1 (2), the revised paragraph 6 *bis* would conclude with the following sentence:

> ". . . This period [i.e. one year] may, however, be extended if the parties so agree after the cause of action has arisen".

This provision allows an extension of the limitation period if the agreement to extend is made "after the cause of action has arisen". A limit as regards the length of the extension is not mentioned so that the parties to the dispute are free to extend at their discretion.[35]

57. Replies have indicated that the provision of the Brussels Protocol cited above is a useful addition to the Brussels Convention and that it should be retained.[36] The Working Group may wish to consider whether such a provision should be retained in a future Convention.

3. *Possible drafting of a provision on extension*

58. Under the Brussels Protocol of 1968 the period may be extended "if the parties so *agree*". In the setting of some languages and legal systems it might be argued that the word "agree" requires a bilateral contractual undertaking, and would not give effect to a unilateral declaration or waiver by the carrier that the period would be extended. To avoid the possibility of such a narrow and unintended application, the Draft Convention on Prescription (Limitation) in the International Sale of Goods, as approved by UNCITRAL at its fifth session, refers in article 21 (2) to extension of the period "by a *declaration* in writing".[37]

59. The requirement that the declaration (or agreement) extending the period be made in writing does not appear in the Brussels Protocol. The reasons for the requirement in the draft Convention on Prescription that the declaration (or agreement) be in writing are explained as follows in the Commentary to the draft Convention.[38]

> "Extension of the limitation period can have important consequences for the rights of the parties. An oral extension could be claimed in doubtful circumstances or on the basis of fraudulent testimony. Therefore, only a declaration in writing can extend the period."

60. A provision based on the Protocol, but modified to conform with the draft Convention on Prescription, might read as follows:

Draft provisions on extension of the period

Alternative A

(*c*) The period of limitation may be extended by the carrier after the cause of action has arisen by a [written] *declaration or* agreement.

---

[33] See *Buxton* v. *Rederi*, 1939 A.M.C. 815; *The Zarembo*, 1942 A.M.C. 544; Comm. Rouen, 19.6.1951, 19 Rev. Scapel, 41; *Coventry Sheppard* v. *Larrinaga S.S. Co.*, 73 Ll.L.Rep. 256; Comm. Anvers, 7.8.1931, 1931 J.P.A. 420; *BGH*, 18.2.1958. 29 BGHZ, 120; *Trib. Rotterdam*, 24.6.1949, 1950 N.J., 538. However, the position is different as regards a shorter period of limitation for claims relating to freight, demurrage, general average contribution and for other matters which the Brussels Convention of 1924 has left outside its scope. Accordingly, a clause stipulating that suit for freight shall be subject to a six-month period of limitation has been held to be valid. See *Piazza* v. *West Coast Line*, 1951 A.M.C. 168; *Goulandris* v. *Goldman*, 1957 Ll.L.Rep. 207; *Cour d'Appel Trieste*, 5.4.1952, 1953 D.M.F. 464. See also S. Dor, op. cit., 78.

The reply of the Government of Sweden indicates that agreements shortening the period should not be allowed and that it would be desirable that this be clarified in article 3 (8) of the Convention.

[34] Astle, Shipowners' Cargo Liabilities and Immunities, 184, "If the parties concerned are the actual cargo owners and the carrier, the question may arise as to whether the agreement is valid having regard to the provisions of Article V, in that surrender of the right by the carrier has not been embodied in the bill of lading". Manca, op. cit., vol. 2, 264, "Under some laws, such a stipulation [i.e. the agreement to extend the period] is null and void inasmuch as it involves renunciation to the prescription still running, which is forbidden, whilst only the prescription already accrued can be waived (for instance, Article 2937, 2nd paragraph, of the Italian Civil Code states that the renunciation to the prescription is allowed only when it is exhausted)".

[35] Manca, op. cit., vol. 2, 264.

[36] Replies supporting the retention of this provision are those of Australia, Czechoslovakia, Iraq, Norway and Sweden. In its reply the Government of Czechoslovakia suggests that the parties to the contract should be entitled to agree on an extension of the period before the accident that causes the loss or damage to the goods occurs.

[37] UNCITRAL, Report on the fifth session (1972) (A/8717), para. 21, UNCITRAL Yearbook, vol. III: 1972, part one, II, A. See also para. 2 of the commentary on the draft convention, A/CN.9/73, UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3, commentary on article 21. It is assumed that a "declaration" could be made in an agreement, and the intention to give equal effect to a "declaration or agreement" is shown by article 21 (1) of the Draft Convention on Prescription.

[38] A/CN.9/73, commentary on article 21 at para. 2, UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3.

61. Retaining the words "or agreement" may not be necessary since an extension in an "agreement" would also a be "declaration". However, the retention of these words may be advisable in the interest of clarity and continuity with the earlier provision.

62. If the Working Group should not require a writing, the draft could follow closely the structure of the provision of the Protocol, and might read as follows:

Alternative B

(*c*) The period of limitation may be extended *by a declaration by the* carrier or by agreement of the parties after the cause of action has arisen.[39]

F. *Recourse action (action for indemnity against a third person)*

63. An ocean carrier, to whom a claim for loss or damage of the goods is presented, may have a right to recover for all or part of the shipper's claim. This may arise from a contract the carrier has with a party who participates in the performance of his contract, or with a liability insurer. The existence and amount of the recourse action may be known only after the final judicial decision fixing the amount of compensation payable or the settlement of the claim. If the shipper or consignee presents his claim to the carrier near the end of the period of limitation, the recourse action by the ocean carrier against the third party may fail, and this irrespective of the merits of his claim, because the one-year limit for bringing such an action has been reached. The question then arises whether the ocean carrier should have the benefit of an extension of the one-year limitation period to bring his action against third parties.

64. The Brussels Convention, in contrast to other transport conventions,[40] has no provision on recourse actions and leaves it to national law to solve this problem.[41]

65. Article 1 (3) of the Brussels Protocol of 1968 provides for the amendment of the 1924 Convention by the insertion, after article 3 (6), of the following paragraph 6 *bis*:

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought with the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

66. An action for indemnity may thus be brought within the time allowed by the law of the court seized of the case, on the condition, however, that the time allowed shall not be less than three months.

67. The replies to the questionnaire indicate that the provision of the Brussels Protocol cited above is a useful addition to the Brussels Convention and that it should be retained.[42] Consequently, this provision is included in the consolidated set of draft provisions (section G, below, at para. 68). A slight stylistic modification might be considered: replacing the word "year" in the first sentence by "period of limitation". This change is indicated by underscoring in the draft provision which appears as paragraph (*e*) in the draft provisions in section G, below.

G. *Consolidation of draft provisions on the period of limitation*

68. Draft provisions on various aspects of the period of limitation have been presented and discussed in this study. To assist the Working Group in examining these provisions in relationship to each other they are presented in the following consolidated form.

Draft provisions on the period of limitation

Article 3

...

6 *bis* (*a*) The carrier and the ship shall be discharged from all liability whatsoever in respect of carriage of the goods unless suit is brought or arbitration proceedings are initiated within [one year] [two years] of the commencement of the period of limitation.[43]

---

[39] If the Working Group should prefer the form of expression in alternative B and would also wish to require a writing, considerations of syntax (which required the rephrasing reflected in alternative A) might make it necessary to add a further sentence to alternative B. This sentence might read: "The declaration or agreement shall be in writing". If a writing is required, in the final preparation of the convention consideration might be given to article 1 (3) (*g*) of the draft Convention on Prescription which includes the following definition: "'Writing' includes telegram or telex".

[40] For example the CMR. Provisions on the relations between successive carriers will be found in articles 34 through 40 of that Convention. Article 39 (4) provides that: "The provisions of article 32 shall apply to claims between carriers. The period of limitation shall, however, begin to run either on the date of the final judicial decision fixing the amount of compensation payable under the provisions of this Convention, or, if there is no such udicial decision, from the actual date of payment."

[41] For example, article 487 of the Netherlands Commercial Code provides, *inter alia*, "if the carrier on his part is party to a contract with another carrier, the former's claim against the latter shall not become barred until three months have elapsed after he himself has paid or has been sued, provided one of these events has taken place within the said term of one year". See also article 32 of Law 66-420 of France.

[42] This is the tenor of the replies of Austria, Australia, Czechoslovakia, Federal Republic of Germany, Iraq, Norway and Sweden. The Australian reply states that "while three months is not a long time, it is probably sufficient given the circumstances in which such actions will arise". The Czechoslovak reply, while it considers article 1 (3) of the 1968 Protocol an improvement, suggests the following re-drafting of that provision: "... if brought within ... months commencing from the day ... or within a longer time allowed by the law of the court or arbitration having jurisdiction to decide upon the issue". On the other hand, the reply of the Government of Turkey indicates that the period for recourse action should be one year.

[43] See section B at paras. 4-14, above. The above draft appears at paragraph 14.

(*b*) The period of limitation shall commence: [44]

(i) in actions for compensation for [loss] [non-delivery] of part of the goods covered by the contract of carriage, for damage, or for delay in delivery: from the last date on which the carrier has delivered any of such goods. The date of such delivery shall be determined on the basis of the provisions of sub-paragraphs (*a*)-(*c*) of paragraphs (ii) of article [ ].[45]

(ii) in actions for compensation for [loss] [non-delivery] of all of the goods covered by the contract of carriage: from [the stated date for delivery or, in the absence of such a stated date], the [ninetieth] day after the time the carrier has taken over the goods.[46]

The day on which the period of limitation begins to run shall not be included in the period.

(*c*) The period of limitation may be extended by the carrier after the cause of action has arisen by a [written] declaration or agreement.[47]

(*d*) A written claim shall suspend the running of the period of limitation until such date as the carrier rejects the claim by notification in writing. If a part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim, or of the reply, shall rest with the party relying upon those facts. The running of the period of limitation shall not be suspended by further claims having the same object.[48]

(*e*) An action for indemnity against a third person may be brought even after the expiration of the *period of limitation* provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than [three months], commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.[49]

[44] See section C at paras. 21-45, above. This draft provision appears at paragraph 39 and is discussed at paras. 39-45.

[45] See the proposed revision of article 1 (*e*). Report on the third session (A/CN.9/63), para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[46] The expression "the time the carrier has taken over the goods" is employed in the revision of article 1 (*e*) at paragraph (ii). See report on third session (A/CN.9/63), para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[47] See section E at paras. 54-62, above. The above text is based on alternative A at para. 60.

[48] See section D (2) at paras. 51-53, above.

[49] See section F at paras. 63-67, above.

PART FIVE: DEFINITIONS UNDER ARTICLE 1 OF THE CONVENTION

A. *Introduction*

1. This part of the reports responds to the decision of the Commission, made in response, to the recommendation of this Working Group, to consider "definitions under article I of the Convention".[1] Article 1 of the International Convention for the Unification of Certain Rules relating to Bills of Lading [2] contains five definitions, two of which have been considered already by this Working Group at its third session.[3] The three definitions remaining for consideration are those of "carrier" (article 1 (*a*)), "contract of carriage" (article 1 (*b*)) and "ship" (article 1 (*d*)).

B. *Definition of "carrier": [4] problems and proposed solution*

2. Article 1 (*a*) states that:

"'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."

3. Thus the term "carrier" designates the person who is responsible to the cargo owner for the performance of the "contract" of carriage and who is subject to the terms of the Brussels Convention.[5] That person may be a shipowner, a charterer or some other person,[6] depending upon the circumstances of a particular case.

[1] UNCITRAL, report on fourth session (1971), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A. See also Working Group on International Legislation on Shipping, report on third session A/CN.9/63 (1972), para. 73, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[2] Hereinafter cited as the Brussels Convention. League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764; reproduced in *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, vol. II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3).

[3] Definitions already taken up are: 1 (*c*) — "Goods" and 1 (*e*) — "Carriage of goods". See report of the Secretary-General on the responsibility of ocean carriers for cargo: bills of lading, A/CN.9/63/Add.1, UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex; and Working Group report on third session (1972), UNCITRAL Yearbook, vol. III: 1972, part two, IV.

[4] The definition of "carrier" may require further consideration at a later time, in light of action that may be taken by the Working Group with respect to problems arising in cases of "trans-shipment". The relationship between the definition of "carrier" and trans-shipment is not considered in this part of the report; instead, see part 2, which deals specifically with "trans-shipment".

[5] Throughout the remainder of the Brussels Convention, the terms "carrier" and "shipper" are used to indicate the parties to the contract of carriage, whose rights and duties are defined in the Convention.

[6] The word "includes" indicates that the specific designations of the "owner" and "charterer" are not meant to be exhaustive. Shipping and forwarding agents may also, under certain types of contractual arrangements, be considered "carriers". See "Bills of lading", report by the UNCTAD secretariat (document TD/B/C.4/ISL/6; United Nations publication, Sales No. 72.II.D.2), paragraphs 180 *et seq.*

4. It is extremely important that the "carrier" be readily identifiable on the face of the bill of lading, so that the bill of lading holder—frequently a bona fide purchaser who takes the bill after it is issued—can know from whom to seek recovery should the goods be lost or damaged. Any difficulties in identifying the "carrier" may not only cause loss to an individual cargo owner, but also may impair the utility of the bill of lading as a commercial document of title. The reply of Australia to the secretariat's questionnaire proposed that, in order to emphasize the point that persons other than shipowners and charterers might be considered "carriers", the definition of "carrier" be amended to read as follows: "'carrier' includes the owner, the charterer *or any other person* who enters into a contract of carriage with a shipper" (emphasis added). The reply of the USSR proposed that an amended definition of the term "carrier" stated that "'carrier' signifies the shipowner, the charterer or any other person who, acting on his own behalf, concludes with a shipper a contract for the carraige of goods".

5. No problems arise over identification of the "carrier" where the shipping line named in the bill of lading and the shipowner are the same company. In somes cases, however, the line named in the bill of lading is a time or voyage charterer [7] of the ship on which the goods covered by the bill of lading are carried, and there is considerable uncertainty as to whether the charterer or the shipowner should be considered the "carrier". In such cases, a shipping line that charters ships to supplement its own fleet may issue bills of lading headed with its own name and address regardless of whether the consignor's goods are loaded onto ships that are chartered by the line. These bills of lading may be signed "for the master" [8] and contain a "demise clause" or identity of carrier clause", of which the following are examples:

(*a*) "If the ocean vessel is not owned or chartered by demise to the company or line by whom this bill of lading is issued (*as may be the case notwithstanding anything that appears to the contrary*), this bill of lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who act as agents only and shall be under no responsibility whatsoever in respect thereof" [9] (emphasis added).

(*b*) "The contract evidenced by this bill of lading is between the merchant and the owner of the vessel named herein (or substitute) and it is therefore agreed that said ship owner only shall be liable for any damage or loss due to any breach or non performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel seaworthiness. If despite the foregoing, it is adjudged that any other is the carrier and/or bailee of the goods shipped hereunder, all limitations of and exonerations from liability provided for by law or by this bill of lading shall be available to such other. It is further understood and agreed that as the Line, company or agents who has executed this bill of lading for and on behalf of the master *is not a principal in the transaction, said Line, company or agents shall not be under any liability arising out of the* contract of carriage, neither as carrier nor as bailee of the goods" [10] (emphasis added).

6. The bona fide purchaser of the goods, upon taking up the bill of lading, notes that it was issued under the name of a reputable shipping line, and sees nothing to indicate that the "carrier" is anyone other than the line. If the goods arrive short or damaged, then the bill of lading holder notifies the line named in the bill. At that point, he discovers that the line disclaims all liability for the goods, on the ground that the line was merely an agent who arranged a contract of carriage between the shipper and the shipowner. This contention is supported by the "demise clause" and the traditional doctrine that the signature of a bill of lading "for the master" binds the shipowner, not the voyage or time charterer.

7. In essence, these are the factual circumstances of several cases that thave arisen in recent years.[11]

8. A cargo owner faced with this situation may choose among several possible courses of action: (*a*) he may initiate legal action against both the shipowner and the charterer, which may mean maintaining separate actions in different countries: or (*b*) he may take action against *either* the shipowner *or* the charterer, facing long and costly delays, while the preliminary issue of

---

[7] A *voyage charter* is a contract for the use of a ship for the carriage of goods on a single voyage or several specified voyages. It may be contrasted with a *time charter*, which is a contract for the use of a ship for the carriage of goods during a specific period of time, and a *demise (or bare-boat) charter*, which transfers not only the use but also the entire operational control of a ship, usually for a specific period of time. Under most voyage and time charters, the master and crew remain servants and agents of the shipowner in all matters relating to operational control of the vessel; the charterer has only the use, or commercial control, of the vessel.

[8] A bill of lading ordinarily is signed "for the master" by the shipowner's agent. Traditionally, a signature "for the master" binds the ship *in rem* and (except in cases of demise charters) binds the shipowner, as the master's employer, *in personam*. See A. W. Knauth, *The American Law of Ocean Bills of Lading*, Baltimore, 1953, p. 179. See also Hugo Tiberg, "Who is the Hague Rule Carrier?", in *Six Lectures on the Hague Rules*, Kurt Grönfors, ed., Goteberg, 1967, p. 131.

[9] See the "Model All-Purpose Liner Bill of Lading", developed by a "P and I Club", set out in Singh and Colinvaux, *Shipowners* (Vol. 13 of *British Shipping Laws*) London, Stevens and Sons, 1967, p. 317.

[10] See the bill of lading form used by the Baltime and International Conference, known as the "Conline Bill" clause 17, set out in "Bills of Lading", Report by the UNCTAD Secretariat, op. cit., Appendix III, pp. 14 *et seq.*; and in Andrée Chao, "Réflexions sur la 'Identity of Carrier Clause'", *Le Droit Maritime Français*, 1967, pp. 12 *et seq.*

[11] See, for example, *Stockholms Sjöförsäkrings Aktiebolag* v. *Stockholms Rederiaktiebolag Svea (The Lulu)*, ND 1960. 349 SCS; NJA 1960 742; *Christiania Søforsikringsselskab* v. *Det Bergenske Dampskibsselskab As Time Charterer of the Steamship Lysaker (The Lysaker)*, ND 1955. 85 SCN; Appel Bruxelles 1er mars 1963, J.P.A. 63, 329; Com. Anvers 18 Dec. 1962, J.P.A. 63, 367; See also Chao, "Réflexions sur la 'Identity of Carrier Clause'", op. cit., and Tiberg, "Who is the Hague Rules Carrier?", op. cit.

whether the defendant is the proper party is resolved, and risking loss on that preliminary issue after the one-year statute of limitations [12] has run—thereby preventing a suit against the other, "proper" party. He may even find that the courts of one country dismiss his action because the *charterer* is not the proper defendant, and the courts of another country dismiss it because the *ship* is not the proper defendant.[13]

9. These problems arise because shipping lines use bills of lading that disclaim liability in the event that the ship is chartered, but that fail to indicate (1) whether the ship is in fact chartered; and if so, (2) the name and address of the shipowner.[14] The Working Group may find it helpful to consider the advisability of amending the Brussels Convention to require inclusion of those two points of information in the bill of lading.

10. Other transport conventions require that the name of the carrier [15] be given in the transport documents. For example, the Warsaw Convention,[16] article 8, states that:

"The air consignment note shall contain the following particulars:

"...

"(*e*) The name and address of the first carrier;"

Articles 9 provides that:

"... If the air consignment note does not contain all the particulars set out in Article 8 [including the 'name and address of the first carrier'] .. the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability."

The CMR Convention,[17] article 6 (6), states that:

"The consignment note shall contain the following particulars:

"...

"(*b*) the name of the forwarding railway;

"(*c*) The name and station of destination...."

The CMR Convention,[18] article 6 (1), stipulates that:

"1. The consignment note shall contain the following particulars:

"...

"(*c*) The name and address of the carrier...".

11. An amendment to require the bill of lading to state (*a*) whether the ship is chartered; and if so, (*b*) the name and address of the shipowner, might be added immediately after the present Article 3 (3) of the Brussels Convention. At present, Article 3 (3) states:

"3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

"(*a*) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner, as should ordinarily remain legible until the end of the voyage;

"(*b*) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;[19]

"(*c*) The apparent order and condition of the goods;".

12. The following draft provision might be added immediately after article 3 (3):

"3 (3) *bis*. The bill of lading [or any similar document of title] shall state the name and address of the carrier. If the ship is chartered, the bill of lading [or any similar document of title] shall so state and shall give the name and address of the shipowner. If the bill of lading [or any similar document of title] does not contain all the information required by this sub-paragraph, the person issuing the bill of lading shall be responsible for the good under the terms of this Convention."

13. These amendments would put the bill of lading holder on notice that the line whose name appeared at the head of the bill of lading was not necessarily the "carrier", and would provide him with the information necessary to discover which party was properly the "carrier".

14. The sanction contained in the last sentence of the prosed article 3 (3) *bis* is intented to impose joint contractual responsibility upon the charterer and the shipowner for failure to provide the information required by that amendment. Such a sanction would be supportable on grounds of fundamental fairness: the charterer who arranges for shipment clearly knows whether the ship is chartered, and if so, to whom. This rule would also be consistent with the widely held legal doctrine

---

[12] See article III (6) of the Brussels Convention, which is discussed in part four of this report.

[13] This was the result in *The Lulu*, cited in note 11, above.

[14] In some cases, courts have held that demise clauses which fail to identify adequately the shipowner are invalid and that, in such cases, the charterer is the "carrier" who is liable under the Brussels Convention. However, this is not an adequate solution on an international scale. The results in such cases depend upon the particular factual circumstances and are by no means uniform, and the continued use of such bills of lading causes unnecessary uncertainty and litigation.

[15] Because these other conventions do not define the term "carrier", it is uncertain whether they use that term to mean only the *owner* or—as in the Brussels Convention—whether the term "carrier" may mean the owner or some other party who enters into a contract of carriage with a shipper.

[16] Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929.

[17] International Convention on the Transport of Goods by Rail, signed at Berne, 25 February 1961.

[18] Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva, 19 May 1956.

[19] For proposed amendment to article 3 (3) (*b*), see part one: Unit limitation of liability, at paragraph 40.

that an agent for an undisclosed principal is jointly liable with his principal.[20]

C. *Definition of "contract of carriage"*

15. Article 1 (*b*) states that:

"'Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same."

16. The UNCTAD secretariat report on bills of lading suggested that

"The phrase '*in so far as such document relates to the carriage of goods by sea*' would have to be amended if it should be decided to extend the Rules to the period when the goods are in the carrier's custody before loading and after discharge" [21] (emphasis added).

17. The Working Group at its third session extended the coverage of the Brussels Convention to periods before loading and after discharge, by revising the definition of "carriage of goods" in article 1 (*e*) to state, in part, that:

"'Carriage of goods' covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage, and at the port of discharge."

18. Because of this revision, the Working Group may find that the existing phrase "in so far as such document *relates to the carriage of goods* by sea" (emphasis added) is broad enough to cover situations in which goods are in the charge of the carrier before loading and after discharge. Accordingly, revision of the definition of "contract of carriage" in article 1 (*b*) may be unnecessary.

19. On the other hand, the Working Group may wish to conform the language of article 1 (*b*) with that of article 1 (*e*). One approach would be by amending article 1 (*b*) to delete the words "by sea" and to add the words "as defined in this Convention", so that article 1 (*b*) would read:

(Words to be deleted are in square brackets; words to be added are in italics.)

"'Contract of carriage' applies only to contracts of carriage covered by bills of lading or any similar document of title, in so far as such document relates to the carriage of goods [by sea] *as defined in this Convention*. . . ."

20. A second approach would call for amending the revised article 1 (*e*) to define "carriage of goods *by sea*", instead of merely "carriage of goods".[22]

D. *Definition of ship*

21. Article 1 (*d*) of the Brussels Convention states that:

"Ship means any vessel used for the carriage of goods by sea."

The UNCTAD secretariat report on bills of lading [23] noted that this definition does not include barges, lighters or similar craft used to transport goods from the carrying ship to the shore during loading and discharging operations. That report concluded that:

"It seems desirable that the Rules should apply to lightering operations when the carrier owns or operates the barges or lighters as part of his contract of carriage. If so, the definition of 'ship' could be amended to include such craft."

22. This suggestion relates not only to the type of vessel to which the Brussels Convention applies, but also to the question of whether the Convention applies during loading and discharging operations. That question was discussed at length during the third session of the Working Group [24] which adopted the following revision to article 1 (*e*), designed to clarify the period of the Convention's application:

"[Revision of article 1 (*a*) "carriage of goods"]

"(i) "Carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage, and at the port of discharge.

"(ii) For the purpose of paragraph (i), the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:

"*a* By handing over the goods to the consignee; or

"*b* In cases when the consignee does not receive the goods, by placing them at

---

[20] The replies of Austria and Czechoslovakia proposed that a signatory of a bill of lading who does not disclose to the cargo owner that he is acting as an agent for the shipowner should be liable under the terms of the bill of lading.

[21] See "Bills of lading: report of the UNCTAD secretariat", op. cit., para. 186.

[22] The replies of Norway and Sweden proposed an additional amendment to article 1 (*b*), stating that the provisions of the Convention are to remain applicable notwithstanding the absence, irregularity or loss of the transport document. The reply of the Federal Republic of Germany stated that it probably was not necessary to extend the coverage of the Hague Rules to contracts of carriage for which no bill of lading has been issued, because bills of lading are issued for virtually every carriage of goods by sea.

[23] Op. cit., para. 189.

[24] See Working Group report on third session, 31 January to 11 February 1972 (A/CN.9/63), paras. 11 to 21, UNCITRAL Yearbook, vol. III: 1972, part two, IV. See also "Responsibility of ocean carriers for cargo: bills of lading", A/CN.9/63/Add.1; UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex. The question of whether the Convention applies during loading and discharging operations was discussed in connexion with the larger problem of the period of ocean carriers' responsibility under the Brussels Convention.

the disposal of the consignee in accordance with the contract or with the law or usage applicable at the port of discharge; or

"*c* By handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

"(iii) In the provisions, of paragraphs (i) and (ii), reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee." [25]

23. The Working Group may find that this revision, by extending the coverage of the Convention to the "period during which the goods are in the charge of the carrier", resolves any uncertainties with respect to whether the Convention applies to barge or lightering operations conducted by the carrier under his contract of carriage. Accordingly, revision of the definition of "ship" in article 1 (*d*) may be unnecessary.

[25] Working Group on International Legislation on Shipping, report on third session, 31 January to 11 February 1972, op. cit., para. 14.

PART SIX: ELIMINATION OF INVALID CLAUSES IN BILLS OF LADING

A. *Introduction*

1. In response to the programme of work developed at the fourth session of UNCITRAL,[1] this part of the report deals with the "elimination of invalid clauses in bills of lading".

2. The central function of the Brussels Convention is to lay down basic requirements from which ocean carriers may not derogate in the contract of carriage.[2] This objective is implemented by article 3 (8), which reads as follows:

"Any clause, convenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance clause in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

3. However, the mere establishment of international legislation that invalidates clauses in bills of lading does not, in the absence of sanctions of other effective controlling measures, in itself prevent carriers from including such clauses, and it appears that bills of lading often contain provisions that are clearly invalid and others that are of questionable validity under the Convention.[3]

4. The inclusion of invalid clauses in bills of lading causes uncertainty in the minds of cargo owners as to their rights and liabilities. Their removal "would facilitate trade, because their continued inclusion [in bills of lading] has the following onerous effects: (*a*) the clauses mislead cargo interests, thus causing them to drop the pursuit of valid claims, (*b*) they present an excuse for prolonging discussion and negotiation of claims which otherwise might have been settled promptly, and (*c*) they encourage unnecessary litigation".[4]

5. Most of the replies of Governments to the questionnaire confirm that shippers' rights are impaired by carriers' use of invalid clauses, and that measures need to be undertaken to deter or prevent carriers from continuing the practice. However, while some respondents acknowledge the problem, they doubt whether a more effective measure than that contained in article 3 (8) is feasible.[5] One Government suggested that article 3 (8) offered "a too restricted interpretation" as it related to "the rules of liability only".[6] The Governments of two countries suggested that the problem of invalid clauses could best be approached through "actions taken by

[1] Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth session, Supplement No. 17* (A/8417), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

[2] Articles prohibiting "invalid" clauses are also contained in some other international transport conventions, as follows:

Article 32 of the Warsaw (Air) Convention provides in part:

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by the Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction shall be null and void. . . .

Article 41 of the Road (CMR) Convention provides:

1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.

2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void.

[3] Dor. Bill of Lading Clauses and the International Convention of 1924 (2d ed. 1960), page 41.

[4] "Bills of lading", report by the secretariat of UNCTAD, TD/B/C.4/ISL/6/Rev.1 (United Nations publication, Sales No. 72.II.D.2), para. 295.

[5] See e.g., the reply of the Government of Australia. The reply of the Government of Turkey observed that the present situation with respect to invalid clauses is satisfactory.

[6] See the reply of Sweden which submitted that the Convention "should include a general provision on the nullity of clauses in a bill of lading which directly or indirectly, derogate from the provisions of the Convention".

persons and organizations representing the various transport interests".[7]

6. In view of these replies, and of the difficulties that are inherent in the topic, it may be appropriate for the Working Group to consider at this stage the general lines of policy that should govern further work on the subject of "invalid clauses".

B. *Alternatives approaches*

7. It would appear that several not necessarily exclusive, approaches to the problem might be considered:

(*a*) Making the mandatory requirements of the Convention as clear and explicit as possible.

(*b*) Specifying in the text of the Convention itself that certain types of clauses are invalid.

(*c*) Introducting sanctions to penalize the use of invalid clauses.

(*d*) Requiring the inclusion, in bills of lading subject to the Convention, of a clause drawing attention to the invalidity under the Convention of any agreement that is inconsistent with the mandatory rules of the Convention.

8. The approach under (a) above, making the mandatory requirements of the Convention as clear and explicit as possible, can be of value in minimizing the impact of invalid clauses. If a bill of lading contains a clause that is clearly invalid under the Convention, that clause cannot readily be abused to persuade the cargo owner to drop or to compromise a valid claim—at least if the cargo owner is aware of his legal rights under the Convention. (Approaches to this latter problem will be considered at paragraph 13, below.) Removing ambiguities latent in the Brussels Convention of 1924 and the 1968 Protocol is an objective specified in the UNCTAD and UNCITRAL resolutions, and one to which the Working Group has been addressing itself. Success in this work is thus relevant to the topic of "invalid clauses".

9. As was noted in paragraph 7 (*b*), one possible approach would be to specify in the text of the Convention that certain clauses are invalid.[8] This approach is used at one point in the present Convention—by the specific reference to "benefit of insurance" clauses in article 3 (8) (see paragraph 2 above). A wider use of this approach might be useful to brand the most flagrant violation of the provisions of the Convention as indisputably void; the rulings implied in the listing of invalid clauses might also help to make clear and explicit the principles of the Convention.

10. The Working Group may wish also to consider certain difficulties that are inherent in branding specificy clauses as "invalid". One basic difficulty is that many clauses are "invalid" when applied to some factual situation but are "valid" when applied to other situations.[9] Defining the circumstances in which a clause is invalid can only be done by the statement of a substantive rule—a function which is central to the Working Group's primary task of revising and clarifying the mandatory rules of the Convention.[10] Moreover, if certain clauses in current use should be identified as invalid, it is possible that legal draftsmen could prepare different wording to achieve similar ends—and defend the new clauses on the ground that they are not among the clauses specifically prescribed by the Convention.[11]

11. The third approach—introducing sanctions to penalize the use of invalid clauses—invites the question whether the penalities would attach to (i) the use of specifically outlawed clauses or (ii) the use of any clause that was inconsistent with a provision of the Convention. The first approach would present the difficulties of identifying specific clauses, as discussed in the preceding paragraph. The second approach—setting forth sanctions for the use of *any* contract clause might be held inconsistent with a rule of the Convention—would have to take account of the possibility that the implications of the rules of the Convention, in some of its applications, would not be perfectly clear. Thus, such a general rule might lead to sanctions where an adverse construction of the Convention was not anticipated and, in some cases, might inhibit the development of contractual solutions for problems where the precise meaning of the Convention is in doubt.

12. It is conceivable that these difficulties might be minimized by applying the sanctions only where the agreement was "clearly" or "plainly" in violation of the Convention; however, such a test might prove difficult of application. As an alternative, the difficulties presented by sanctions for any "invalid" clauses might be minimized if the applicable sanctions were relatively light. Consideration might be given to a provision modelled on article 7 (3) of the Road (CMR) Convention, whereby "the carrier shall be liable for all expenses, loss

---

[7] See, for example, the reply of Sweden. Similarly the Norwegian Government took the view that "the problems involved should be given serious consideration by the various organizations engaged in elaborating standard transport documents for carriage of goods by sea".

[8] See the suggestion made to this effect in "The carriage of goods by sea", by Professor E. R. H. Hardy-Ivamy, "*Current Legal Problems*", London, 1960, pp. 216-217, cited in UNCTAD secretariat report on bills of lading, para. 298.

[9] One example is given in the UNCTAD secretariat report, "Bills of lading", para. 296 and note 290. It is there noted that a clause that freight is earned "vessel and/or goods lost or not lost" is invalid where the carrier is legally responsible for the loss, but is valid where the carrier is not legally responsible.

[10] It might be suggested that the reference to "benefit of insurance" clauses in article 3 (8) shows that it is generally feasible to brand specific clauses as invalid. On the other hand, this provision may not be typical. In the first place, the "benefit of insurance" issue may be more clear-cut than most. In the second place, a substantive rule that the shipper has the right to retain the proceeds of his insurance might not be protected from a contractual provision to the contrary under the present language of article 3 (8) of the 1924 Convention since such a contract might not be deemed to be "a clause *relieving* the carrier from *liability*". This is essentially a problem of the language and scope of article 3 (8) to which attention could be given in a general review or revision of the Convention.

[11] The replies of the Governments of the Federal Republic of Germany and the USSR indicated that the attempt to identify invalid clauses was not practical. Various other replies expressed general doubts as to the feasibility of special measures to deal with invalid clauses.

and damage" resulting from the inclusion of an invalid (or "clearly" invalid) clause in the contract of carriage.[12]

13. The approach mentioned in paragraph 7 (*d*), above, responds to the view that invalid clauses are particularly susceptible of abuse when the cargo owner is not aware of the provisions of the Convention which invalidate such clauses. It seems possible that some cargo owners, particularly cargo owners who are not a part of a large business establishment, might feel that they were bound by a provision in the contract of carriage which would appear clearly to bar their claim. To alert such persons to their rights, consideration might be given to a provision that contracts of carriage subject to the Convention must state that any provision of the contract that is inconsistent with the Convention cannot be given effect.[13]

14. Such a "requirement" would be meaningless unless failure to include the required provision in the contract of carriage is subject to a sanction. It seems that there could be little excuse for failing to include such a prescribed statement in the contract of carriage. Consequently, it might be appropriate to follow article 9 of the 1929 Warsaw (Air) Convention, which states that if the air consigment note fails to contain particulars specified in article 8 (including "a statement that the carriage is subject to the rules relating to liability established by this Convention"), "the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability".

15. A requirement that the contract of carriage alert the cargo owner to the protection afforded by the Convention (paragraph 13, above) probably would provide only modest assistance to minimize the abuse of invalid clauses. But if the Working Group should conclude that alternative measures are not feasible, this minimal approach to the problem may be worthy of attention.

[12] One attractive feature of a rule based on the CMR Convention is that the causal connexion between the invalid clause and the resulting loss would avoid the argument that sanctions would be invalid in some hypothetical or unlikely situation. The sanction of loss of limitation of liability, provided in article 9 of the Warsaw Convention, lacks this causal connexion, and may be unduly harsh in situations where the invalidity of the contract clause may be in doubt.

[13] Such a required statement probably should stress the possible invalidity of contractual provisions more clearly than does article 6 (1) (*k*) of the Road (CMR) Convention, which requires that the consignment note contain "a statement that the *carriage is subject*, notwithstanding any clause to the contrary, *to the provisions* of this Convention".

5. *Report of the Working Group on International Legislation on Shipping on the work of its fifth session (New York, 5-16 February 1973) (A/CN.9/76)* *

CONTENTS

* 28 February 1973.