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APPROACHES TO BASIC POLICY DECISIONS CONCERNING
ALLOCATION OF RISKS BETWEEN THE CARGO OWNER AND
CARRIER: WORKING PAPER BY THE SECRETARIAT

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INTRODUCTION

1. At its third session, held in Geneva 31 January to 11 February 1972, the Working Group commenced consideration of the last and most general item on its agenda, approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier. The report of the Working Group 1/ on this matter concluded as follows:

"70. In conclusion, most representatives were of the view that further work should proceed along the following lines:

"(a) Retention of the principle of the Hague Rules that the responsibility of the carrier should be based on fault;

"(b) Simplification and strengthening of the above principle by (e.g.) the removal or modification of exceptions that relieved the carrier of responsibility for negligence or fault of his employees or servants (see Articles IV (2) (a) and (b));

"(c) Simplification and unification of the rules on burden of proof; to this end careful consideration should be given to the proposal in paragraph 269 of the report of the Secretary-General.

"71. It was noted that many representatives had reservations or doubts concerning some of the foregoing principles and that other representatives felt that further information was needed before final decisions could be taken. It was therefore agreed that the above should be considered further."

2. Most representatives at the third session of the Working Group expressed the view that a special session for consideration of the remaining topics should be held, with priority given to the basic question of carrier responsibility. The Commission at its fifth session (A/8717, para. 51) approved such a special session and noted that "the Working Group should give priority in its work to the basic question of the carrier's responsibility...".

3. This working paper is prepared to assist the Working Group in its consideration of this priority question. 2/ The underlying considerations have already been fully

1/ Report of the Working Group on International Legislation on Shipping on the Work of its third session, held in Geneva from 31 January to 11 February 1972 (hereinafter referred to as report of the Working Group) (A/CM.9/63).

2/ In the course of the third session of the Working Group some members expressed their hope that the Secretariat would be able to prepare a working paper for use by the Working Group in its consideration of this subject. The Secretariat indicated that every effort would be made to respond to this request. The Secretariat acknowledges assistance from Robert Hellowell, Professor of law, Columbia University.

developed in documents that have been previously submitted to the Working Group: the report of the Secretary-General entitled "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/63/Add.1) (hereinafter referred to as report of the Secretary-General) and the report of the UNCTAD secretariat entitled "Bills of lading" (TD/B/C.4/ISL/6/Rev.1) (hereinafter referred to as the report of the UNCTAD secretariat). The report of the Secretary-General describes and discusses changes in the Hague Rules that would implement a general policy of carrier liability for fault and a unified burden of proof formula. ^{3/} Parts I, II and III examine alternative approaches for implementing the above objectives within the basic framework of the Hague Rules. Part IV considers ways in which these objectives might be implemented through provisions designed to parallel existing international air, rail and road carrier conventions.

I. DISCUSSION DIRECTED TO THE IMPLEMENTATION OF A GENERAL POLICY OF CARRIER LIABILITY FOR FAULT

A. Introduction

4. The provisions of the Hague Rules which bear the major burden of allocating the risk of cargo loss and damage between the cargo owner and carrier are found in articles 3 and 4 of the Brussels Convention of 1924. Article 3 sets out the carrier's obligations to cargo:

"1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:

- (a) Make the ship seaworthy.
- (b) Properly man, equip and supply the ship;

^{3/} Several specific exceptions to carrier liability for fault are not treated in this paper because they have been considered in earlier reports to the Working Group: live animals (art. 1 (b)); deck cargo (art. 1 (b)); and provisions dealing with the carrier's period of responsibility (art. 1 (e)). Two other widely-enacted provisions of maritime law which might be considered to exonerate a carrier from liability for the consequences of its fault are also omitted from this paper. One of these provisions is the limitation of liability provisions (art. 4 (5)) of the Brussels Convention of 1924 containing the package or unit limitation. A study on this subject will be part of a report of the Secretary-General that will be presented to the fifth session of the Working Group. Another such provision is the over-all limitation of shipowners' liability incorporated in the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (1957). For a description of the nature of the over-all shipowners' limitation see report of the Secretary-General, para. 201.

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- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation.

"2. Subject to the provisions of article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Article 4 (1) and (2) set out a variety of exceptions to the carriers' article 3 obligations. 4/

4/

ARTICLE 4

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
- (b) Fire, unless caused by the actual fault or privity of the carrier;
- (c) Perils, dangers and accidents of the sea or other navigable waters;
- (d) Act of God;
- (e) Act of war;
- (f) Act of public enemies;
- (g) Arrest or restraint of princes, rulers or people, or seizure under legal process;
- (h) Quarantine restrictions;
- (i) Act or omission of the shipper or owner of the goods, his agent or representative;
- (j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;
- (k) Riots and civil commotions;
- (l) Saving or attempting to save life or property at sea;
- (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
- (n) Insufficiency of packing;
- (o) Insufficiency or inadequacy of marks;
- (p) Latent defects not discoverable by due diligence;
- (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

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5. Part IV of the report of the Secretary-General analyses these provisions and their varying interpretations. It describes in some detail the extent to which the Hague Rules depart from the fault principle, approved by a majority of the Working Group. To summarize briefly, articles 3 and 4 for the most part hold carrier liable to the shipper for loss or damage to cargo caused by fault of the carrier and its employees. There are two major exceptions to this: error in navigation and management of the ship (art. 4 (2) (a)) and fire (art. 4 (2) (b)).

B. Means to implement general policies considered by the third session of the Working Group

1. Navigation and management

6. The report of the Working Group concluded that work should include "simplification and strengthening of the fault principle" by (e.g.), "the removal or modification of exceptions that relieved the carrier of responsibility for negligence or fault of his employees or servants (see article/s/ 4 (2) (a)...". This is the provision which relieves carrier of liability for negligent navigation or management of the ship. The various considerations underlying the conclusion that this provision should be removed are set out in the report of the Secretary-General and need not be repeated here. 5/

7. If the Working Group decides that carriers should be liable to shippers for damage caused by negligent navigation or management, it should consider whether implementation of this policy can be accomplished simply by deleting article 4 (2) (a) or whether an affirmative provision should also be added. It should be noted here that if article 4 (2) (a) is deleted it is possible that courts would reach the result intended by the Working Group without any such affirmative provision. Thus, as described in the report of the Secretary-General (paras. 244-245), when a claimant proves that cargo was delivered to the ship in good condition and returned at destination in damaged condition, the carrier normally has the burden of proving that it comes within some particular exemption. With article 4 (2) (a) removed a carrier at fault with regard to navigation or management could not fit within any exemption provision and, therefore, would probably be held liable. However, as was mentioned earlier, the structure of the Brussels Convention sets out the carriers' obligations in article 3 and the exceptions to those obligations in article 4. There is now, of course, no obligation in article 3 (or elsewhere in the Brussels Convention) as to navigation and management, and consequently the intended result of carrier's liability would be left somewhat speculative by the mere deletion of article 4 (2) (a). A specific obligation on navigation and management in article 3 would be in accord with the structure of the Convention and would eliminate any doubt as to the outcome. A new article 3 (3) might read as follows:

"3. The carrier shall properly and carefully navigate and manage the ship."

5/ For example at paras. 240-43.

2. Fire

8. The other provision of article 4 which is inconsistent with the general principle of carrier liability for fault is section 2 (b), the fire provision. As is explained more fully in the report of the Secretary-General (paras. 163-166) the import of section 2 (b) is that the negligence of carrier's employees, leading to a fire, will not necessarily result in carrier liability; the fault must be that of the carrier itself. In the case of corporate shipowners some decisions have held that only the negligence of a senior employee or officer will result in carrier liability. 6/ But whether or not all cases would so draw the line, it is clear that the shipowner will not be held responsible for the negligence of all of his employees. There does not appear to be any peculiarity to loss or damage from fire which demands this unique rule. Policy considerations seem about the same for fire losses as for other types of losses. That is, considerations of insurance, economics, fairness and friction, as discussed in the report of the Secretary-General (paras. 246 and 178-214) all seem to bear on liability for fire loss in about the same manner as on liability for other types of losses. It should be pointed out, however, that it is often difficult or impossible for the carrier to establish the cause of shipboard fires. At the third session of the Working Group it was asserted that in such cases, without the fire exception (and with the burden of proof) carrier will be, in a sense, subject to something like strict liability. 7/ However, the cargo owner is generally in an even poorer position to establish the cause of a shipboard fire and, accordingly, a contrary rule would seem to leave the cargo owner without recourse regardless of the fault of the carrier. In any event, if there is to be a general rule that carriers are liable for loss or damage to cargo caused by the fault of the carrier or its employees, it would follow that the fire provision should be eliminated.

3. Seaworthiness during the voyage

9. Section 1 of article 3 spells out carrier's obligation to provide a seaworthy ship but limits the obligation by the language - "before and at the beginning of the voyage".

10. Thus a carrier does not violate its obligations under section 1 by allowing the ship to become unseaworthy after commencement of a voyage 8/ even if carrier was negligent. Such negligence under present law would most likely be considered negligence in the management of the ship, with the result that carrier would have no liability for loss or damage to cargo.

6/ Tetley, *Marine Cargo Claims* 112 (1965); *Earle v. Stoddart*, 287 U.S. 420, 425 (1932); Gilmore and Black, *the Law of Admiralty* 698 (1957).

7/ Report of the Working Group, para. 65.

8/ A common rule is that the voyage commences with respect to each item of cargo when the ship breaks ground at the port at which that item of cargo was loaded.

11. Under the changes in articles 3 and 4 proposed thus far, carrier would, of course, be liable for damage to cargo caused by negligent management of the ship as well as by negligent care of cargo. Consequently, if those changes are adopted, the limitation of carrier's duty to provide a seaworthy ship to the period "before and at the beginning of the voyage" is probably not of great consequence. Any fault of the carrier rendering the ship unseaworthy during the voyage would most likely be held a fault in management or in care of cargo, for either one of which carrier would be liable. However, there is always the possibility of a gap - of some act of negligence making the ship unseaworthy which some court might hold was neither an act of management or navigation nor care of cargo. To allow a carrier to escape liability for such an act would be contrary to a general policy of carrier liability for fault. Consideration should be given to amending article 3 (1) to guard against any such gap. The beginning of article 3 (1) might be amended to read as follows:

"The carrier shall be bound before, and at the beginning of and throughout the voyage to exercise due diligence to:"

4. Removing ambiguities that arise when carrier's fault concurs with an article 4 exception

(a) Introduction

12. The result under the Hague Rules is unclear when a fault of the carrier combines with an article 4 (2) exception. This requires some explanation. First, consider exceptions (e) through (o) which involve the overwhelming force of third parties, fault of the shipper or the goods, or an attempt to save life or property at sea. Normally, if one of these situations, or exceptions, causes the loss the result is clear. Thus, if loss or damage to cargo results from a delay caused by quarantine restrictions, normally no carrier fault is involved; and exemption of the carrier under (h) is consistent with the principle of carrier liability only for fault. But suppose that carrier's negligence had in some fashion caused the quarantine. Or suppose that carrier's negligence in incorrectly storing the cargo contributed or added to the damage. The Hague Rules are not clearly addressed to this situation. Which prevails, the carrier's article 3 obligations or the article 4 (2) exceptions?

13. A common view in these situations is that the exception will not exonerate the carrier. ^{9/} Where carrier's fault has caused the exception to occur, carrier will usually be held liable for the entire damage. And where carrier's fault concurs with the exception - for example, cheese is damaged by a combination of quarantine delay in a hot harbour and improper storage - carrier will commonly be held responsible for that portion of the damage attributable to its fault, or for all of the damage if that portion cannot be singled out. However, while the above is a common interpretation of exceptions (e) through (o), it is not universal. Some jurisdictions take a contrary view and in others the result is unclear.

^{9/} See report of the Secretary-General, paras. 167-71, 267.

14. Other exceptions present a very similar situation. Thus, the perils of the sea exception (c) and the act of God exception (d) have been interpreted by some courts to have an inherent no-fault requirement. Those courts have held that unless the carrier has exercised due diligence to protect against the particular peril involved, be it high sea or lightning, the exception will not apply and the carrier will be liable. 10/ But in other courts the result is different or unclear. 11/

15. At the third session of the Working Group, most representatives were of the view that the responsibility of the carrier should be based on fault and that uncertainties should be clarified or eliminated. 12/ The present article 4 (2) exceptions, when combined with carrier fault, create uncertainty and the possibility of carrier fault without liability. Alternative approaches to this problem are given below. The first alternative would add a provision dealing with those kinds of situations where carrier's fault may combine with an article 4 (2) exception and providing an appropriate rule of liability in such cases. Apart from adding such a provision the first alternative would leave the article 4 (2) exceptions as they are now. The second alternative would eliminate all of the specific article 4 (2) exceptions.

(b) First alternative: adding a clarifying provision to article 4

16. A new provision, 13/ such as the following, might be added to article 4 immediately after article 4 (2) (q):

"Provided, however, that the occurrence of one or more of the foregoing exceptions shall not relieve carrier of responsibility for any of the loss or damage arising or resulting therefrom if carrier's fault or want of due diligence:

(i) caused or brought about the occurrence of the exception or exceptions;
or

(ii) concurred with the occurrence of the exception or exceptions;
however, carrier shall be liable only for that portion of the loss or damage attributable to its fault provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault."

10/ See report of the Secretary-General, para. 159.

11/ There remain two additional provisions to be noted: The latent defect exception (art. 4 (2) (p)) expressly requires that the defect be "not discoverable by due diligence". And article 4 (1) exempts carrier from liability for loss or damage resulting from unseaworthiness "unless caused by want of due diligence...". By reason of their explicit language these are the two clearest provisions on the matter of carrier's concurring fault.

12/ Report of the Working Group, para. 70, quoted at para. 1 supra.

13/ The text of the provisions resulting from this alternative and the changes proposed in sections 1-3, supra, of this part of the working paper appears infra at para. 34 (alternative proposal A).

(c) The second alternative: elimination of exceptions

17. A second alternative for eliminating the ambiguities and difficulties described above (at paras. 12-14) would eliminate all the specific exceptions, leaving only one general or catch-all exception similar to the present article 4 (2) (q). ^{14/} That general exception clearly exonerates carrier from liability for all loss or damage arising or resulting from all causes whatsoever - except the fault of the carrier; this provision would appear to be sufficient to implement a policy of carrier liability for fault. The specific exceptions are superfluous. ^{15/} Article 4 (2) (q) removes all danger that carrier will be held liable for any loss or damage if it is not at fault. It appears that elimination of the specific exceptions is preferable to the first alternative because it is a simpler and more certain way to implement a general system of carrier liability for fault. Leaving in unnecessary specific provisions is likely to cause confusion. (The discussion on burden of proof in part II (paras. 21-31) of this working paper will further illustrate the redundancy of the specific exceptions and will indicate their potentiality for confusion.)

18. To make the rule in the case of concurring negligence clear, under this alternative a provision such as the following could be considered as article 4 (2):

"2. Where carrier's fault concurs with another cause to produce loss or damage, carrier shall be liable only for that portion of the loss or damage attributable to its fault, provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault."

(d) The "subject to" qualification to article 3 (2)

19. Whichever of the above alternatives is chosen, a change should also be considered in article 3 (2). This section, which sets out the carrier's duties regarding care of cargo, begins with the clause: "subject to the provisions of article 4...". It appears desirable to eliminate the quoted words.

20. This clause might appear to be innocuous, but can present serious difficulty if independent meaning is ascribed to it. One construction of the "subject to" clause would be to conclude that it adds nothing to the law on the ground that it merely means that article 4 should be given effect. However, this would be obvious without the clause. Thus, the argument that independent meaning must be given to these words could lead a court to conclude that if a carrier fit within

^{14/} The text of the provisions resulting from this alternative appears infra at para. 35 (alternative proposal B).

^{15/} Note that the article 4 (2) (1) exception "Saving or attempting to save life or property at sea" seems unnecessary on the ground that this conduct in itself would not seem to constitute fault and carrier is liable only for the consequences of fault (article 4 (2) (q)). Any doubt on this issue could be removed in connexion with review of the deviation provision which makes specific reference to saving life or property at sea.

one of the article 4 (2) exceptions it had no obligation to exercise proper care of the cargo. This would, of course, be contrary to a liability for fault principle. If either of the two foregoing alternatives is adopted it is unlikely that many courts would so interpret the "subject to..." language. But since the phrase serves no useful purpose and can lead to confusion, consideration should be given to its elimination.

II. CHANGES TO BE CONSIDERED IN IMPLEMENTATION OF A UNIFORM BURDEN OF PROOF SYSTEM

21. As is explained more fully in the report of the Secretary-General (paras. 167-177) the Brussels Convention of 1924 contains no unified burden of proof system. Some provisions have their own express burden of proof rules 16/ but for the most part the Convention is silent on the matter. As a result, courts have developed several different burden of proof rules. The rule used may vary with the particular exception relied upon and with the jurisdiction in which the case is brought. Under many circumstances it is quite unclear what the rule on burden of proof is. Moreover, it does not appear that any consistent or rational policy can account for the varying burden of proof rules currently used in article 3 and 4 cases.

22. At the third session of the Working Group there was substantial support for simplification and unification of the rules on burden of proof and for careful consideration of the burden of proof proposal in paragraph 269 of the report of the Secretary-General. 17/ That proposal would add a provision to article 4 (2) as follows:

"The burden of proof shall be on the claimant to show:

- (a) that the claimant is the owner of the goods or is otherwise entitled to make the claim;
- (b) that the loss or damage took place during the period for which carrier is responsible;
- (c) the physical extent of the loss or damage;
- (d) the monetary value of the loss or damage.

16/ Foot-note 12, supra.

17/ See report of the Working Group at para. 70 (c) quoted at para. 1, supra. Three minor changes were made in the proposal as it appeared in the report of the Secretary-General: "shipper" was changed to "claimant"; "(b) the contract" was eliminated as unnecessary; the words "to avoid liability" were added for clarity.

The burden of proof shall be on the carrier as to all other matters: to avoid liability carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage."

The proposal is based on considerations described in the report of the Secretary-General, 18/ including the desirability of placing the burden of proof upon the party most likely to have knowledge of the facts - generally the carrier. Another important consideration is the need to clarify and simplify the present burden of proof rules which are now complicated, uncertain and, therefore, wasteful.

23. This section will analyse the textual changes to be made in article 4, if the burden of proof proposal in paragraph 269 of the report of the Secretary-General is adopted.

24. Exceptions (e) through (o). It is necessary first to consider the article 4 exceptions in paragraphs (e) through (o) in relationship to the above unified burden of proof proposal. These involve the overwhelming force of third parties, fault of the shipper or the goods or an attempt to save life or property at sea. No single statement can be made as to burden of proof in relation to all of these exceptions in all jurisdictions - indeed, the existence of confusing and varying rules on burden of proof under the present Hague Rules is an important reason for change and simplification. However, a common rule is that carrier has the burden of proving itself within the exception and, if carrier succeeds, the burden then passes back to cargo owner to prove that the carrier's fault caused the excepted act or concurred with the excepted act in producing the loss or damage. 19/

25. This burden of proof formula is clearly inconsistent with the proposed unified provision on burden of proof. If the proposed provision is adopted, therefore, two courses are open: these alternatives are analogous to the two alternatives of part I, section 4 of this working paper (paras. 16-18, supra).

26. Under the first alternative, language would be added to the unified burden of proof provision making it clear that it applies in all cases, whether or not one of the article 4 (2) exceptions is also applicable. The following underlined words could be added: "The burden of proof shall be on the carrier as to all other matters, whether or not one or more of the provisions in article 4 (2) is applicable:". 20/

18/ See paras. 256-65.

19/ Report of the Secretary-General, paras. 167-71.

20/ The text in its fuller setting appears at infra para. 34.

27. Under the second alternative, the specific exceptions, article 4 (2) (e) through 4 (2) (o) could be eliminated. This may be the preferable alternative. With a new unified burden of proof provision the exception should no longer play a role in the burden of proof. And if a general liability for fault rule is adopted the exceptions will no longer have any substantive effect on liability: they will all be subsumed in the general catch-all provision based on the present article 4 (2) (q). Accordingly, the (e) through (o) exceptions would be left with no function.

28. Provisions without function invite misinterpretation and confusion. A court faced with a large array of specific exceptions will be reluctant to conclude that they have no meaning or function. It will be recalled that these exceptions present difficulties in effecting a general policy of carrier liability for fault (see paras. 12-14, supra). These exceptions also present difficulties with respect to burden of proof. It seems likely that some courts will attempt to attribute meaning to the surplus exception provisions - an effort that is likely to lead to results that are unintended by the draftsmen. Accordingly, if the proposed burden of proof provision is adopted and the liability for fault is implemented, serious consideration should be given to eliminating exceptions (e) through (o).

29. Exceptions (c), (d), and (p). The perils of the sea exception (c) and the act of God exception (d) may differ from the (e) through (o) exceptions as to burden of proof in one respect. They have sometimes been interpreted to require the carrier to prove its lack of negligence before it will be considered to fit within the exception. 21/ The burden of proof, therefore, stays with the carrier once the cargo owner has carried its initial burden of showing the loss. To the extent courts follow this pattern there would be no inconsistency between these provisions and the proposed burden of proof scheme. Nor would there be any inconsistency with a general liability for fault policy. This may suggest that the exceptions are innocuous and should be left intact. However, there is no certainty that all (or even most) courts will follow this pattern. 22/ Thus, these provisions really present the same problems and alternatives as the (e) through (o) exceptions. The choice is between the previously suggested addition to the burden of proof language 23/ and elimination of (c) and (d). Elimination appears to be the better alternative: as non-functional surplus the (c) and (d) exceptions would have the same potential for mischief as the (e) through (o) exceptions.

21/ Report of the Secretary-General, para. 173.

22/ See Corte di Cassazione 4 aprile 1957, in Dir. Mar. 1958, p. 67 (shipper has burden of proving carrier negligence under perils of the sea exception).

23/ Viz. "whether or not one or more of the provisions in article 4 (2) is applicable:".

30. The latent defect exception reads "(p) Latent defects not discoverable by due diligence". The text appears to require that the carrier show due diligence, and thereby bear the burden of proof, for the exception to apply. However, relying on such a textual analysis seems less certain than the suggested explicit provisions on burden of proof. Thus, again the choice is between the previously suggested addition to the burden of proof language and the elimination of (p).

31. Unseaworthiness: article 4 (1). Article 4 (1) provides that carrier will not be liable for loss or damage resulting from unseaworthiness unless there was a want of due diligence. It contains its own express burden of proof provision as follows:

"Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article."

The burden of proof provision does not appear inconsistent with the proposed uniform burden of proof scheme. Nor does the substantive provision appear to be inconsistent with a general policy of carrier liability for fault. It is equally clear, however, that article 4 (1) would be redundant if the uniform burden of proof scheme and the general policy of liability for fault were adopted. Thus article 4 (1) poses in its purest form the question of whether a provision without apparent function should be eliminated. Its potential for harm seems slight; but its potential for usefulness appears to be negligible. Given this situation the elimination of article 4 (1) seems to be indicated.

32. The catch-all exception: article 4 (2) (q). Article 4 (2) (q) (the general, or catch-all, exception) also has its own burden of proof provision. Like article 4 (1), article 4 (2) (q) is consistent with the proposed uniform scheme but would be redundant if the uniform scheme is adopted. Accordingly, it seems preferable to eliminate the burden of proof provision from article 4 (2) (q).

III. COMPILATION OF ALTERNATIVE PROPOSED TEXTUAL CHANGES IN ARTICLES 3 AND 4

33. This part sets out those provisions of articles 3 and 4 of the Hague Rules that have been discussed in this working paper and shows all suggested changes. Alternative proposal A shows the suggested changes on the assumption that the specific exceptions (article 4 (2) (c) through (p)) remain in the Convention. Alternative proposal B shows the suggested changes on the assumption that those exceptions are deleted. In both alternatives, suggested deletions from the present text of the Brussels Convention are enclosed in brackets; suggested additions are underlined.

/...

34. Alternative proposal A.

Article 3

(1) The carrier shall be bound before, /and/ at the beginning of and throughout the voyage to exercise due diligence to: 24/

- (a) Make the ship seaworthy;
- (b) Properly man, equip and supply the ship;
- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(2) /Subject to the provisions of article 4, / 25/ The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) The carrier shall properly and carefully navigate and manage the ship. 26/

Article 4

/1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article. / 27/

/2/ (1) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

24/ These proposed changes are discussed at paras. 9-11, supra.

25/ This proposed deletion is discussed at paras. 19-20, supra.

26/ This proposed addition is discussed at para. 9, supra.

27/ This proposed deletion is discussed at para. 31, supra.

/...

- ~~[(a)]~~ Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;~~]~~ 28/
- ~~[(b)]~~ Fire, unless caused by the actual fault or privity of the carrier;~~]~~ 29/
- ~~[(c)]~~ (a) Perils, dangers and accidents of the sea or other navigable waters;
- ~~[(d)]~~ (b) Act of God;
- ~~[(e)]~~ (c) Act of war;
- ~~[(f)]~~ (d) Act of public enemies;
- ~~[(g)]~~ (e) Arrest or restraint of princes, rulers or people, or seizure under legal process;
- ~~[(h)]~~ (f) Quarantine restrictions;
- ~~[(i)]~~ (g) Act or omission of the shipper or owner of the goods, his agent or representative;
- ~~[(j)]~~ (h) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;
- ~~[(k)]~~ (i) Riots and civil commotions;
- ~~[(l)]~~ (j) Saving or attempting to save life or property at sea;
- ~~[(m)]~~ (k) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
- ~~[(n)]~~ (l) Insufficiency of packing;
- ~~[(o)]~~ (m) Insufficiency or inadequacy of marks;
- ~~[(p)]~~ (n) Latent defects not discoverable by due diligence;
- ~~[(q)]~~ (o) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage~~]~~; 30/

28/ This proposed deletion is discussed at paras. 6-7, supra.

29/ This proposed deletion is discussed at para. 8, supra.

30/ This proposed deletion is discussed at para. 32, supra.

provides, however, that the occurrence of one or more of the foregoing exceptions shall not relieve carrier of responsibility for any of the loss or damage arising or resulting therefrom if carrier's fault or want of due diligence:

- (i) caused or brought about the occurrence of the exception or exceptions; or
 - (ii) concurrent with the occurrence of the exception or exceptions; however, carrier shall be liable only for that portion of the loss or damage attributable to its fault provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault. 31/
- (2) The burden of proof shall be on the shipper to show:
- (a) That the claimant is the owner of the goods or is otherwise entitled to make the claim;
 - (b) That the loss or damage took place during the period for which the carrier is responsible;
 - (c) The physical extent of the loss or damage;
 - (d) The monetary value of the loss or damage.

The burden of proof shall be on the carrier as to all other matters, whether or not one or more of the provisions in article 4 (2) is applicable: to avoid liability carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage. 32/

35. Alternative proposal B.

Article 3

(1) The carrier shall be bound before, and at the beginning of and throughout the voyage to exercise due diligence to: 33/

- (a) Make the ship seaworthy;
- (b) Properly man, equip and supply the ship;

31/ This proposed addition is discussed at paras. 12-16, supra.

32/ These proposed additions are discussed at paras. 21-23, 26, supra.

33/ These proposed changes are discussed at paras. 9-11, supra.

- (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(2) /Subject to the provisions of article 4, / 34/ The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

(3) The carrier shall properly and carefully navigate and manage the ship. 35/

Article 4 36/

/2/ (1) Neither the carrier nor the ship shall be responsible for loss or damage / arising or resulting from:/

/ (q) Any other / from any cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier / but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage/. 37/

(2) Where carrier's fault concurs with another cause to produce loss or damage, carrier shall be liable only for that portion of the loss or damage attributable to its fault, provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault.

(3) The burden of proof shall be on the claimant to show:

- (a) That the claimant is the owner of the goods or is otherwise entitled to make the claim;
- (b) That the loss or damage took place during the period for which the carrier is responsible;
- (c) The physical extent of the loss or damage;
- (d) The monetary value of the loss or damage.

34/ This proposed deletion is discussed at paras. 19-20, supra.

35/ This proposed addition is discussed at para. 7, supra.

36/ Article 4 (1) and 4 (2) (a) through (p) are deleted. These proposed deletions are discussed at paras. 17, 24, 27-31, supra. The full text of articles 3 and 4 is found at supra, para. 4 and foot-note 4.

37/ These proposed changes are discussed at para. 32, supra.

/...

The burden of proof shall be on the carrier as to all other matters: to avoid liability carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage." 38/

IV. STANDARDS OF LIABILITY BASED ON CONVENTIONS GOVERNING
OTHER MODES OF TRANSPORT OF GOODS

A. Introduction

36. The report of the Secretary-General describes the bases of liability and the burden of proof systems of the major conventions dealing with international carriage of cargo by rail, road and air. 39/ These are the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention), 40/ the International Convention Concerning the Carriage of Goods by Rail (CIM) 41/ and the Convention on the Contract for the International Carriage of Goods by Road (CMR). 42/ The pattern of the liability provisions of the three conventions is very similar. One section states what appears to be a rule of strict liability, seemingly holding carrier liable for all loss or damage to the goods during the period of carriage. A second section, however, in effect cuts down carrier liability to something like a fault or negligence standard. For example article 18 (1) of the Warsaw Convention provides:

"The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any... goods, if the occurrence which caused the damage so sustained took place during the transportation by air."

And article 20 (1) cuts the broad rule down as follows:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

The language of article 20 (1) has been interpreted to require a standard of reasonable care only. 43/

B. Substantive provisions based on other international conventions

37. If the approach of the three conventions were followed in amending the Hague Rules article 3 (1) imposing a duty on carrier to provide a seaworthy ship and

38/ These proposed changes are discussed at paras. 21-23, supra.

39/ Report of the Secretary-General, paras. 215-230.

40/ See report of the Secretary-General, paras. 216-221.

41/ Ibid., paras. 222-226.

42/ Ibid., paras. 227-230.

43/ Ibid., paras. 217-218.

article 3 (2) requiring the carrier, inter alia, to carefully load, handle and discharge the goods. both of these articles should be deleted. In their place would be a new article 3 (1) such as the following:

"The carrier shall be liable for all loss or damage to the goods carried occurring while in the charge of the carrier."

38. The above provision was modelled on article 17 (1) of CMR but would not be significantly different if modelled on the counterpart provisions of either CIM or the Warsaw Convention. 44/

39. Article 4 (1) and (2) would also be deleted. They could be replaced by a provision from one of the three conventions as follows:

However, the carrier shall not be liable if -

(a) /Air: The Warsaw Convention/ "he and his agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures";

(b) /Rail: The CIM Convention/ the loss or damage resulted "through circumstances which the /carrier/... could not avoid and the consequences of which it was unable to prevent";

(c) /Road: The CMR Convention/ "through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent." 44a/

C. Burden of proof

40. The general rule under all three conventions is that carrier bears the burden of proof. There are certain exceptions to this general rule, described in the report of the Secretary-General, 45/ which are different under each convention and presumably are based on the particular conditions of each mode of carriage. The unified burden of proof arrangement proposed in paragraph 269 of the report of the Secretary-General is like the scheme of the three conventions in placing the burden of proof on the carrier as a general rule. Paragraph 269 differs from the

44/ It will be noted that this draft provision omits the references to delay which was found in the CMR and CIM Conventions since the effect of delay may be an item for separate consideration.

44a/ Both the CIM and CMR Conventions relieve the carrier for loss or damage arising from the "special risks inherent" in specified circumstances. See the report of the Secretary-General at paras. 222 (note 186) and 229 (note 190). Some of these specified circumstances are similar to the carriage of goods on deck, and the carriage of live animals which were considered at the third meeting of the Working Group. Any such special circumstances requiring particular treatment could be dealt with by provisions which would supplement the rules establishing the basis for liability.

45/ See report of the Secretary-General, paras. 225-226, 230.

/...

three conventions much as they differ among themselves - that is, in the particular exceptions to the general burden of proof rule. There does not seem to be any good reason why the particular exceptions of either air, rail or road should be followed. Probably such detail should depend on the conditions and practices of each particular mode of carriage. However, paragraph 269, in generally placing the burden on carrier, is exactly in line with the central thrust of the burden of proof provisions of all three conventions.

D. Compilation of provisions on carrier's liability based on the other international conventions

41. This section sets out suggested substantive provisions regarding carrier's liability based on the Warsaw Convention and the CMR and CIM Conventions. The second part of the provision includes alternative language based on (1) the Warsaw Convention and (2) the CMR and CIM Conventions. The unified burden of proof provision (in para. 4) is taken from the draft proposed in part II of this working paper. It will be noted that this draft burden of proof provision is in line with the draft proposed in paragraph 269 of the report of the Secretary-General.

42. Alternative proposal C

"(3) The carrier shall be liable for all loss or damage to the goods carried occurring while in the charge of the carrier. 46/

However, the carrier shall not be liable if..."

/Alternative C (1) - based on the Warsaw Convention/ "he and his agents have taken all necessary measures to avoid the damages or it was impossible for him or them to take such measures".

/Alternative C (2) based on the CIM and CMR Conventions/ "the loss or damage resulted through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent". 47/

"(4) The burden of proof shall be on the claimant to show:

(a) that the claimant is the owner of the goods or is otherwise entitled to make the claim;

(b) that the loss or damage took place during the period for which carrier is responsible;

(c) the physical extent of the loss or damage;

(d) the monetary value of the loss or damage.

46/ This proposed provision is discussed at paras. 36-38, supra.

47/ These alternative provisions are proposed in para. 39, supra.

The burden of proof shall be on the carrier as to all other matters: to avoid liability carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage." 48/

E. Comparison of rules based on other transport conventions with provisions based on the Hague Rules

43. The liability rules of the three conventions seem very similar in effect to the liability rules suggested earlier in this paper. All appear to rest, essentially, on a liability for fault system. But the approaches are different. The three conventions first state a flat rule of carrier liability for loss or damage to the goods carried during the relevant time period. Then a general exception is provided which appears in effect to reduce carrier liability to a fault standard.

44. The liability system described earlier in this paper, which we might call a modified Hague Rules system, has quite a different pattern. It states the obligations of carriers in a much more limited way than the flat initial rules of the three conventions. The modified Hague Rules system requires only that the carrier exercise "due diligence" to make the ship seaworthy, and that it "properly and carefully" care for the cargo and navigate and manage the ship. Thus article 4, in excusing carrier for damage arising without fault or neglect, can be regarded as reinforcement of the terms "due diligence" and "properly and carefully" rather than as an exception.

45. Certainly both systems are pointed in the same direction - toward a liability for fault rule - and appear to come out in approximately the same place. It is difficult to say which would require a higher standard of care on the part of the carrier, or whether there would be any difference in this respect.

46. It may be difficult to predict the interpretations that maritime courts would give the words of the three conventions. Since the draft based on the Hague Rules departs less in form from the traditional statutory language it may raise fewer doubts as to how courts will interpret the language in the setting of the carriage of goods by sea.

47. On the other hand adopting the system of one of the three conventions might facilitate the making of contracts for combined transport operations and the preparation of uniform rules applicable to such contracts. Under the existing régimes attempts at unification of the rules of liability encounter serious difficulties because of the differences in liability rules for the various modes of carriage. To the extent that the liability rules regarding carriage of goods by sea may be brought closer to the rules of other types of carriage, these problems would be alleviated. 49/

48/ This proposed provision is discussed at paras. 21-23 and 40, supra.

49/ See report of the Working Group, para. 64.