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UNITED NATIONS COMMISSION ON
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Working Group on International
Legislation on Shipping
Fifth session
New York, 5 February 1973

REPLIES TO THE SECOND QUESTIONNAIRE ON BILLS OF LADING SUBMITTED BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS FOR CONSIDERATION BY THE WORKING GROUP

1. The UNCITRAL Working Group on International Legislation on Shipping, at its third session, held in Geneva from 31 January to 11 February 1972, requested the Secretary-General "to invite comments and suggestions from governments and from international intergovernmental and non-governmental organizations active in the field", to provide material needed in the presentation of the second report of the Secretary-General on the responsibility of ocean carriers for cargo in the context of bills of lading. Accordingly a questionnaire was prepared and circulated to Governments and to international organizations active in the field. A copy of the questionnaire is attached hereto as annex I.

2. The report by the Secretary-General entitled "Second report on responsibility of ocean carriers for cargo: bills of lading (unit limitation of liability; transshipment, deviation; the period of limitation, definitions, invalid clauses)" (A/CN.9/WG.III/WP.10, vols. I-III) has drawn on material contained in those replies that were received before 1 December 1972. Attached hereto are all substantive replies to the questionnaire (annex II) received in one of the working languages of the United Nations before 20 December 1972. Replies are reproduced in the original language.

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Annexes

Annex I

QUESTIONNAIRE OF JULY 1972 ON CERTAIN MATTERS REGARDING THE RESPONSIBILITY OF CARRIERS FOR LOSS OR DAMAGE TO CARGO IN THE CONTEXT OF BILLS OF LADING

Introduction

The United Nations Commission on International Trade Law (UNCITRAL) at its fourth session (1971) adopted a resolution calling for an examination of rules and practices relating to the responsibility of carriers for damage or loss to cargo in the context of bills of lading.[1/] Paragraph 1(b) of the resolution, which sets out the topics to be taken up by the UNCITRAL Working Group on International Legislation on Shipping, reads as follows:

> "(b) That within the subject of bills of lading, the topics for consideration should include those indicated in paragraphs 1 and 2 of the resolution adopted by the Working Group on International Shipping Legislation of the United Nations Conference on Trade and Development at its second session, reading as follows:
>
> > '1. Considers 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.
> >
> > '2. Further considers that the examination referred to in paragraph 1 should mainly aim at the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others, should be considered for revision and amplification:
> >
> > (a) responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;

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. 18 (A/8417), para. 19, UNCITRAL Yearbook, vol. II, part one.

'(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 transshipment;

'(f) extension of the period of limitation;

'(g) definitions under Article I of the Convention;

'(h) elimination of invalid clauses in bills of lading;

'(i) deviation, seaworthiness and unit limitation of liability.';

it is noted that, by its terms, paragraph 2 of the resolution does not confine consideration to those areas listed in sub-paragraphs (a) through (i)."

Topics (a) through (d) and topic (e) (except for transshipment) were the subjects of a questionnaire sent in June 1971 to Governments and international organizations active in the field. Replies to the questionnaire were incorporated into the Report by the Secretary-General on "Responsibility of Ocean Carriers for Cargo: Bills of Lading" (A/CN.9/63/Add.1). This Report was considered by the Working Group at its third session, held from 31 January to 11 February 1972. The Working Group decided inter alia that "at the next regular session the Working Group should take up the remaining topics listed in the resolution adopted by UNCITRAL at its fourth session."2/

Part I of this questionnaire contains questions relating to the topics listed in the UNCITRAL resolution that remain to be considered by the Working

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2/ International Legislation on Shipping. Report of the Working Group on the work of its third session held in Geneva from 31 January to 11 February 1972, A/CN.9/63.

Group. These topics are:

"(e) responsibility for...transshipment;

"(f) extension of the period of limitation;

"(g) definitions under Article I of the Convention;

"(h) elimination of invalid clauses in bills of lading;

"(i) deviation,...[3/] and unit limitation of liability."

Part II of the questionnaire relates to the Working Group's decision adopted at its third session requesting a report by the Secretary-General "identifying any related problem areas in the field of ocean bills of lading not specifically named in the list adopted by UNCITRAL at its fourth session."[4/]

3/ The topic of seaworthiness which is listed in topic (i) is considered in connexion with topic (b) of the list in paragraph 1(b) of the resolution on the subject.

4/ Report of the Working Group at para. 76.

Part I

1. Transshipment

One of the topics set forth in paragraph 1(b) of the Commission's resolution is "(e) responsibility for...transshipment". Attention has been directed to the absence of any provision in the Brussels Convention of 1924[5/] dealing directly with transshipment. Evidence has been presented that bills of lading often contain clauses providing that the goods may be transshiped by the carrier prior to their delivery at the port of destination stated in the bill of lading, and that the carrier's responsibility for loss or damage shall be limited to the period the goods are in his possession. Questions have been raised as to whether such clauses unduly restrict the responsibility of the carrier.

Do you consider the existing rules and practice regarding transshipment satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem.

2. Deviation

One of the topics set forth in paragraph 1(b) of the Commission's resolution is "(i) Deviation...". Attention is directed to Article IV(4) of the Brussels Convention of 1924 which states: "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." Questions have been raised as to whether: (1) the standard with respect to the limits within which deviation from the expected route of the ship will be permitted should be clarified; (2) the consequences for the carrier of a deviation not permitted under the Convention should be specified.

5/ International Convention for the Unification of Certain Rules relating to Bills of Lading, League of Nations, Treaty Series, vol. CXX, p. 157, No. 2764.

Do you consider the existing international legislation in this area satisfactory? If so, please set forth any reasons you may wish to provide. If not, please indicate any desired proposals for modification of such international legislation and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem.

3. Unit Limitation of Liability

One of the topics set forth in paragraph 1(b) of the Commission's resolution is "(i)...unit limitation of liability". Attention is directed to Article IV(5) of the Brussels Convention of 1924, which places a maximum limitation upon the liability of carriers for loss or damage to or in connexion with goods, of "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" (Art. IV(5)). Attention is also directed to Article 2(a) of the Brussels Protocol of 1968,[6/] which would establish a limitation of "Frcs. 10,000 per package or unit or Frcs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher". Questions have arisen concerning the adequacy of these limitation amounts and the interpretation of these provisions.

a. Is the monetary limitation of ocean carriers' liability established by Article IV(5) of the Brussels Convention of 1924 ("100 pounds sterling" per package or unit) satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem. In this connexion you may wish to comment on Article 2(a) of the Brussels Protocol of 1968 which establishes a limitation amount of "the equivalent of Frcs. 10,000 per package or unit or Frcs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher".

6/ Protocol to Amend the International Convention for the Unification of Certain Rules relating to Bills of Lading, 1968 (Brussels).

b. The Carrier's liability is limited under Article IV(5) to a certain amount "per package or unit" of goods lost or damaged. Is the phrase "per package or unit" satisfactory as a means of measuring the carrier's liability? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem. In this connexion, you may wish to comment on Article 2(a) of the Brussels Protocol, quoted above.

c. Article 2(c) of the Brussels Protocol of 1968 states that "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." Is this a satisfactory rule? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor. In replying, it may be helpful to indicate whether this rule differs from the legal rules (legislation and case law) currently applicable.

d. Article 2(d) of the Brussels Protocol of 1968 states that "a franc means a unit consisting of 65.5 milligrammes of gold of millesimel 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." Do you consider this to be a satisfactory rule for fixing the value of the currency in which the limitation amount is stated? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor.

e. Both Article IV(5) of the Brussels Convention of 1924 and Article 2 of the Brussels Protocol of 1968, which is designed to replace Article IV(5), limit the carrier's maximum liability, "unless the nature and value of /the/ goods have been declared by the shipper before shipment and inserted in the bill of lading".

It has been suggested that this provision for the declaration of the nature and value of goods presents difficulties in practice in view of freight rates that may be charged when the nature and value of the goods have been declared. Do you agree with this suggestion? If so, please indicate any desired proposals for legislation on this subject and the reasons therefor.

f. Are there any other problems relating to the limitation of carrier's liability that require consideration with a view to international legislation? If so, please indicate those problems and set forth any reasons that you may wish to provide. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem.

4. Definitions under Article I of the Brussels Convention of 1924

One of the topics set forth in paragraph 1(b) of the Commission's resolution is "(g) definitions under Article I of the Convention". Attention is directed to the definitions of "carrier" (Article I(a)), "contract of carriage" (Article I(b)), and "ship" (Article I(d)). Questions have been raised concerning the adequacy of some of these definitions.

a. Do you consider the definition of the term "carrier" in Article I(a) of the Brussels Convention of 1924 to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor.

In connexion with this definition, you may wish to consider a clause, known variously as a "demise", "identity of carrier" or "agency" clause, which is contained in some bills of lading. An example of this clause is the following:

> "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." 7/

7/ 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.

It has been suggested that under such a clause cargo claimants may encounter problems in identifying the correct party (for example, the shipowners or charterers) against whom legal actions for loss or damage to goods should be brought. Do you agree with this suggestion? If so, please describe those problems and indicate any desired proposals for international legislation on the subject.

b. Do you consider the existing definition of "contract of carriage" in Article I(b) of the Hague Rules to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor.

c. Do you consider the present definition of "ship" contained in Article I(d) of the Hague Rules to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on the subject and the reasons therefor.

In this connexion, it has been suggested that any difficulties with the definition of "ship" in Article I(d) relating to the application of the Article to barges, lighters or similar craft used to transport goods to and from the ocean carrying vessel might be overcome by the following amendment to Article I(e) of the Brussels Convention of 1924, which was proposed by the UNCITRAL Working Group on International Legislation on Shipping at its third session (A/CN.9/63, at paras. 14-15(a)):

> (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 received 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 instructiors, respectively, or the carrier or the consignee".

Please indicate your views regarding this suggested solution.

5. The period of limitation

One of the topics set forth in paragraph 1(b) of the Commission's resolution is "(f) extension of the period of limitation". Attention is directed to Article III, paragraph 6, sub-paragraph 4 of the Brussels Convention of 1924 which provides as follows: "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". Questions have been raised regarding the length of the period of limitation provided for in this sub-paragraph; questions have also been raised concerning the interpretation given to certain words used in the provisions of the Convention.

a. Do you consider the length of the period of limitation in Article III, paragraph 6, sub-paragraph 4 of the Brussels Convention of 1924 to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on the subject and the reasons therefor.

b. Have difficulties been encountered as to the starting-point for the period with respect to the phrase "one year after delivery of the goods" or "the date when the goods should have been delivered"?

If the present formulation of the starting-point for the period of limitation requires re-examination, please indicate any desired proposals and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem. In this connexion, attention is directed to the proposal of the Working Group on Shipping (quoted, above, in question 4(c)) to redefine the carrier's period of responsibility under Article I(e) of the Brussels Convention of 1924.

c. Questions have been raised as to whether the period of limitation, provided for in the Brussels Convention of 1924, within which "suit" must be brought applies to arbitration proceedings as well as to judicial proceedings. Have any difficulties arisen with respect to the scope of the word "suit" in Article III, paragraph 6, sub-paragraph 4 of the Brussels Convention of 1924? If so, please indicate any desired proposals for international legislation on the subject, and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of the problem.

d. Is existing legislation satisfactory as to whether an agreement can modify, extend or interrupt the period of limitation? If not, please indicate any desired proposals for international legislation on the subject, and the reasons therefor.

e. Attention is directed to Article 1, paragraph 3 of the Brussels Protocol of 1968 which provides as follows:

> "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 be not 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.'"

Do you consider the provisions of this article to be satisfactory? If not, please indicate any desired proposals for international legislation on the subject and the reasons therefor.

f. Are there any other problems relating to the period of limitation that require consideration with a view to international legislation? If so, please indicate those problems and set forth any reasons that you may wish to provide. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this subject.

6. Elimination of invalid clauses

One of the topics set forth in paragraph 1(b) of the Commission's resolution is "(h) elimination of invalid clauses in bills of lading".

Do you consider the present situation to be satisfactory in regard to the continuing use by ocean carriers of bill of lading clauses which are null or void under the Brussels Convention of 1924? If not, please indicate any desired proposals for international legislation or other remedial measures on the subject, and your reasons therefor. If desired in connexion with any such proposal, it may be helpful to set forth clauses generally employed in bills of lading that would be affected by such proposals, and reasons for concluding that such clauses are invalid.

Part II

The Working Group on International Legislation on Shipping at its third session requested the Secretary-General to prepare a report identifying any related problem areas regarding the responsibility of carriers for loss or damage to cargo in the context of bills of lading not specifically listed in paragraph 1(b) of the resolution adopted by the Commission at its fourth session, as quoted in the Introduction to this questionnaire.

To assist the Secretary-General in the preparation of the above report, it would be appreciated if you would point out and comment on any problem areas not specifically listed above which should be considered by the Working Group. It would be helpful if such comments could include concrete proposals for solution of any problems raised.

Annex II

REPLIES TO THE QUESTIONNAIRE BY GOVERNMENTS AND BY INTERNATIONAL ORGANIZATIONS

Argentina

- Parte I -

1.- Responsabilidad por trasbordo.

Para regular el trasbordo es necesario distinguir distintas hipótesis.

a) En primer lugar, puede configurarse por conveniencia del transportador, después de haber recibido las mercaderías del cargador. En este caso la responsabilidad del transportador debe sustituir, salvo que por alguna razón justificada se hubiera dado por concluído el viaje. Habría que determinar en que casos se debe considerar concluído el viaje.

b) En segundo lugar, puede tratarse de un trasbordo realizado en cumplimiento de un transporte combinado o conocimiento directo y habría que prever la regulación correspondiente a estas modalidades del transporte moderno.

c) En tercer lugar, podría contemplarse el caso del trasbordo, cuando no se ha expedido un conocimiento directo. En esta hipótesis hay que atenerse a las cláusulas del conocimiento y nuestra jurisprudencia ha reconocido validez a las que

precisan la responsabilidad del transportador.

2.- Cambio de ruta.

a) La norma de la Convención es razonable, y se justifica por la solidaridad que existe entre los navegantes y la obligación de salvar vidas humanas en el mar. La única incongruencia se daría en el caso de que la carga sufriera daños, como consecuencia de la desviación y el transportador cobrara un salario de asistencia o salvamento. Este punto debería contemplarse en la reforma de la Convención.

b) En la hipótesis de efectuarse la desviación en virtud de lo establecido en el conocimiento, si el desvio es razonable no cabe imputar responsabilidad al transportador, aún cuando se deriven de ese hecho perjuicios a la carga.

La solución tendría que ser distinta si el cambio de ruta es irrazonable y se producen consecuencias perjudiciales para la carga.

3.- Limitación unitaria de responsabilidad.

a) Consideramos equitativa la solución incorporada al Protocolo de 1968.

En oportunidad de la Conferencia diplomática se fundamentó esa tesis diciendo:

Se establece, en primer lugar, una limitación que sólo va a funcionar cuando se trate de mercaderías de excepcional valor, porque en los casos normales la cifra límite de responsabilidad será el valor real de las mercaderías.

En segundo lugar, existe una opción para el cargador, valuar sus bienes, insertar ese valor en el conocimiento y pagar el flete en relación al valor o, para el caso de no hacerlo, saber que funciona una limitación alternativa, a razón de 10.000 francos Poincaré por bulto o 30 francos Poincaré por kilogramo de mercadería perdida o dañada.

En cuanto a la fijación de las cifras se aclaró que se hizo en la misma forma como se había establecido el valor de cien libras en la Convención de Bruselas de 1924, tomando el valor promedio máximo del transporte común de mercaderías.

Se consideró que la cifra de 10.000 francos Poincaré es una cifra apropiada para la clase de mercadería promedio que se transporta por paquete o bulto.

Pero como esa cifra podría ser inapropiada para el caso de "containers" se previó una fórmula distinta y el cargador tendrá la posibilidad de convenir con el transportador la individualización de las mercaderías y el establecimiento del límite para cada unidad contenida en el "container" o, de lo contrario, que el "container" se compute como unidad.

Cualquier persona que quiera saber cuál es el límite máximo de responsabilidad en caso de transportarse un "container", tendrá que examinar el conocimiento y fijarse si están individualizadas las mercaderías contenidas en el mismo y si se toman como unidad, o si en cambio, el "container" en su totalidad, es la unidad que se ha considerado para efectuar el transporte.

La filosofía de la cláusula propuesta por el comité de redacción y que se incorporó en el Protocolo de 1968, radica en establecer una cifra límite para las mercaderías de excepcional valor y no debe olvidarse que hay tres tipos distintos de "containers": a) cuando el "container" es del armador y entonces éste recibe mercaderías de distintas personas y las coloca en el "container"; b) cuando el "container" es del cargador, y esa persona es la individualizada en el conocimiento; c) cuando el "container" es de un operador de este tipo de envase, que recibe mercaderías de distintos cargadores, las estiba en su "container" y luego entrega este envase al transportador. En este caso, según palabras del miembro informante sería complicar extraordinariamente la cuestión establecer una cifra límite, como algunas delegaciones propusieron, además de la ya establecida, que tiene por resultado eliminar los gastos indirectos.

Con el nuevo sistema, el transportador debe adecuar sus seguros en relación a la unidad, es decir, al paquete en su conjunto, salvo que se individualicen las unidades y el peso con la alternativa establecida.

En síntesis, se estima razonable la limitación por bulto o unidad de medida computada para el pago del flete y establecida en el conocimiento, con la alternativa respecto al peso que consagra el Protocolo de 1968.

b) Siempre debe dejarse a salvo la exclusión de la limitación cuando se declare el valor de las mercaderías y se inserte en el conocimiento.

c) Con respecto a la determinación de la tasa de cambio para fijar el valor de los francos Poincaré en la moneda corriente en cada país, es razonable remitir la decisión a la legislación nacional. De elegirse una solución de fondo habría

que establecer la del cambio vigente a la fecha del pago o de la sentencia, como más próximo al mismo.

4.- Definiciones.

En principio se consideran aceptables las definiciones establecidas en la Convención de Bruselas de 1924 aunque podrían mejorarse en su redacción.

a) Porteador. Transportador es quien celebra o ejecuta un contrato de transporte, salvo que se trate de un mero intermediario o agente. Deben superarse las dificultades que pueden aparejar la "demise-clause" o similares que posiblemente nuestros tribunales declararían inválidas.

b) Contrato de Transporte. Con modificaciones en su redacción, cabe aceptar la propuesta formulada en el mes de Febrero del corriente año en cuanto a la extensión del contrato de transporte y la responsabilidad del transportador desde la recepción hasta la entrega de la carga.

c) Buque. Podría definirse como toda construcción flotante destinada a la navegación, mediante la cual se cumple un contrato de transporte o que esté destinado a efectuar ciertas operaciones incluídas en dicho transporte.

5.- Prescripción.

a) El plazo de un año es suficiente para formular el reclamo, pero es conveniente autorizar expresamente la posibilidad de prorrogarlo, como se estableció en el Protocolo de 1968.

b) El plazo debe computarse a partir de la entrega de las mercaderías o desde que el transportador deja de tener su custodia. Se han planteado algunas dificultades en la interpretación, cuando las mercaderías son entregadas a depósitos fiscales o privados de terceros y no son recibidas directamente por el consignatario. Estos problemas se verían aclarados si se incorporan las soluciones propuestas en la reunión de Febrero de este año, mejorando su redacción.

c) El término debe correr para acciones arbitrales o judiciales.

d) Ultimamente, se ha considerado en nuestra jurisprudencia que la acción para obtener el reconocimiento de las mercaderías interrumpe el término de prescripción.

6.- Eliminación de las cláusulas Nulas.

De acuerdo a la Convención de Bruselas son nulas todas las cláusulas que reducen o limitan la responsabilidad establecida para el período del transporte.

La interpretación de este texto no ofrece dudas y es el fundamento para declarar la nulidad de toda cláusula que pueda considerarse que excluye o limita la responsabilidad de orden público que consagra la Convención.

- Parte II -

Entre los temas que habría que contemplar se encuentran los referentes a las cláusulas de reserva y a las cartas de garantía que interesan tanto al cargador como al transportador.

El transportador debe formular todas las observaciones que sean necesarias para individualizar la carga recibida y el estado aparente de la misma.

A su vez, el cargador desea que no se observe el conocimiento y que se mantenga "limpio" para poder negociarlo y cobrar el precio correspondiente.

En muchas oportunidades ofrece entregar cartas de garantía con la finalidad de recibir el conocimiento sin observaciones.

En el Proyecto de Código de la Navegación argentino se ha contemplado éste tema consagrando las siguientes soluciones:

1) El transportador, capitán o agente pueden insertar reservas en el conocimiento con respecto a las marcas, números, cantidades o pesos de las mercaderías, cuando sospechen razonablemente que tales especificaciones no corresponden a la mercadería recibida, o cuando no tengan medios normales para verificarlo.

2) En defecto de esas reservas se presume, salvo prueba en contrario, que las mercaderías fueron embarcadas conforme a las menciones del conocimiento.

3) Esa prueba no es admitida cuando el conocimiento ha

sido transferido a un tercero portador de buena fé.

4) Son válidas las cartas de garantía entre cargador y transportador pero no pueden ser opuestas al consignatario ni a terceros.

5) Son nulas las cartas de garantía que se emitan para perjudicar los derechos de un tercero o que contengan estipulaciones o menciones contra la prohibición de las leyes.

Australia

Introduction

1. As was the case with the Australian Reply (1971) to the First UNCITRAL Questionnaire on Bills of Lading this Reply deals with bills of lading issued in connexion with Australia's overseas trade. No attempt has been made to deal with bills of lading issued in connexion with Australian coastal trade (either interstate or intrastate).

2. Some of the matters raised in this Second Questionnaire have also been discussed in -

(a) the Australian Reply (1971) to the First UNCITRAL Questionnaire on Bills of Lading; and

(b) the Australian Study (1971) on responsibility for deck cargo, live animals and transshipment.

3. The Sea-Carriage of Goods Act, 1924 of the Commonwealth of Australia, a copy of which is attached (pages 26 & 27), applies all articles from Article I to the first paragraph of Article IX of the 1924 Hague Rules to outward bills of lading - subject to certain limitations in section 10 of the Act, and subject to the deletion of the word 'sterling' from the reference to monetary liability in Article IV(5) of the Hague Rules. On the other hand, Australia has not introduced legislation applying the provisions of the 1968 Brussels Protocol.

4. As was stated in the Australian Reply to the First UNCITRAL Questionnaire on Bills of Lading the Australian view is that, as a matter of policy, there should be a balanced allocation of risks between the carrier and the cargo owner. ('Cargo owner' as used in this reply includes owners of the goods, consignors, consignees, their agents or servants or anyone acting on behalf of anyone of them, or any person having rights against the carrier under the Bill of Lading). In this regard, it would seem that the 1924 Hague Rules, as amended by the 1968 Brussels Protocol, permit a construction

unduly favourable to the carrier. This latter view has been put forward within UNCTAD (see in particular document TD/B/C.4/ISL/6, the Report by the UNCTAD Secretariat on Bills of Lading (especially Chapter VI) - hereafter referred to as the UNCTAD Secretariat Report).

5. The approach as to the balance of risk between the carrier and the cargo owner in the Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 (the Warsaw Convention) as amended by the 1955 Hague Protocol and supplemented by the 1961 Guadalajara Convention and the 1971 Guatemala Protocol is considered to be more satisfactory.

6. In this connection the Australian view is that, as a matter of principle, having regard to the rapid development of contracts regulating inter-modal carriage in recent years, especially with the introduction of container and similar unit - load traffic, a development which is likely to continue, it is desirable for the various Modal International Agreements to be revised so that they are as uniform as possible in their approach to the question of carriers' liability. These Agreements were, understandably enough, originally formulated in the context of separate modal carriage, and for this reason are, in many aspects, dissimilar, with the result that difficulties have already arisen in their application to inter-modal carriage. Efforts have been initiated to overcome this problem e.g., by proposals to adopt an international combined transport convention (TCM Convention), but serious difficulties have been encountered in attempting to draft this proposed convention on the basis of utilising the presently existing dissimilar Modal International Agreements. For this reason it is considered by Australia that every opportunity should be taken to secure uniformity and consistency in the field of international legislation covering carriers' liability including, where appropriate, the use of uniform terminology.

PART 1

1. Transshipment

7. Question 1: 'Do you consider the existing rules and practice regarding transshipment satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem.

8. Answer 1: The Hague Rules, the Brussels Protocol and much domestic legislation (including that of Australia) contain no provisions dealing directly with transshipment. However, at common law, in the absence of special provisions in the bill of lading, the carrier's undertaking is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly, without unnecessary deviation.

9. At the same time, what are known as 'transshipment clauses' are now common in bills of lading. These clauses usually contain two provisions -

(a) That the carrier is only responsible for goods while they are in his possession.

(b) That the carrier may, inter alia, transship or land goods short of or beyond the port of destination specified in the bill of lading at the risk and expense of the cargo owner (provisions such as this were listed in paragraph 73(i) of the UNCTAD Secretariat Report as one of its 'main grounds for concern' with the existing Hague Rules).

10. Australia supports, in general, the approach adopted in paragraphs 306 to 309 of the UNCTAD Secretariat's Report. Therefore, the Australian view is that -

(a) Owing to the widespread use of transshipment clauses the Hague Rules should be amended to regulate these clauses.

(b) In the interests of certainty and of obtaining more equitable balance of risk between the carrier and the cargo owner, the carrier should not be able to avoid his responsibility by the use of transshipment clauses.

11. Two other problems which can arise in connexion with transshipment are -

(a) Transshipment of goods which constitutes a deviation from the expected route (see paragraphs 14 to 21 below).

(b) Transshipment of goods in order to perform a contract involving the inter-modal carriage of goods. This is dealt with in paragraphs 12 and 13 below.

12. Where there is a contract involving inter-modal carriage of goods, the transshipment may be necessary to perform the contract, but may mean that the cargo owner cannot establish where loss of or damage to his cargo occurred. Because of these problems and the present day emphasis on through and/or combined transport contracts, there seems to be increasing acceptance of the view that the only satisfactory solution to the problem of liability in inter-modal carriage is to prepare a set of international regulations that will cover all modes of transport and govern the combined transport movement from the time the goods are received from the consignor until the time they are delivered to the consignee. This view is reflected in the current attempts to draw up a TCM Convention.

13. The Australian view is that there would seem to be some room in this area for co-ordination of activity with the current work being done on the TCM Convention with a view to having similar principles applicable to both the bill of lading and the combined transport document, provided that these principles reflect a balanced allocation of risks between the carrier and the cargo owner.

2. Deviation

14. Question 2: 'Questions have been raised as to whether: (1) the standard with respect to the limits within which deviation from the expected route of the ship will be permitted should be clarified; (2) the consequences for the carrier of a deviation not permitted under the Convention should be specified. Do you consider the existing international legislation in this area satisfactory? If so, please set forth any reasons you may wish to provide. If not, please indicate any desired proposals for modification of such international legislation and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem.'

15. Answer 2: The Hague Rules provide in Article IV(4) that '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.'

16. There is no objection to allowing the carrier to deviate for the purpose of saving life or property at sea and there has been little contention in relation to this matter.

17. However, it is in the area of what constitutes 'any reasonable deviation' that contention can arise. For example, it may be reasonable to allow the carrier to deviate for the purpose of completing a voyage which might otherwise be unreasonably delayed because of quarantine restrictions. Contention, where it has arisen, has occurred in those cases where ships have deviated from the customary or contractual route for the purpose of discharging cargo (or disembarking passengers) as a result of strikes or congestion at the usual or contractual destination port. While deviation may be reasonable in some of these cases, carriers inevitably claim that such action is forced on them and that discharge of cargo (or disembarkation of passengers) at the alternative port they have chosen completes their contractual obligations.

18. Subject to the provisions of the Hague Rules, the carrier may by contract give himself the right to decide when to deviate. He may provide that cargo discharged at an alternative port is deemed to have been delivered, and that all loss or damage or for that matter delay, thereafter, and cost of on-carriage, is to the cargo owner's account.

19. The standard with respect to the limits within which deviation will be permitted could be clarified by the insertion of a provision similar to that in the U.S. Carriage of Goods by Sea Act 1936 which presumes deviation for the purpose of loading or unloading cargo (or passengers) is prima facie unreasonable unless the carrier can prove otherwise. (See paragraph 264 of the UNCTAD Secretariat Report). Alternatively, Australia could support the proposal in paragraph 263 of the UNCTAD Secretariat Report, which states that -

> 'These problems might be clarified and simplified if deviations were presumed to be unjustified, and carriers were held liable for all risk and expense of bringing the goods to a destination port, unless they could prove that compelling conditions for the benefit of both ship and cargo forced them to deviate.'

20. Whatever provisions are adopted clarifying the limits of allowable deviation, it would seem desirable to deal with the consequences of deviation (whether or not it is permitted under the Hague Rules) as follows -

(a) The carrier should be responsible for ensuring on-carriage to the original destination.

(b) In the case of a deviation permitted by the Hague Rules, the matter of payment for any on-carriage that may be involved should be decided between the carrier and the cargo owner when drawing up the contract that is evidenced by the bill of lading.

(c) In the case of a deviation not permitted by the Hague Rules the carrier should be

> responsible for the payment of any on-carriage that may be involved and should also be responsible for any loss damage or delay resulting from the deviation.

21. As was indicated in its answers to the First UNCITRAL Questionnaire, Australia considers that the exemption granted to the carrier under the present Article IV(2)(j) ('strikes or lockouts, or stoppage or restraint of labour from whatever cause, whether partial or general') should be deleted from the Hague Rules.

3. Unit Limitation of Liability

22. In its Answers to the First UNCITRAL Questionnaire, Australia included, as a matter of interest, some comments that had been received in 1969 from two shipowner organizations on the 1968 Brussels Protocol in the context of its possible ratification by Australia. It was emphasised that the Australian Government did not necessarily agree with the comments.

23. In view of their relevance to the Questions concerning the unit limitation of liability, these are set out again as Attachments 'A' and 'B' respectively (see pages 22 to 25 below). As was mentioned earlier, the Australian Government does not necessarily agree with these comments.

24. The whole issue of the unit limitation of liability is discussed in paragraphs 265 to 284 of the UNCTAD Secretariat's Report and there is little that Australia would wish to add to this. Australia endorses the statement in paragraph 284 that -

> '... it would appear that the existing Article IV(5) is unsatisfactory and in need of considerable modification, although the 1968 amendments have made some improvements ...'.

25. Question 3(a): 'Is the monetary limitation of ocean carriers' liability established by Article IV(5) of the Brussels Convention of 1924 ("100 pounds sterling" per package or unit) satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate

any desired proposals for international legislation on this subject and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem. In this connexion you may wish to comment on Article 2(a) of the Brussels Protocol of 1968 which establishes a limitation amount of "the equivalent of Frcs. 10,000 per package or unit or Frcs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher".'

26. Answer 3(a): Article IV(5) of the Hague Rules, broadly speaking, limits the liability of the carrier, in the event of loss or damage to the goods, to a fixed amount per package or freight unit unless 'the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading'. Article 2 of the 1968 Brussels Protocol amends Article IV(5) of the Hague Rules by raising the fixed monetary limit and providing special rules to govern containers and other systems of unitisation of cargo.

27. In the legislation of the Commonwealth of Australia applying the Hague Rules to outward bills of lading (see paragraph 3 above), the monetary limitation of liability is expressed as 'one hundred pounds per package or unit'.

28. It is not possible to comment on the monetary sums that have been chosen in the 1924 Hague Rules and the 1968 Brussels Protocol without the benefit of thorough research on the subject. Such research would entail, among other things, a detailed review of all decided court cases and of all other cases where these provisions have been considered. In the absence of such a review, Australia considers that the figures in the Brussels Protocol are the latest acceptable.

29. Some thought should also be given to the question of inflation or deflation. Would it be possible to include in the amendments a mechanism that took account of this?

30. Question 3(b): 'The carrier's liability is limited under Article IV(5) to a certain amount "per package or unit" of goods lost or damaged. Is the phrase "per package or unit" satisfactory as a means of measuring the carrier's liability? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem. In this connexion, you may wish to comment on Article 2(a) of the Brussels Protocol, quoted above.'

31. As has been pointed out by the UNCTAD Secretariat Report -

(a) the terms 'package' and 'unit' are not sufficiently precise to fit various shipping practices (paragraph 271), and

(b) problems arise in applying this provision to containers and pallets, which were unknown when the Hague Rules were drafted (paragraph 275).

32. Australia considers that in relation to loose or bulk cargo it would be better to base the value limitation clause on weight or cubic dimension, as appropriate, which would be easier to apply and better related to cost than unit or package. Whilst Article 2(a) of the 1968 Brussels Protocol insofar as it offers an alternative, is an improvement on the original provision in the 1924 Hague Rules, Australia would prefer the value limitation clause to be also based on cubic dimension where appropriate. For unitized cargo see paragraph 35 below.

33. In the case of items not freighted by weight or dimension, the formula used in the U.S. Carriage of Goods by Sea Act 1936 of 'customary freight unit' would seem to be preferable to the present 'package' or 'unit'. However, it might be necessary to examine the decided U.S. cases on this formula to ensure that its application in particular circumstances is equitable (see, for example, Leather's Best Inc. v. S.S. Mormaclynx (2nd Circuit 29 October 1971) and General Motors Corporation v. Moore-McCormack Lines 1971 American Maritime Cases 2408.)

34. Question 3(c): 'Article 2(c) of the Brussels Protocol of 1968 states that "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." Is this a satisfactory rule? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor. In replying, it may be helpful to indicate whether this rule differs from the legal rules (legislation and case law) currently applicable.'

35. Answer 3(c): Australia considers that this Article 2(c) is a distinct improvement on the original provisions of the Hague Rules and would wish it to be retained in any further amendment of the Hague Rules.

36. Question 3(d): 'Article 2(d) of the Brussels Protocol of 1968 states that "a franc means a unit consisting of 65.5 milligrammes of gold of milesimel 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." Do you consider this to be a satisfactory rule for fixing the value of the currency in which the limitation amount is stated? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor.'

37. Answer 3(d): Subject to the problems of inflation and deflation (see paragraph 29 above), this seems to be a satisfactory rule. However, there would seem to be a need to provide for the rate at which this franc is to be converted into national currencies.

38. Question 3(e): 'Both Article IV(5) of the Brussels Convention of 1924 and Article 2 of the Brussels Protocol of 1968, which is designed to replace Article IV(5), limit the carrier's maximum liability, "unless the nature and value of

(the) goods have been declared by the shipper before shipment and inserted in the bill of lading". It has been suggested that this provision for the declaration of the nature and value of goods presents difficulties in practice in view of freight rates that may be charged when the nature and value of the goods have been declared. Do you agree with this suggestion? If so, please indicate any desired proposals for legislation on this subject and the reasons therefor.'

39. Answer 3(e): In general, Australia considers that this provision is satisfactory. Some responsibility still remains on the cargo owner, particularly when he is consigning goods that are very valuable. However, it seems reasonable that the responsibility should remain with the cargo owner to decide whether he will declare the full value of the cargo and risk additional freight, or whether he will not disclose the full value of the cargo and either cover the additional risk with extra insurance of his own or merely carry his own risk.

40. Question 3(f): 'Are there any other problems relating to the limitation of carrier's liability that require consideration with a view to international legislation? If so, please indicate those problems and set forth any reasons that you may wish to provide. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem.'

41. Answer 3(f): As it may be of interest, Australia draws attention to the case of Frank Hammond Pty. Ltd. v. Huddart Parker Ltd. and the Australian Shipping Board (1956) V.L.R. 496. This case, which arose in respect of the Australian coastal trade, involved a bale of satin chintz and silk brocade which was incorrectly described as matting.

In his judgment Mr Justice Gavan Duffy of the Victorian Supreme Court considered Article IV(5) of the Hague Rules as applied by the Sea Carriage of Goods Act 1924 of the Commonwealth of Australia (see paragraph 27 above). He made the following points -

(a) The person responsible for the incorrect description of the goods in the bill of lading was an employee of the shipper, but the employee had honestly believed that the goods were matting.
(b) The nature of the goods had not been 'knowingly misstated by the shipper in the bill of lading' within the meaning of Article IV(5), because the knowledge which the shipper had of the contents of the bale could not be combined with the misstatement by his employee which was innocently made.
(c) The last paragraph of Article IV(5) is intended to secure that if there is a declaration of the nature and value of the goods in the bill of lading, such declaration will be true, and that if it is knowingly misstated, the carrier's and the ship's liability is limited to one hundred pounds per package; it does not operate to relieve the carrier and the ship from all liability in the event of the loss of the goods if the nature or value of the goods is knowingly misstated.

4. Definition under Article 1 of the Hague Rules

42. Question 4(a): 'Do you consider the definition of the term "carrier" in Article 1(a) of the Brussels Convention of 1924 to be satisfactory? If so, please set forth any reasons that you may wish to provide. If no, please indicate any desired proposals for international legislation on this subject and the reasons therefor.

In connexion with this definition, you may wish to consider a clause, known variously as a "demise", identity of carrier" or "agency" clause, which is contained in some bills of lading. An example of this clause is the following:

"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." (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).

It has been suggested that under such a clause cargo claimants may encounter problems in identifying the correct party (for example, the shipowners or charterers) against whom legal actions for loss or damage to goods should be brought. Do you agree with this suggestion? If so, please describe those problems and indicate any desired proposals for international legislation on the subject.'

43. Article 1(a) of the Hague Rules states that -

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

44. Answer 4(a): Generally this definition seems adequate, but, as is pointed out in paragraph 91 of the UNCTAD Secretariat Report, there are two uncertainties -

'(a) whether other persons, such as shipping and forwarding agents who issue bills of lading, might be considered "carriers" for the purpose of the operation of the Rules; and

(b) whether the shipowner or the charterer is liable as "carrier" when a ship has been chartered and the bill of lading contains a "demise clause".

45. As regards the first uncertainty, Australia generally agrees with the comments in paragraph 181 of the UNCTAD Secretariat Report -

'.....the word 'includes' suggests that the designation of owners and charterers is not exhaustive and that others might be considered carriers. In order to remove any doubt on the matter, the definition of carrier might be

clarified to confirm that 'carrier' includes the owner, the charterer or any other person who enters into a contract of carriage with a shipper.'

46. However, Australia also considers that regard must be had to any possible problems that might arise with the combined transport operator as designated under the proposed TCM Convention (see paragraphs 6, 12 and 13 above).

47. As regards the second uncertainty, Australia agrees with the comments in paragraph 185 of the UNCTAD Secretariat Report -

'185. The conflict and uncertainty surrounding the effect of the 'demise' clause could be relieved if, in addition to expanding the definition of carrier as suggested above, (i.e. paragraph 181 of the UNCTAD Secretariat Report), the Rules were further amended to put beyond doubt the invalidity of such a clause. In any case the original reason for the clause has now largely disappeared because of changes in the law relating to limitation of liability. Moreover, the limitation of liability that is now of most practical importance vis-à-vis cargo owners is not that relating to the shipowner's total liability, based on the ship's size or value, but the package and unit limitation in the Hague Rules.'

48. Question 4(b): 'Do you consider the existing definition of "contract of carriage" in Article I(b) of the Hague Rules to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor.'

49. Answer 4(b): Article I(b) of the Hague Rules 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 charterparty

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.'

50. Australia has no evidence that this definition has caused problems in the carriage of its overseas trade. (See also paragraphs 72 and 73 below).

51. However, Australia considers that the carrier should be responsible for the goods during the whole period of the carriage from consignor to consignee. Accordingly, Australia considers that the words 'in so far as such document relates to the carriage of goods by sea" will need to be amended to take account of the amendments that are being proposed to Article I(e) dealing with 'carriage of goods' (A/CN.9/63 paras. 14-15(a)) (see also UNCTAD Secretariat Report paragraph 186).

52. Question 4(c): 'Do you consider the present definition of "ship" contained in Article I(d) of the Hague Rules to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on the subject and the reasons therefor.

In this connexion, it has been suggested that any difficulties with the definition of "ship" in Article I(d) relating to the application of the Article to barges, lighters or similar craft used to transport goods to and from the ocean carrying vessel might be overcome by the following amendment to Article I(e) of the Brussels Convention of 1924, which was proposed by the UNCITRAL Working Group on International Legislation on Shipping at its third session (A/CN.9/63 at paras 14-15(a))....

Please indicate your views regarding this suggested solution.'

53. Answer 4(c): Article I(d) of the Hague Rules states -

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

54. Australia would support any amendment to the definition of 'ship' that was designed to include barges or lighters that are owned or operated by the carrier as part of his contract of carriage (see paragraph 189 of the UNCTAD Secretariat Report).

55. However, Australia agrees that a solution along the lines of the proposed definition of 'carriage of goods' proposed by the UNCITRAL Working Group at its Third Session would overcome the difficulties that can currently arise in the application of the Hague Rules to barges, lighters or similar craft used to transport goods to and from ocean carrying vessels.

5. The Period of Limitation

56. Question 5(a): 'Do you consider the length of the period of limitation in Article III, paragraph 6, sub-paragraph 4 of the Brussels Convention of 1924 to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on the subject and the reasons therefor.'

57. Answer 5(a): As indicated in paragraph 5 above, Australia believes that every opportunity should betaken to secure uniformity and consistency in the field of international legislation covering carriers' liability. For this reason, 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.

58. Question 5(b): 'Have difficulties been encountered as to the starting-point for the period with respect to the phrase "one year after delivery of the goods" or "the date when the goods should have been delivered"?

If the present formulation of the starting-point for the period of limitation requires re-examination, please indicate any desired proposals and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this problem. In this connexion, attention is directed to the

proposals of the Working Group on Shipping (quoted, above, in question 4(c)) to redefine the carrier's period of responsibility under Article I(e) of the Brussels Convention of 1924.'

59. Answer 5(b): Australia considers that it would be desirable to amend Article III(6) to make it clear that 'delivery' means the moment when the consignee receives, or should receive, the goods.

60. Question 5(c): 'Questions have been raised as to whether the period of limitation, provided for in the Brussels Convention of 1924, within which "suit" must be brought applies to arbitration proceedings as well as to judicial proceedings. Have any difficulties arisen with respect to the scope of the word "suit" in Article III, paragraph 6, sub-paragraph 4 of the Brussels Convention of 1924? If so, please indicate any desired proposals for international legislation on the subject, and the reasons therefor. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of the problem.'

61. Answer 5(c): To avoid possible arguments that might arise in connexion with arbitration, Article III(6) should be amended to avoid the problem that can face a consignee when the bill of lading has been issued under a charterparty containing an arbitration clause (see UNCTAD Secretariat Report paragraph 216).

62. Question 5(d): 'Is existing legislation satisfactory as to whether an agreement can modify, extend or interrupt the period of limitation? If not, please indicate any desired proposals for international legislation on the subject, and the reasons therefor.'

63. Answer 5(d): Australia supports the provision in the 1968 Brussels Protocol that the limitation period may be extended if the parties so agree after the cause of action has arisen.

64. Question 5(e): 'Attention is directed to Article 1, paragraph 3 of the Brussels Protocol of 1968 which provides as follows:

> "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 be not 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.'"

Do you consider the provisions of this article to be satisfactory? If not, please indicate any desired proposals for international legislation on the subject and the reasons therefor.'

65. Answer 5(e): Generally speaking, this provision seems to be satisfactory. While three months is not a long time, it is probably sufficient given the circumstances in which such actions will arise.

66. Question 5(f): 'Are there any other problems relating to the period of limitation that require consideration with a view to international legislation? If so, please indicate those problems and set forth any reasons that you may wish to provide. Please note any existing legislative provisions or other rules of law that should be borne in mind in connexion with the consideration of this subject.'

67. Answer 5(f): Should consideration be given to the law to be applied in the calculation of the period of the limitation? It is noted that Article 29(2) of the Warsaw Convention provides -

> 'The method of determining the period of limitation shall be determined by the law of the Court to which the case is submitted.'

In considering this matter, should consideration be given to the work that has been done by UNCITRAL on the

question of prescription (limitation) in the international sale of goods?

6. Elimination of invalid clauses

68. Question 6: 'Do you consider the present situation to be satisfactory in regard to the continuing use by ocean carriers of bill of lading clauses which are null or void under the Brussels Convention of 1924? If not, please indicate any desired proposals for international legislation or other remedial measures on the subject, and your reasons therefor. If desired in connexion with any such proposal, it may be helpful to set forth clauses generally employed in bills of lading that would be affected by such proposals, and reasons for concluding that such clauses are invalid.'

69. Answer 6: Australia considers that the continued use by ocean carriers of clauses in their bills of lading that are null or void under the Hague Rules is unsatisfactory. However, it doubts whether there is anything practical that can be done about this.

70. In its answers to the First UNCITRAL Questionnaire and to this Second Questionnaire, Australia has put forward various suggestions that have been designed to achieve certainty in the application of the Hague Rules. From a practical point of view, it is considered that these suggestions, together with the application of the present Article III(8), are the most that can be achieved in this area at this stage.

PART II

71. Question: 'The Working Group on International Legislation on Shipping at its third session requested the Secretary-General to prepare a report identifying any related problem areas regarding the responsibility of carriers for loss or damage to cargo in the context of bills of lading not specifically listed in paragraph 1(b) of the resolution adopted by the Commission at its fourth session, as quoted in the Introduction to this questionnaire.

To assist the Secretary-General in the preparation of the above report, it would be appreciated if you would point out and comment on any problem areas not specifically listed above which should be considered by the Working Group. It would be helpful if such comments could include concrete proposals for solution of any problems raised.'

Should a bill of lading be compulsory?

72. As was pointed out in the Australian Reply to the First UNCITRAL Questionnaire, the Hague Rules, as presently framed, leave the question of when a bill of lading should be issued uncertain (see, for example, the cases quoted in Carver : Carriage by Sea : Twelfth Edition : paragraph 53). As is pointed out by Carver in paragraph 233 -

> 'The Rules apply to all contracts for the carriage of 'goods' (as defined in Article I(c)), by sea, except those under which the shipper is not entitled to demand from the carrier a bill of lading or similar document of title'.

73. Uncertainty in this area is undesirable, and the Australian view is that the Hague Rules should apply in the case of all contracts for the carriage of goods by sea, whether or not caught by the current definition of 'contract of carriage'. (See paragraphs 48 to 51 above).

Delays in Delivery

74. As was pointed out in the Australian Reply to the First UNCITRAL Questionnaire, responsibility for delay in delivery was the subject of discussion at the four Joint IMCO/ECE Meetings on the proposed TCM Convention held during 1970 and 1971. At these Meetings there was substantial agreement that the cargo owner should be compensated for such delay. However, the discussion highlighted the fact that there is considerable uncertainty as to what constitutes delay and as to the measure of liability for delay.

75. It is desirable that this uncertainty be resolved by proper definition, and that the determination of responsibility be clear. Australia considers that the onus should be on the carrier to show that any delay was unavoidable. This would bring the Hague Rules in line with Article 19 of the Warsaw Convention, which provides -

> 'The carrier is liable for damage occasioned by delay in the carriage by air, of passengers, baggage or cargo.'

Servants or Agents of the Carrier

76. As was pointed out in the Australian Reply to the First UNCITRAL Questionnaire a further matter for review could be the relationship between the cargo owner and the servants or agents of the carrier.

77. Article IV Bis of the Hague Rules as amended by the 1968 Brussels Protocol, extends the defence and limits of liability which the carrier is entitled to invoke to the carrier's servants or agents. In these circumstances the question arises as to whether the responsibilities and liabilities of the carrier should also attach to his servants or agents.

Basis of assessment of liability

78. The Hague Rules do not define the basis upon which the liability of the carrier in respect of cargo loss or damage should be assessed. (See, for example, the article on this subject in 'Fairplay International Shipping Journal' 7 October 1971).

79. In the interests of certainty, consideration should be given to the question whether provisions relating to the basis of assessment of liability should be inserted in the Hague Rules.

AUSTRALIAN REPLY TO SECOND UNCITRAL QUESTIONNAIRE ON BILLS OF LADING: ATTACHMENT 'A'

'.....

However, its (the 1968 Brussels Protocol's) application in the case of a container packed by shipper at his premises seems to present some difficulty. It does not seem realistic to require the carrier to accept liability for losses to goods packed into a container and valued by the shipper for which he has no opportunity to verify or examine the contents or the adequacy of the packing methods employed. Current practice is to accept no liability unless there is obvious physical evidence of damage having occurred to the container during transit.

Whilst the scope and extent of the amendment when inserted into the Australian Sea-Carriage of Goods Act cannot at this juncture be foreseen, it would seem that some differentiation will be required between those units packed by shipper and those packed or consolidated by the carrier.

In instances where a container load consists of small packages all of exceptional value, the liability of the carrier could reach astronomical heights, and would no doubt involve the imposition of considerable freight differentials'.

AUSTRALIAN REPLY TO SECOND UNCITRAL QUESTIONNAIRE ON BILLS OF LADING: ATTACHMENT 'B'

'.....

The essential point to be considered with relation to the proposed alterations to the Rules is of course the effect of same on our liability as shipowners. The limits imposed are:-

Existing rules	$200	per package	($400 under the Gold Clause Agreement)
Proposed rules	$592	(say $600)	per package
	$1805	(say $1800)	per ton weight

The increase in the per package rate in the light of current monetary values seems reasonable. For practical purposes the per package limit for other than large units continue to apply to cargo shipped in the conventional manner. The new weight limitation being a provision for goods of exceptional size i.e. containers, large pallets, etc. It seems logical that if the method of determining liability remains under the per package systems that some differentiation be made between say a package of 20 c.ft. with one of 1200 c.ft. However the maximum weight liability of $1800 per ton is a dramatic increase and could under certain situations result in the shipowner becoming liable for an enormous amount of money. We should not however lose sight of the fact that it is not intended that liability extends beyond the declared value of the goods.

Those concerned with the drafting seem to have been obsessed with the introduction of containers and the fact that a unit of this nature could in some circumstances be considered the package, in which case the limit of say $600 would apply. This of course would be much too favourable to the shipowners. However, the proposed remedy whereby the shipper has open to him three alternative value declarations when completing his documentation could easily be confusing in practice and lead to disputes between shipowners and shipper, with resultant legal

ATTACHMENT 'B' (Cont'd)

expenses being a common experience to both parties. Whilst the alternative declaration covered in the amendments should in practice be readily understood by a shipowner's employee used to handling such documents in the course of his normal duties, the same would not necessarily be so by a shipper, particularly if not a regular client. Containers consolidated and shipped by forwarders on a single document but packed with a number of lines from their different clients could also present problems, as the onus of declaration would fall on the forwarder acting on behalf of his principals.

We suggest that a much simpler rule would be to abandon the present and proposed limitations based on a per package and adopt a single unit such as weight/measurement, whichever is the greater. This would have the twofold advantages of being easily understood by all involved and probably be a better reflection of the potential value of the cargo. Certainly it would eliminate the wide variety of values possible under the suggested rules, and still be equitable as between shippers and shipowner. If a shipper had particularly valuable cargo, it would still of course be open to him to declare the value, and pay a higher freight rate.

The question then remains as to whether the limit of Francs 30 per Kilo ($1800 per ton) is realistic even though a maximum figure. As previously mentioned it seems on the high side but we have no comprehensive statistics on which to base an assessment of it.

Proposed Hague Rules

say 10,000 dwt. tons @ $1800 per ton = $18,000,000

ATTACHMENT 'B' (Cont'd)

Merchant Shipping Act

(a) In Australia

Registered tonnage	8262	
Deductions for engine room added back	2578	
	10840	@ £8 sterling = $185,800

(b) In United Kingdom

10840 tons @ Francs 1000 (=$59.23) $642,100

Whilst the figures shown under the proposed Hague Rules is admittedly an extreme case in relation to values it nevertheless highlights the dramatic increases in liability that shipowners would possibly be faced with if the Protocol is accepted, as now appears likely.

Consequently we feel objection should be made to the proposed liability limits, as being ambiguous in particular cases and of no practical limitation of liability in a great number of cases.

With regard to other than the liability limits there do not seem to be any provision to which we would object, although there are one or two which would be conducive to prolonged legal argument e.g.

(a) A new paragraph 6 BIS in Article 3 of the convention (Article 1 of the Protocol) talks of actions for indemnity against third persons, which is outside of the normal provisions of the British Law.

(b) Article 4 paragraph 5 (e) (Article 2 of Protocol) says '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'.

AUSTRALIAN REPLY TO SECOND UNCITRAL QUESTIONNAIRE ON BILLS OF LADING

SEA CARRIAGE OF GOODS ACT 1924 OF THE COMMONWEALTH OF AUSTRALIA

AN ACT RELATING TO THE SEA-CARRIAGE OF GOODS

Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia as follows:-

1. This Act may be cited as the Sea-Carriage of Goods Act 1924.

2. This Act shall commence on a date to be fixed by Proclamation.

3. The Sea-Carriage of Goods Act 1904 is hereby repealed.

4.-(1.) Subject to the provisions of this Act, the Rules contained in the Schedule to this Act (in this Act referred to as 'the Rules') shall have effect in relation to and in connexion with the carriage of goods by sea in ships carrying goods from any port in the Commonwealth to any other port whether in or outside the Commonwealth.

(2.) The Rules shall not by virtue of this Act apply to the carriage of goods by sea from a port in any State to any other port in the same State.

5. There shall not be implied in any contract for the carriage of goods by sea to which this Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

6. Every bill of lading or similar document of title issued in the Commonwealth which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied by this Act.

7. A bill of lading issued in accordance with paragraph 3 of Article III of the Rules shall for all purposes be deemed to be a valid bill of lading with the like effect, and capable of negotiation in all respects and with the like consequences, as if it were a shipped bill of lading.

8. Where, under the custom of any trade, the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in the Rules, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

9.-(1.) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

(2.) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect.

10.-(1.) Nothing in this Act shall affect the operation of Division 10 of Part IV of the Navigation Act 1912-1920 or the operation of any other Act for the time being in force limiting the liability of the owners of sea-going vessels.

(2.) The Rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea made before the commencement of this Act.

Austria

Part I, Question 1

In sea transport, too, the carrier should be made responsible from the time of his taking charge of the goods until their delivery at the port of destination, i.e., his responsibility should include loss or damage caused by transshipments before reaching the port of destination. In this as in many other situations, the Brussels Convention of 1924 does not provide for a fair distribution of risks.

In general, the system of the Brussels Convention as such is to be rejected, because the Convention, while containing rules on certain obligations of the carrier ("Obligations de moyens"), does not stipulate his obligation to deliver the goods in an undamaged condition ("Obligation de résultat").

Part I, Question 2

There are no objections to the retention of Article IV(4) of the Convention. It would hardly be practicable to draft provisions in such a way as to lay down more precisely which deviations from the scheduled route are justified and which are not. Where a deviation was not justified, there is no ground for excusing the carrier from his liability. Other sanctions are not required.

Part I, Question 3

(a) The amendment of Article IV(5) of the Brussels Convention by Article 2(a) of the Protocol of 1968 represents a great improvement. This type of twofold limitation is satisfactory. However, the question arises whether Frcs. 30 Poincaré is high enough, or rather whether it is still high enough given the constant rise in the prices of all goods. This question can only be answered by detailed statistics on the average value of goods carried. In any case, the limit should be higher than this average value, and should only protect the carrier with regard to all-inclusive liability for particularly expensive goods.

(b) and (c) These questions are not of very great importance. The most important limitation is the one by weight, contained in the Protocol of 1968. The limitation by packages or units is only intended to avoid a situation where in case of loss or damage of a small but valuable portion of the goods compensation could be limited exclusively according to the weight of that small part.

(d) In principle, it does not matter whether the franc Poincaré or the franc Germinal (10/31 grams of gold of millesimal fineness 900) is taken as the basis of

calculation. As, however, all agreements and draft agreements on land transport (CIM, CIV, CMR, etc.) use the latter unit, it would be desirable in future to use it for sea carriage as well, although this would make it recommendable at some future date for air transport to be converted to that system, since the Warsaw Convention also uses the Poincaré franc.

(e) Austria has no objection to Article IV(5) of the Brussels Convention or Article 2 of the Brussels Protocol.

(f) The most serious defect of the Brussels Convention (even as amended by the Brussels Protocol) is the exoneration from liability for faults in the navigation and management of the ship and for fires (Article IV(2)(a) and (b)). This exemption in case of nautical faults reflects the ways of thinking of an age in which maritime navigation was full of uncertainties and risks, and in which the ship-owner was unable to get in touch with his ship's crew during a voyage. In any reform of the civil-law aspects of the carriage of goods by sea the elimination of these exemptions from liability would be an absolute must.

Part I, Question 4

The definitions of "carrier" and "contract of carriage" are not satisfactory. If such definitions are required at

all (they are particularly popular in countries adhering to the English and Americal legal tradition), it should be stated explicitly that the carrier is deemed to be he who has concluded the contract of carriage in his own name. Any contract of carriage where the consignor has not been explicitly informed that the other signatory is acting as the representative of some other party should be regarded as having been concluded in that signatory's own name. If so, clauses lending themselves to abuses, such as the one quoted, could no longer be used.

Although the text proposed by the UNCITRAL Working Group for Article I(e) of the Convention does not necessarily relate to this question, there are no objections to its wording.

Part I, Question 5

(a) There are no objections of principle to the period provided for claims (one year). However, in view of the fact that in most cases suits have to be brought in a foreign country, perhaps even in another continent, it would be conceivable to have a longer period; but if legal security is not to suffer, two years should not be exceeded.

(b) There are no objections to the starting-point for the running of the period. This provision resembles the rules provided for in many other agreements concerning carriage.

(c) The invocation of an arbitration tribunal should be sufficient to interrupt the lapse of the period. Whether this period can be interrupted at all depends on the question whether it is a period of limitation ("Verjährungsfrist") or a period of forfeiture ("Fallfrist"). The Austrian Federal Ministry of Justice is of the opinion that it would be preferable to envisage a period of limitation, because otherwise claims might be forfeited where the court or arbitration tribunal first invoked later finds that it lacks jurisdiction, or where proceedings are terminated for some other procedural reason. Probably, details regarding suspension and interruption should be left to domestic law, unless an attempt is made - e.g. on the lines of the UNCITRAL draft on limitation in international purchases - to solve these questions in the Convention itself, at least in a simplified form.

(e) There are no objections to the provision of the Brussels Protocol of 1968 quoted in this question.

(f) Reference is made to the responses to Question 5 (c) and (d).

Question 6

There will hardly be any possibility for effective action against the inclusion in the bill of lading of clauses which violate the Convention and are therefore null and void.

Part II

Attention is directed in particular to the observations on Question 3(f) in Part I.

Chile

PARTE I

1.- Transbordo.-

¿Considera que las reglas y prácticas vigentes en materia de transbordo son satisfactorias?

Sobre esta materia nuestra respuesta no puede ser otra que negativa. En efecto, no existen normas internacionales que traten directamente el transbordo de mercadérías y, como se señaló en la consulta, frecuentemente se consignan en los conocimientos de embarque cláusulas limitativas o eximentes de la responsabilidad de los porteadores. Al responder en esta forma se tienen en consideración los siguientes antecedente:

A) Que como reiteradamente se ha expresado por los países en vías de desarrollo, inclusive en petición expresa de UNCTAD, el verdadero mandato conferido a UNCITRAL debe procurar que en la legislación uniforme se cautelen debidamente los intereses económicos de los más desprotegidos, vale decir, los cargadores de mercaderías;

B) Que acorde con lo anterior, nuestra legislación contempla la plena responsabilidad de los navieros hasta el momento jurídico de la entrega (artículos 906 No.3 y 1003 del Código de Comercio), sin considerar en absoluto los transbordos que se puedan experimentar en las etapas intermedias del transporte.-

Además, también resulta aplicable al caso en exámen el artículo 1084 del mismo Código que considera que son "averías"

de la mercancía todas las que reciben "desde su embarque en lanchas u otros buques menores en el lugar de la expedición hasta su desembarque en el de la consignación".-

C) En nuestra opinión, debe insistirse en una responsabilidad para los porteadores que termine con la entrega efectiva de la mercadería a los consignatarios, sin que puedan hacerse excepciones como lá que aquí se indica para el caso de transbordo. Resulta digno hacer presente, que en otras Convenciones Internacionales atingentes a otros medios de transporte, siempre la tónica se ha puesto precisamente en el momento de la entrega. Así sucede, por ejemplo, en el transporte aéreo internacional (Convención de Varsovia de 1929, artículo 18), en los transportes internacionales por carreteras (Convención de Ginebra de 1956, artículo 17) y en los transportes internacionales por ferrocarriles (Convención de Berna de 1961, artículo 27).-

En resúmen, estimamos como lo más acertado, proponer que no se hagan excepciones en materia de responsabilidad por causa de transbordo y que la futura reglamentación internacional sobre este tema considere fundamentalmente las disposiciones contenidas en Convenciones referentes a otros medios de transportes que reflejen mayor ecuanimidad y son de contenido más moderno.-

2.- Cambios de Ruta.-

¿Considera que la regulación internacional vigente en esta materia es satisfactoria?

Sobre este particular nuestra respuesta debe ser nuevamente negativa, fundamentalmente porque el Convenio de Bruselas mantiene incertidumbres que originan frecuentes quejas de los cargadores ya que aparte de que dicho Convenio no define lo que se considera

Cambio de Ruta, tampoco indica las alternativas que pueden producirse por un cambio de ruta "que no sea razonable". Además, la Convención vigente genera sobre este punto numerosos problemas referentes a cuestiones de prueba (que se debe probar y quién debe hacerlo).-

A nuestro juicio, dos soluciones podrían ser acertadas: la primera consistiría en formular la nueva reglamentación bajo la presunción "Juris tantum" de que todo cambio de ruta, en principio no se considerará razonable para estos efectos (tenemos entendido que un sistema similar impera en Estados Unidos). La otra proposición que nos parece más adecuada, sería contemplar, en disposición expresa que todo cambio de ruta es injustificado haciendo responsable al porteador de todos los riesgos y gastos hasta la entrega de la mercadería en el puerto de destino salvo, que dicho porteador pruebe que existieron condiciones imperiosas que lo obligaron a ello para salvar o intentar el salvamento de vidas o bienes.-

3.- Limitación Unitaria de Responsabilidad.-

a) ¿Es satisfactorio el límite monetario de la responsabilidad de los porteadores marítimos establecido en el artículo IV 5) del Convenio de Bruselas de 1924 (100 libras esterlinas por bulto o unidad).-

Sobre este punto nuestra respuesta debe ser nuevamente negativa. En primer término porque tal como se hace presente en el documento de consulta, la cantidad señalada fué alzada por el Protocolo de Bruselas de 1968 a 10.000 francos por bulto o unidad o 30 francos por kilógramo de peso bruto de las mercancías perdidas o dañadas siendo aplicable el límite más elevado; esta sola circunstancia demostraría que la cantidad fijada en el Convenio de

Bruselas resulta actualmente exigua y atentatoria de los intereses de los cargadores. En principio, aparentemente, la solución estaría en las propias reglas que hacen excepcionarse de la limitación a los cargadores cuando declaren "la naturaleza y valor de las mercaderías antes de su embarque y que esta declaración se haya insertado en el conocimiento". Sin embargo, en la práctica, se ha demostrado que los cargadores casi nunca hacen uso de esta opción, por motivos económicos que escapan a la naturaleza de esta propuest

Peso a lo anterior, estimamos que es perfectamente factible realizar un estudio que pudiera demostrar la conveniencia o inconveniencia de hacer una inversión de las reglas, vale decir, que los porteadores respondan ante pérdidas y daños por el valor real de la mercadería, salvo que, no habiéndose expresado dicho valor, se hiciera aplicable por una cantidad fija que también podría ser materia de un informe técnico.-

En resúmen, nuestra proposición concreta sería solicitar un informe técnico (que podría ser evacuado por la propia UNCTAD) de la incidencia en los costos, (fletes y primas de seguros) al hacer responsable por pérdidas reales a los navieros, informando asimismo que supletoriamente y a falta de declaración del cargador, cual podría ser la indemnización que fijen las reglas internacionales.-

En el caso de que el informe en referencia demuestre que es factible ubicar en primer término una obligación como la que se propone, la norma internacional podría quedar redactada más o menos en estos términos: "En caso de pérdida o daños causados a las mercancías o que afecten a estas, el porteador responderá

según la naturaleza y el valor de estas mercancías al tenor de la declaración que el cargador hizo antes de su embarque y que está insertada en el conocimiento. Faltando dicha declaración, en ningún caso el porteador responderá por una cantidad mayor de....." (este valor tendría también que fijarse como resultante del mismo estudio).-

b) ¿Considera que la frase "por bulto o unidad" para medir la responsabilidad del porteador es satisfactoria?

Nuestra respuesta es negativa. Consideramos que estas palabras carecen de precisión especialmente en los momentos actuales en que el comercio marítimo se hace cada vez más complejo; el término "bulto" crea problemas en cuanto a que da a suponer que ciertas mrecaderías se encuentran contenidas en cierto tipo de embalaje (como cajas, baúles, maletas, fardos, etc.), razón por la cual resulta difícil precisar en ciertos casos su aplicabilidad, no sólo en circumstancias de embalajes fuera de lo común, sino que también en aquella mercancía que no se encuentra dentro de un envoltorio.-

Por su parte, la voz "unidad" también aparece como excesivamente ambigua y con el agravante, en este caso, que en el contexto internacional podría interpretarse jurídicamente de dos maneras distintas: como "unidad de carga" (Italia, Código de la Navegación, artículo 423) o, como "unidad de flete" (Suiza, Código Marítimo, artículo 105). No necesito mayores explicaciones sobre las consecuencias divergentes que emanarían de una u otra solución.-

Se debe reconocer sin embargo, que el problema no reside en un simple cambio de nomenclatura, ya que dificilmente se podrían encontrar palabras comprensivas de tan amplia gama de

situaciones, máxime si se tiene en vista la dificultad posterior al traducirse a los distintos idiomas. Reconocemos que la dificultad es grande y una solución perfecta muy difícil de lograr; posiblemente y sin hacer una proposición concreta, se podría sugerir que usándose estos mismos términos u otros que se consideren más apropiados, podría agregarse una definición de lo que entendría la Convención por el contenido de dichas voces.-

c) ¿Es satisfactoria la regla contenida en el artículo 2 c) del Protocolo de Bruselas de 1968?

El artículo mencionado dispone que "cuando se utilicen para agrupar mercancías un contenedor, una paleta o cualquier dispositivo similar, todo bulto o unidad que según el conocimiento vaya embalado en tal dispositivo, se considerará como el bulto o unidad. Fuera de este caso, tal dispositivo se considerará como un bulto o una unidad".-

Nuestra respuesta es negativa, fundamentalmente por una sola razón de orden práctico y que ya ha planteado problemas, porque normalmente la existencia de distintos bultos dentro de un mismo contenedor u otro aparato similar, depende no de una existencia física de distintos bultos o unidades sino que es la consecuencia de agrupar mercaderías de distintos propietarios y la existencia, en consecuencia, de tantos conocimientos de embarque como cargadores distintos en un mismo contenedor. En otras palabras, si en un solo contenedor se agruparan distintos bultos bajo un solo conocimiento se entenderá que se trata de un solo bulto, en circunstancias que si esa misma mercadería perteneciese a distintas personas se entendería que son varios bultos. Como de todo esto pueden dimanar profundas diferencias de trato económico indemnizatorio, nos parece evidente que la forma no puede considerarse acertada en líneas generales.-

Estimamos, sin embargo, que la solución parcial de este problema estaría contenida en nuestra respuesta a la pregunta a) del mismo tema.-

Debemos hacer presente, que la regla analizada no interfiere en su redacción actual en nuestra legislación vigente, ni existe jurisprudencia nacional al respecto.

d) ¿Considera satisfactoria la regla del artículo 2 a) del Protocolo de Bruselas de 1968 para determinar el valor de la moneda en que se fija la cantidad límite?

En este caso la respuesta es afirmativa. En efecto, la moneda a que hace referencia el precepto invocado se refiere a una unidad monetaria de 65,5 miligramos de oro de 900 milésimas (franco Poincaré), con lo cual se hace aplicable a estas indemnizaciones el padrón oro con fecha de conversión en moneda nacional según determine la ley del Tribunal competente. Con este sistema, indudablemente, se pone a cubierto la Convención de las imprevisibles devaluaciones que experimenten las distintas monedas, de tal manera que con el sistema padrón oro se da mayor seguridad a los usuarios, sin perjuicio de que en teoría es posible buscar otros padrones, que en la medida que otorguen igual seguridad, serían también aceptables en nuestro sistema.-

En Chile existe experiencia y jurisprudencia contradictoria en materias de valorizaciones en oro pero, estimamos que en la forma en que se encuentra redactado este artículo en el protocolo, no encuentra dificultades legislativas nacionales para su aplicación.-

e) ¿Está de acuerdo con la cláusula "a menos que el cargador haya declarado la naturaleza y el valor de estas mercancías antes de su embarque y que esta declaración se haya insertado en el conocimiento?"

Sobre este punto nos remitimos a nuestra contestación supra a) en que se analizó esta cláusula y se hizo una proposición concreta al respecto.-

f) ¿Hay otros problemas relativos a la limitación de la responsabilidad del porteador que deben examinarse con miras a la adopción de una posible reglamentación internacional?

En principio, y creemos que ello se desprende claramente de nuestras respuestas anteriores al cuestionario, somos contrarios a la existencia de estas limitaciones de responsabilidad, principalmente porque al haberse aceptado casi universalmente el derecho de los navieros para hacer abandono de su nave, estas limitaciones a responsabilidades por la carga pasan a constituir nuevas limitaciones de responsabilidad, las cuales si bien es cierto tuvieron su razón de ser por las contingencias propias del comercio marítimo, no se justifican en la actualidad por las cada días más frecuentes aplicaciones científicas y técnicas a la navegación eliminando prácticamente los riesgos que dieron motivo a estas limitaciones. Por esta razón, en este punto reiteramos nuestro planteamiento de que, en base a un informe técnico, se responsabilice a los porteadores por la carga" ad valorem".-

Sin embargo, como entendemos que podrían presentarse grandes dificultades con un cambio tan radical del sistema, subsidiariamente creemos que bajo el imperio del sistema actual debieran examinarse algunos problemas que han suscitado inconvenientes de carácter práctico como: I) la situación de la responsabilidad del porteador en los casos de carga "a granel", ya sea por peso o cabida, ya que existe incertidumbre sobre la forma de

aplicar estas reglas a esta clase de cargamento; 2) tal como se señaló en nuestra respuesta supra b) entendemos que debe aclararse si un contenedor o paleta en otros medios actuales o futuros de transporte constituyen o no una unidad en si mismo; y 3) aún cuando tenemos entendido que cada día se hace más relevante la interpretación de que la responsabilidad del porteador debe hacerse efectiva tanto por los daños directos o indirectos, creemos que una materia tan importante debiera contenerse en una regla expresa en la futura Convención.-

4.- La definiciones del artículo I del Convenio de Bruselas de 1924.-

a) ¿Considera que la definición del término "porteador" contenida en el artículo I a) del Convenio de Bruselas de 1924 es satisfactoria?

Aún cuando en principio no pueda tenerse objeciones de fondo respecto a esta definición dado que ella al usar la expresión "comprende" daría a entender que por "porteador" se puede considerar también a otra persona que no sea el propietario o el fletador, desde el punto de vista formal podría ser conveniente hacerla más comprensiva. lo que se puede lograr, por ejemplo, reemplazando la actual definición por una que dijera que "porteador" es cualquier persona que celebre un contrato de transporte con un cargador".-

La definición propuesta nos parece incluso más apropiada que la existente en nuestra legislación positiva que nos dice que "llámase naviero o armador la persona que, sea o no propietario de la nave, la apareja, pertrecha y expide a su propio nombre y por su cuenta y riesgo" (artículo 862 Código de Comercio).-

En lo referente a la cláusula de "entrega" (Cesión",

identidad del porteador" o de "mandato") estimamos que ella no es aconsejable por los grandes problemas que he planteado y que sería recomendable su prohibición, prohibición que por otra parte, bajo la forma de nulidad de la cláusula, tenemos entendido fué propuesta en su Segundo Período de Sesiones por la Comisión del Transporte Marítimo de la Junta de Comercio y Desarrollo (UNCTAD, Ginebra, Febrero 1971).-

b) ¿Considera que la definición actual de contrato de transporte de las reglas de La Haya es satisfactoria?

Esta definición no nos merece reparo y la consideramos comprensiva en forma amplia de los casos y circunstancias que se han presentado. Tenemos entendido que tampoco ha merecido reparo en el campo de Derecho Internacional.-

Pese a lo anterior, no podemos dejar pasar la ocasión para hacer una reflexión que estimamos necesaria; en efecto si en definitiva en la futura Convención se estimase conveniente ampliar (de conformidad a los deseos de UNCTAD) la responsabilidad de los porteadores a períodos "pre" y "post" marítimos, necesariamente tendría que estudiarse una eventual modificación en aquella parte en que se hace referencia al "transporte de mercancías por mar". Evidentemente que al no poderse conocer anticipadamente el criterio que imperará al respecto, no estamos en condiciones de proponer una frase de reemplazo ya que ello tendrá que depender del contexto general del proyecto, en el cual se tendrán que contemplar las connotaciones gramaticales pertinentes.-

e) ¿Considera que la definición actual de "buque" contenida en el artículo I d) de las reglas de La Haya es satisfactoria?

Estimamos que la definición en referencia no merece mayores objeciones y su mayor ventaja reside precisamente en lo escueto de su redacción. Por otra parte estamos de acuerdo con el documento de consulta en que la modificación propuesta por el Grupo de Trabajo de UNCITRAL sobre Reglamentación Internacional del Transporte Marítimo (A/CN.9/63) soluciona implícitamente el problema a que se hace mención respecto a barcazas, lanchas u otras embarcaciones menores por la vía de extender la responsabilidad de los porteadores.-

5.- El Plazo de Prescripción.

a) ¿Considera que la duración del plazo de prescripción prevista en el artículo III párrafo 6 inciso 4º del Convenio de Bruselas de 1924 es satisfactoria?

La respuesta es afirmativa. El plazo de un año establecido por dicho precepto tenemos entendido que contó con consenso al incorporarse a las reglas de La Haya y no conocemos objeciones formuladas que tengan peso jurídico.-

Por otra parte, en nuestra legislación positiva este plazo se encuentra aceptado como plazo de prescripción para la entrega de mercaderías (artículo 1314 No. 4 inciso 2º Código de Comercio).-

b) ¿Se ha tropezado con dificultades en cuanto al comienzo del plazo respecto de la frase "el año siguiente a la entrega de las mercancías" o la frase "la fecha en que estas hubieran debido ser entregadas"?

En principio las frases en consulta no plantean problemas e, incluso, aparecen como una versión más moderna de la frases usadas por los legisladores del siglo pasado en que se usaban

frases para la iniciación del plazo de prescripción como aquella "desde que la nave sea admitida a libre plática" (artículo 1315 inciso final del Código de Comercio). Pese a lo anterior, debe observarse que la segunda de dichas frases ("hubiera debido ser entregadas") podría aparecer como ambigua si se acepta la proposición del Grupo de Trabajo sobre Transportes Marítimos de ampliar la responsabilidad de los porteadores.-

Aún cuando desde nuestro propio punto de vista cualquiera interpretación tendría que hacerse observando el contexto de la futura Convención y por lo tanto, la fecha en que debe entregarse la mercadería obviamente, en el caso de falta de entrega, tendrá que coincidir con la fecha de término de la responsabilidad contractual de los porteadores, podría resultar conveniente buscar una fórmula más concreta y no correr el riesgo de interpretaciones "a posteriori" que sólo irían en perjuicio de los cargadores. No estamos en condiciones de proponer una frase de reemplazo por cuanto ella debe quedar supeditada, en el caso que fuese necesario, a la redacción definitiva que se dé para el artículo I e) del Convenio de Bruselas de 1924.-

c) ¿Se ha tropezado con dificultades en cuanto al alcance de la palabra "acción" que figura en el artículo III, párrafo 6 inciso 4º del Convenio de Bruselas de 1924?

La respuesta es negativa. En nuestro sistema legal la palabra "acción" aún cuando no esté expresamente definida, resulta claro que no es otra cosa que la puesta en movimiento del derecho o pretension de una parte por vías judiciales; en ese sentido se considera el término en múltiples disposiciones de diferentes

leyes de la República entre las cuales se pueden destacar los artículos 17 a 21 inclusive de nuestro Código de Procedimiento Civil y en el mismo sentido se considera el término en la definición de prescripción que nos dá el artículo 2.492 del Código Civil.

Desde otro punto de vista, para los efectos de la consulta, en nuestro derecho positivo no se hacen diferencias entre procedimientos arbitrales y procedimientos judiciales, ya que toda la regulación de la justicia arbitral se encuentra formalmente contenida en los artículos 222 y siguientes del Código Orgánico de Tribunales de tal manera que el problema que entendemos se plantea en otros ordenamientos jurídicos no existe en el régimen chileno.

d) ¿Es satisfactoria la legislación vigente en cuanto a la posibilidad de que un acuerdo modifique, prorrogue o interrumpa el plazo de prescripción?

La respuesta debe ser afirmativa. Entendemos que aún cuando existen países cuyo ordenamiento jurídico plantea problemas a esta clase de acuerdos, sabemos que en la gran mayoría estas objeciones no existen. En nuestro sistema positivo no hay inconvenientes de tipo legal o jurídico para su validez, bastando para demostrar lo aseverado citar el artículo 2.495 de Código Civil que permite incluso la renuncia a la prescripción.-

c) ¿Considera satisfactoria la enmienda contenida en el artículo 1º, párrafo 3º del Protocolo de Bruselas de 1968?

La respuesta es afirmativa. Desde el momento en

que el precepto citado se refiere a acciones de indemnización que las partes de un contrato de transporte marítimo ejerzan contra terceros responsable, resulta indudable que no es justo que personas ajenas a dicho contrato puedan favorecerse de actos culpables mediante una prescripción de corto tiempo que sólo debe regir para las partes contratantes. Aún cuando nuestra legislación positiva no contiene una regla expresa sobre el particular, debe considerarse esta situación como un principio de derecho dimanante de toda nuestra legislación civil y, especialmente de los preceptos del Código Civil y Código de Comercio que establecen distintos plazos de prescripción para las responsabilidades civiles contractuales y extracontractuales.-

De esta manera, si bien es cierto que para nuestro Derecho Nacional la norma en comentario puede parecer superflua, somos partidarios de su mantención desde el momento en que ella puede evitar conflictos, o interpretaciones si se mira el problema bajo el prisma de otros sistemas legislativos.-

f) ¿Hay algún otro problema respecto del plazo de prescripción que debe considerarse desde el punto de vista de la reglamentación internacional?

Si se recuerda que la revisión de las normas internacionales sobre transporte marítimo obedece a un deseo expreso de UNCTAD que, entre otras cosas, pidió expresamente que se eliminaran las ambigüedades existentes en el ordenamiento actual, estimamos de interés que en la futura reglamentación se establezca claramente que en el evento de que se interpusiera una demanda en que se ejercitara una acción en un país determinado, la incoación de este

proceso interrumpa el plazo anual de prescripción en los demás países.-

Esta proposición se formula atendiendo principalmente a que el criterio imperante en el Grupo de Trabajo de UNCITRAL es el de extender lo más posible los ámbitos de jurisdicción para las partes contratantes, especialmente cargadores, con lo cual, seguramente, que conflictos de esta naturaleza tendrán que surgir con mayor frecuencia que en la actualidad.-

Podemos señalar que en un caso concreto que está en nuestro conocimiento (Compañía Colombiana de Seguros con Pacific S.N. 1963), la jurisprudencia inglesa determinó que en ese caso no operaba la interrupción (puede verse R.P. Colinvaux en "Journal of Business Law" 1963-64 página 171).-

Por otra parte en nuestro sistema positivo esta clase de interrupción, denominada interrupción civil, se encuentra expresamente consagrada por nuestro Código Civil en su artículo 2.518 inciso 3º.-

6.- Eliminación de las Cláusulas Nulas.-

¿Considera que es satisfactoria la situación actual respecto de que los porteadores marítimos sigan utilizando cláusulas de conocimiento de embarque que son nulas o sin valor con arreglo al Convenio de Bruselas de 1924?

Nuestra respuesta es indudablemente negativa. Aparte de las razones que se dieron al contestar la respuesta supra 4 a) entendemos que la incorporación de cláusulas de esta naturaleza, aún cuando de manera alguna pueda otorgarles ni siquiera síntomas de validez, resulta evidente que ellas pueden

llevar a confusiones a las partes más débiles economicamente y que, por consecuencia, pueden encontrarse desprotegidas desde el punto de vista de una adecuada asesoría jurídica.-

De lo anterior sólo puede resultar la proposición, también ya insinuada anteriormente, de establecer una prohibición absoluta de incorporar a los conocimientos de embarque cláusulas que son, o serán de ningún valor de conformidad a las convenciones vigentes al momento de celebrarse el contrato.-

PARTE II

En esta parte se solicita, en general, la posibilidad de señalar materias afines en que se planteen problemas sobre responsabilidad de los porteadores de la carga en el contexto de los conocimientos de embarque y que no estén expresamente enumerados en el párrafo I b) de la resolución aprobada por UNCITRAL en su 4º período de sesiones.-

Sin perjuicio de estimar que no se deben encomendar nuevos trabajos al Grupo de Transporte Marítimo, mientras éste no cumpla su cometido respecto de los problemas de que está actualmente conociendo, consideramos, tal como se señaló en nuestra respuesta supra 3 b) y 3 f), que resulta indispensable abordar las materias atingentes a: 1) Carga a granel; 2) Contenedores, Paletas y otros medios modernos de transporte marítimo; y 3) la responsabilidad de los porteadores por los daños indirectos a la mercadería.-

Czechoslovakia

Part I

1. Transshipment

The existing rules and practice regarding transshipment are not satisfactory. The carrier considers himself in conformity with the transshipment clause contained in the liner Bill of Lading to be responsible for the goods only while they are in his possession; as regards any further part of the voyage after the goods have been transshipped, the carrier declares his responsibility for the choice of the on-carrier only.

The original carrier should remain responsible for the whole of the through transit and the provisions of the international convention (the Rules) should apply during the entire period covered by the issued Bill of Lading.

The Rules should define the carrier's obligations to effect the carriage "properly and carefully" limiting thus the carrier's decision to transship the goods when and where he thinks it is suitable.

The original carrier should seek indemnity from the on-carrier to satisfy a claim for loss or damage occurring while the goods are in the custody of the on-carrier.

When considering this problem the wording of the Transatlantic Australian Homeward Bill of Lading, section 3 (d) as quoted on page 114 of the UNCTAD material TD/B/C.4/ISL/6 of December 14th, 1970, should be borne in mind.

The position of the original carrier in the recourse proceedings against the on-carrier is always better than that of the cargo owner/holder of the Bill of Lading as the legal relation of the original carrier and the on-carrier is usually based on a contract while the cargo owner/holder of the Bill of Lading would be forced to seek indemnity from an on-carrier fully unknown to him (which is one of negative consequences of jurisdiction clauses in Bills of Lading).

2. Deviation

The existing international legislation in this area is not satisfactory. It is not quite clear when deviation is to be deemed to be reasonable in accordance with Art.IV (4) of the Brussels Convention of 1924.

There are some differences in the interpretation of "deviation" in several countries. On one side "deviation" is considered to be a deviation in the geographical sense only while, on the other side, a lot of reasons, e.g. non-delivery, overcarriage of the goods, carriage of deck-cargo, etc., are considered as implied therein.

It should be defined what deviation is and, in particular, what deviation is reasonable or, as the case may be, what deviation is not considered to be reasonable, e.g. for the purpose of loading and/or unloading cargo and/or passengers.

Carrier should be fully liable for all consequences of un - reasonable deviation so that he would not be entitled to refer to any limitation of liability or exception clauses.

3. Unit Limitation of Liability

a. The monetary limitation of ocean carrier's liability as established by Art.IV (5) of the Brussels Convention of 1924 ("100 pounds sterling" per package or unit) is not satisfactory. The majority of states have availed themselves of the possibility under Art.IX of the Brussels Convention of 1924 and expressed the limitation of the carriers liability in their own money (currency) disregarding the golden basis of the amount provided for in the Brussels Convention. Moreover, the maximum amount does not correspond with the original price level and the increased number of carriages of valuable goods at present.

   The new regulation by the Brussels Protocol of 1968 which establishes a limitation amount of "the equivalent of Frcs 10.000 per package or unit or Frcs 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher", is more in conformity with the principle of balance of rights and obligations of the parties to the contract of carriage of goods by sea.

b. The expressions "per package or unit" in Art.IV (5) are not satisfactory as a means of measuring the carrier's liability. Consequently, differences in the interpretation caused a number of disputes between the parties and there are also differences in judgements in various countries. The problem is to establish on the ground of facts and ascertainments what is a "unit" in a concrete case. The problems have not been solved by using the phrase "customary freight unit" in the legislation of some countries to the full satisfaction.

   The wording of the Brussels Protocol of 1968 that combines the maximum liability amount "per package or unit" with the liability per kilo of gross weight of the goods lost or damaged, whichever is the higher, may be considered as more appropriate to exclude or limit the existing problems to the minimum.

c. The wording of Art.2(c) of the Brussels Protocol of 1968 regarding containers, pallets or similar articles of transport used to consolidate goods etc. may be considered as a satisfactory solution for the time being.

d. The provision of Art.2(d) of the Brussels Protocol of 1968 in defining "a franc unit" is not fully satisfactory from practical reasons due to fluctuation of prices of gold. Nevertheless, unless a more appropriate solution is found, the definition appears to be acceptable.

The provision of the Brussels Protocol of 1968 as regards the way and date of conversion of the sum awarded into national currencies is, however, unsatisfactory because of the reference to the law "of the Court seized of the case". Such a formulation governs cases only if brought before a Court having jurisdiction to determine the dispute. It does not cover, however, disputes decide in arbitration or there might arise difficulties in arguing that the mentioned formulation covers both cases decided in courts and in arbitration. Further, it does not cover matters settled between the parties without court or arbitration proceedings.

Even if the mentioned provision should be interpreted in the way of governing all above mentioned matters, i.e. on the basis of law of the court (or arbitration) that would have the jurisdiction in case the parties decide to go to the court (or arbitration) to have the dispute determined, there would arise problems in connection with the jurisdiction due to jurisdiction clauses in Bills of Lading and their questionable legal nature.

From the practical point of view a solution might be found in a re-formulation of the phrase to the effect that the conversion into national currencies should be governed by the rate of exchange prevailing on the day when the claim has been recognised or settled. The recognition or settlement should be effected, as a rule, in the currency in which the damage was suffered.

e. Irrespective of some difficulties arising in connection with the provision of Art.IV(5(of the Brussels Convention of 1924 and Art.2 of the Brussels Protocol of 1968, which is designed to replace Art.IV(5) as regards the limitation of the carrier's maximum liability "unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the Bill of Lading", the present wording is suitable and should remain in force.

f. No comments.

4. Definitions under Article I of the Brussels Convention of 1924

a. The definition of the term "carrier" in Art. I(a) of the Brussels Convention of 1924 is in principle correct.

Difficulties, however, arise in connection with clauses of some Bills of Lading, e.g. demise, identity of shipowner, agency etc. being misleading, unclear and, in consequences, lessening the carrier's liability so that they shall be considered, in accordance with Art.III (8) of the Brussels Convention of 1924, null and void and of no effect.

The clause quoted as an example in the questionnaire is a typical one to demostrate the problem.

To exclude troubles in identifying the person of the carrier responsible for the performance of the contract of carriage of goods by sea the Rules should foresee the liability of the carrier in all cases when a Bill of Lading is issued without a distinct indication that it is issued on behalf of a different person than the shipowner; in such a case, the other person should have been named expressly.

b. The existing definition of "contract of carriage" in Art.I (b) of the Hague Rules is not fully satisfactory, in particular with regard to the practice of transshipment clauses in Bills of Lading. Reference is made to the comments above under 1. Transshipment.

A reformulation of the definition of the contract of carriage seems to be worth while considering.

c. The present definition of "ship" contained in Art.I (d) of the Hague Rules is not fully satisfactory. It should cover not only vessels used for the carriage of goods by sea but also vessels undertaking carriage of goods by sea and inland waters during one voyage.

The efforts of UNCITRAL to make a new definition of "ship" relating to the application to barges, lighters or similar craft used to transport goods to and from the ocean carrying vessel as quoted in the questionnaire are appreciated. The proposed formulation might be acceptable with an ammendment in para (ii) under (b) as follows :

> "(b) in cases when the consignee has not taken over the goods though invited to do so by the carrier, 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; "

A further ammendment should be made in para (ii) under (c) in adding the following text :

> "(c) .... if the mentioned authority or other third party does not act in taking delivery of the goods on consignee's behalf, the carrier shall be deemed to be in charge of the goods until the time the goods are actually handed over to the consignee."

5. <u>The period of limitation</u>

a. The length of the period of limitation in Art.III para 6 subpara 4 of the Brussels Convention of.1924 is in principle satisfactory.

Attention is, however, directed to Art.1 para 3 of the Brussels Protocol of 1968 as commented under e. below. As regards recourse proceedings a further period of at least 3 months should be allowed.

Another question seems to be worth while considering when a new draft of an international convention is going to be prepared, viz. to provide stay of course of period of limitation for the period from lodging a claim until the moment of reply or,as the case may be, if the reply is not given within a certain time after the claim has been lodged, the period of limitation continues to run. Reference is made to the existing practice under different international conventions governing various modes of transport, e.g. CIM-Convention (railway), CMR-Convention (lorries), etc.

b. Difficulties have been encountered as to the starting-point for the period with respect to the phrase "one year after

delivery of the goods" or "the date when the goods should have been delivered", viz. in connection with the interpretation of the word "delivery".

The proposal by UNCITRAL as quoted under 4.c. might be of assistance in defining it more properly and distinctly. Reference is, however, made to amendments to the UNCITRAL proposal as suggested to be made above under 4.3., i.e. in para (ii) under (b) and (c).

c. Difficulties have arisen with respect to the scope of the word "suit" in Art. III para 6 subpara 4 of the Brussels Convention of 1924.

The Rules should provide expressly that "suit" covers "initiation of arbitration" as well of it is foreseen that disputes shall be decided in way of arbitration in accordance with the arbitration agreement or if the parties have agreed upon submission to arbitration.

The formulation of part of Art. III para 6 subpara 4 could read as follows:

> "... 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 ...."

d. The existing legislation as to whether an agreement can modify, extend or interrupt the period of limitation is not satisfactory.

The problem should be regulated by a revised wording of the Brussels Convention or another international convention to unify the existing differences in legislation in various countries. While in some countries modification or extension of the period of limitation is allowed to be made by agreement, in other countries such an agreement would be considered as invalid and of no effect.

From practical reasons, the extension of period of limitation by agreement of the parties, if valid, would enable to arrive at an amicable settlement of claims arisen out of the carriage of goods by sea without necessity to bring the matter before a court or to initiate arbitration proceedings.

In this connection, reference is also made to the suggestion to regulate the stay of the course of the period of limitation during a certain time foressen for the reply to the lodged claim (see above under 5.a.), e.g. 3-6 months.

The extension of the period of limitation by agreement as provided for in Art.1 para 2 of the Brussels Protocol of 1968 might be considered as satisfactory for the solution of the problem unless a more appropriate solution is found. At any case, however, the second phrase should be re-drafted

to the effect that the parties to the contract of carriage of goods by sea are entitled to agree upon the extension of the period of limitation when concluding the contract, i.e. before the accident occurred that caused the loss of or damage to the goods. The formulation should be wider; instead of reference to "suit" there should be reference to "claim".

e. Art. 1 para 1 of the Brussels Protocol of 1968 may be considered as an improvement of the plaintiff's position in the recourse proceedings. A reformulation should be, however, worth while re-drafting, e.g. as follows:

> " .... 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."

f. As regards other problems relating to the period of limitation that require consideration with a view to international legislation reference is made to the proposal made above under 5.a. and 5.d. to regulate the stay of course of period of limitation.

6. Elimination of invalid clauses

The present situation in regard to the continuing use by ocean carriers of Bills of Lading clauses which are null and void under the Brussels Convention of 1924 cannot be considered to be satisfactory. The number of invalid or at least questionable clauses is still increasing and the carriers though fully aware of the invalidity or questionable nature of such clauses continue in their practice as they calculate on the basis of their experience that the cargo owner or the holder of the Bill of Lading will, in the majority of cases, hesitate to bring a suit against the carrier if there are some problems of legal nature whether a certain clause of the Bill of Lading is valid or invalid, in particular if the decision by the court upon the issue depends on evaluation of the facts and interpretation of the wording differing in details.

The continuing of the practice is far from the declared aim of balancing the rights and obligations of the parties to the contract of carriage of goods by sea.

A solution of the problem should be sought in an international regulation by an amendment to the Brussels Convention of 1924.

Part II

No proposals to add further problem areas regarding the responsibility of carriers for loss of or damage to cargo in the context of Bills of Lading not specifically listed in para 1(b) of the resolution adopted by UNCITRAL at its 4th session.

Denmark

Part I

QUESTION 1. TRANSSHIPMENT.

Under existing Danish Law the contracting carrier is entitled to exempt himself from liability for loss or damage occurring while the goods are in the custody of another carrier if the carriage of the goods according to the contract may wholly or fully be performed by such other carrier.

This provision has given rise to certain difficulties and a Committee which has been preparing the legislation necessary if Denmark should ratify the Brussels Protocol 1968 has - in close cooperation with similar Committees in the other Nordic countries - proposed some important changes in the above mentioned rules.

The proposed new rules which are likely to be introduced in the Danish Merchant Shipping Act in the near future are based on the following principles.

a) the contracting carrier shall remain liable for the performance of the entire carriage

b) the performing carrier shall for the part of the carriage performed by him be liable under the same rules as the contracting carrier

c) the contracting and the performing carriers shall be liable jointly and severally, however the total amount of their liability should not exceed the applicable limit of liability.

d) the contracting carrier shall not be entitled to exempt himself from the liability for loss or damage occurring while the goods are in the custody of another carrier except in cases where the parties have agreed expressly or impliedly that the carriage wholly or jointly shall be performed by another carrier.

It is the opinion of the Danish government that future international rules on this subject should be based on the principles set out above.

QUESTION 2. DEVIATION.

The existing Danish legislation in this area which is based upon Art 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.

QUESTION 3. UNIT LIMITATION OF LIABILITY.

a)-f)

The provisions relating to limitation of carriers liability in Art 4(5) of the Brussels Convention of 1924, which was enacted in Danish maritime law in 1937, has for a long time not been satisfactory. This is mainly due to the fact that the gold clause in Art 9 of the convention is only effected by very few countries, and that the amount of 100 Pounds Sterling pr. package or unit does not in many cases give the cargo owner sufficient compensation for his loss or damage. Therefore the adoption of the Brussels Protocol of 1968 was regarded as a great step forward, and as mentioned in our reply to question 1 above the rules contained in the Protocol are now being implemented by a revision of the Danish Merchant Shipping Act during the 1972/73 session of the Danish Parliament. It is the general feeling in Danish commercial circles that the Protocol gives a reasonable solution to many of the problems which had arisen under the 1924 convention, and we have for the present no further remarks to offer on this question.

QUESTION 4. DEFINITIONS UNDER ARTICLE 1. OF THE BRUSSELS CONVENTION OF 1924.

a) In present Danish Law the term "carrier" is used in the meaning "contracting carrier". As it will appear from the

reply to question 1 it is envisaged in the near future to amend the Danish Merchant Shipping Act in such a way that it is clearly laid down that the contracting carrier shall remain liable for the entire carriage and the definition of "carrier" will be amended accordingly.

b) The existing definition of "contract of carriage" may be considered too narrow in view of the fact that the use of bills of lading during later years for various reasons has lost some of its importance. It seems desirable that all contracts for maritime transport of goods except contracts of the types evidenced by charter-parties should be governed by the rules of the convention, and the definition in question be amended accordingly.

c) The present definition of "ship" is considered to be satisfactory.

QUESTION 5. THE PERIOD OF LIMITATION.

It is the general feeling in Danish Commercial circles, that the existing provisions in Art 3 paragraph 6 (4) of the Brussels Convention of 1924 according to which the period of limitation is one year, has been satisfactory. We also find that the amendments and additions to this article introduced by the Brussels Protocol of 1968 are satisfactory, and that these provisions should be retained in a future convention.

QUESTION 6. ELIMINATION OF INVALID CLAUSES.

The existing provisions in Art 3 paragraph 8 of the Brussels Convention of 1924 regarding invalid clauses in contracts of carriage seem to be satisfactory and should be maintained in a new convention.

Part II

No comments.

Federal Republic of Germany

The questionnaire of the UN Commission on International Trade Law (UNCITRAL) of 18 July 1972 gives the Federal Government an opportunity to make further observations on the Hague Rules. It gladly avails itself of this opportunity. However, it takes the liberty in this connexion to refer to its answer, dated 20 July 1972, to the questionnaire of 4 July 1971 and, in particular, to the general remarks preceding the answers to the questions.

1. Transshipment

This subject was dealt with in the Federal Government's answer of 20 July 1972. In the Federal Government's opinion transshipment must be possible without the shipper's consent. It should be admissible, however, only if it is reasonable in consideration of all the circumstances of the individual case. In the case of an admissible transshipment the original carrier should be liable to the shipper for the whole voyage as "the carrier" and should be responsible for the careful transshipment and speedy forwarding of the goods.

2. Deviation

This subject, too, was dealt with in the answer dated 20 July 1972. The Federal Government does not think it is necessary to include an exact definition of the term "deviation" in the Convention. It suggests, however, that the onus should be on the carrier to prove that any deviation from the route he considers appropriate is in fact justified. The Federal Government, therefore, considers that it would be expedient to include in the Convention a rebuttable presumption to the effect that a deviation for the purpose of loading or unloading is deemed unjustified.

3. Unit Limitation of Liability

a) Amount of Liability

The Federal Government is of the opinion that the maximum limitation of £ 100 per package or unit provided in the Hague Rules can no longer be regarded as sufficient in view of the present prices for goods and monetary values. The necessity of increasing the maximum limitation, which had been obvious for some time, was taken account of already by the Brussels Protocol of 1968. The Federal Government considers **that liability of up to Poincaré Frcs. 10 000 per unit** or Poincaré Frcs. 30 per Kilo is sufficient and that this amount may be expected in the foreseeable future to cover the average value of goods shipped by sea. Therefore, the Federal Government takes the view that **an increase is not now required.**

b) Measuring Liability per Package or Unit

Measuring the carrier's liability solely per package or unit has proved to be unsatisfactory. Seeing that these measures bear no relation to the value of the goods **shipped, the amount of liability may be very high or very**

low in relation to the value of the goods in an individual case. Moreover, the rather vague terms "package" and "unit" admit various interpretations by the courts of the Contracting States. Calculating the amount of liability per package or unit also enables the parties to a contract of carriage by sea to circumvent the mandatory Hague Rules on minimum liability by combining the individual consignments into one unit. Nevertheless, a more suitable measure is not apparent. Therefore, the present rule should stand. The Federal Government considers it an important improvement that the Brussels Protocol of 1968 introduced the weight of the goods as an additional determinant factor thereby providing a measure that is like in all the Contracting States. The well-balanced rule in the 1968 Protocol affords adequate liability for heavy units.

c) Container Clause

On the basis of the calculation of the carrier's liability per package or unit it appears that the so-called "Container Clause" of Art. 2 (c) of the Brussels Protocol of 1968 is the best solution that can be attained. It avoids some of the difficulties of interpretation created by the use of containers and similar articles of transport. Besides, this rule is largely in accordance with present practice.

d) The Poincaré Franc

The Federal Government is of the opinion that it is expedient to express the liability amounts in a monetary unit that corresponds to a certain value in gold. Only in this way liability amounts can be guaranteed that are largely independent of fluctuations in the value of national currencies. It would, however, be more satisfactory if the time of the conversion of the Franc into national currecnies would not be left to the national

courts but be prescribed in the Convention. The material time of conversion should be the time when the claim comes into existence.

e) Declaration of Value

The agreement of a higher maximum liability of the carrier by a declaration of value has not so far led to any difficulties in practice. On the other hand, it is seldom resorted to in Germany because shippers, as a rule, prefer not to touch the liability limits under the Hague Rules, even where the value of the goods is higher, and to cover the excess value by cargo insurance. In the case of a declaration of value the charging of an adequate increase in the freight rate does not appear to be unreasonable.

f) No Comment

4. Definitions

a) Carrier

The definition of Art. I (a) of the Hague Rules is not satisfactory because it does not reveal with sufficient clarity what persons are to be regarded as "carrier" within the meaning of the Hague Rules. The Federal Government would, therefore, welcome a clarification that also extends to the frequently employed "identity of carrier clause". Under present German law these clauses are unobjectionable provided that the parties to the loading can clearly recognize on whose behalf the bill of lading was issued. This is possibly not so in the case of the clause quoted in the questionnaire.

b) Contract of Carriage.

In the Federal Government's opinion no difficulties arise as a result of the coupling of the contract of

carriage with the issuance of a bill of lading under the Hague Rules. It might be considered extending the mandatory character of the Hague Rules to the effect that contracts of carriage for which no bill of lading was issued come within the sphere of application of the Convention. In the view of the Federal Government such an amendment is not required because bills of lading are issued for practically every carriage of goods by sea, and, consequently, the Hague Rules apply.

Concerning the limitation of the application of the Hague Rules in respect of time reference is made to the observations of the Federal Government on question 1 d of the Questionnaire of 4 July 1971 (p. 43 of the Document A/CN 9/WG 4/Add. 1 (Vol I)).

c) Ship

The application of the Hague Rules to the lightening of sea-going ships into barges is, in the opinion of the Federal Government, not so much a question of the definition of "ship" as one of the sphere of application of the Convention. And this is how the problem was obviously considered by the UNCITRAL working group who solves it in the proposal quoted in the questionnaire by defining "carriage of goods". In its former observations the Federal Government stated that it considers that an extension of the sphere of application of the Hague Rules would be desirable. The proposal made by the UNCITRAL working group shows the way toward a solution that might be regarded as suitable.

5. Period of Limitation

a) Length of the Period of Limitation

In the opinion of the Federal Government the period of limitation of one year is adequate. Within this period,

it is, as a rule, possible to ascertain the facts underlying the loss or damage and, if necessary, bring a suit. The period is apportioned so as not to be too long and allows for the fact that the chances of ascertaining the facts do not increase with the course of time, but decrease and that in commercial dealings there is a commendable need for speedy certainty of the settlement of transactions.

b) Commencement of the Period of Limitation

The wording of Art. III, para. 6, sub-para. 4, actually gives rise to misunderstanding and in the Federal Republic has led to different views and varying decisions of the courts. A clarification would, therefore, be welcomed by the Federal Government. The proposal of the UNCITRAL working group quoted in the questionnaire indicates a suitable solution to which the Federal Government might be able to agree.

c) Institution of Court Proceedings

Under German law no problems have arisen concerning the question at what time the suit is considered to have been brought. In the case of an action under Civil Law the material time is the service of the notice of the action on the defendant. In cases of other actions for the preservation of rights (e.g. in bankruptcy proceedings) the corresponding time is determined by the applicable procedural provisions.

d) Abbreviation or Extension of the Period by Agreement

Under German law the parties may agree to extend the period; further, in cases of loss or damage giving rise to liability under Art. I (e) and Art. VII of the Hague Rules, the period may be shortened by the parties. An interruption of the period is not possible. In the Federal Government's view, this is satisfactory.

e) Period of Limitation in Cases of Actions for Indemnity

Art. 1,para. 3, of the Brussels Protocol contains a special provision on the bringing of actions for indemnity. The Federal Government thinks that such a provision is necessary, and it is convinced that it will prove its worth in practice.

f) No proposals

6. Invalid Clauses

The Federal Government is of the opinion that international legislation should endeavour to prevent the inclusion of invalid clauses in bills of lading as far as possible. This may best be done by unambiguous and clearly defined provisions of substantive law. The Federal Government expects little success from expressly banning the inclusion of clauses in bills of lading which, according thereto, are void; such a provision could have no further effect than that the clause is invalid -- which it is anyhow. Nor does the Federal Government recommend inserting a provision in the Convention by which an agreement on certain clauses in bills of lading is declared invalid because in this case the trade could disregard such a provision by agreeing on new clauses.

Finland

Part I

1. Transshipment

The existing rules and practices with respect to transshipment cannot be regarded as fully satisfactory. The sole provision on the subject is contained in § 123 of the Shipping Act, according to which the contract carrier is able to free himself from his responsibility for any loss, diminution or damage to goods that may take place during the time when they are in the possession of the performing carrier. This provision of law applies both to cases where the transshipment was initially agreed upon and to those in which it takes place by virtue of a general transshipment clause. In Nordic legal practice, the provision has been extended to transport operations performed under the Bills of Lading Act. The possibility for a carrier to limit his liability is, however, restricted by the principle that the limitation must be made on the understanding that the cargo owner shall be entitled to present his claims against the performing carrier.

Such a comprehensive right to limit one's liability in a case where the transshipment takes place only by virtue of a general transshipment clause implies various disadvantages for the cargo owner in diminishing considerably his chances to get indemnification.

This is why the Nordic committees on maritime legislation have suggested, in their proposal for modernization of the Chapter of the Maritime Act concerning affreightment, that the contract

carrier should be allowed to free himself from his responsibility only where a specific prior contract about transshipment has been made. Thus, the inclusion of a mere general transshipment clause in the bill of lading would not entitle to such exemption. On the other hand, the right to limit one's liability should remain unchanged and should be applicable to both maritime and land transports as well as any storage periods. This requirement would be mandatory. A similar one should be considered in modernizing the Convention of 1924.

2. Deviation

Article IV (4) of the Brussels Convention of 1924 does not perhaps make it quite clear that deviations from the expected route for the particular purpose of saving the property involved should always be permissible. In this respect, an effort should be made to clarify the Convention. Moreover, the implications of a deviation are interpreted differently e.g. in the United Kingdom and the Nordic countries; in this respect, too, harmonization of the procedures would be desirable.

3. Unit Limitation of Liability

a. Article IV (5) of the Brussels Convention of 1924 limits the cargo owner's liability to 100 pounds sterling per package or unit. According to the Finnish Bills of Lading Act the maximum compensation is 600 markkas (about 60 pounds),in Sweden it is 1,800 crowns (about 160 pounds). The amount of compensation thus varies considerably from a contracting state to another.

This inconvenience was essentially eliminated by the Brussels Protocol of 1968. According to Article 2 thereof, Article IV (5) of the Convention shall be replaced by a provision to the effect that the Poincaré franc shall be taken as a basis for calculation. In view of the competitive situation for carriers, this unification is, in fact, to be considered

desirable and a similar effect should be reached by the new Convention.

As a result of intensive efforts, new limitation provisions have been incorporated in the Visby Rules. Before investigations are made of the economic effects of any new systems, these provisions should be approved and embodied in the new Convention.

b. The concept of "unit" has been a source of considerable difficulty, e.g. because some contracting states have, in incorporating provisions of the Convention in their national legislations, deviated from its wording. Difficulty may also arise from the relative vagueness of the very concepts of "package" and "unit", which should, therefore, be avoided when possible. The economic implications of a new concept should be clarified. Only after this work has been carried out, it could be considered if the new Visby Rules should be replaced. In the meantime, the system based on these Rules should prevail.

c. The so-called container clause of the Protocol of 1968 cannot be regarded as fully satisfactory. Clarification of this point should be carried on.

d. A reference can be made in this context to what was said at the beginning of item (a) above, with the further comment that it would hardly be possible, in the prevailing situation of the foreign exchange market, to determine definite equivalents for the Poincaré franc in the various contracting states.

e. The provision of Article IV (5) regarding the declaration of the value of goods has been used hardly at all in practice. If the owner of the cargo declares on the bill of lading an exceptionally high estimate of value he may have to pay a higher freight on account of the declared value. But even though cargo owners obviously have made use of the said provision very rarely, this should however not be excluded from law,

because it does not involve any inconvenience in practice but provides the cargo owner, in any case, with a chance to declare a value for the goods e.g. when wishing a particular package to be handled with special care.

4. Definitions under Article I of the Brussels Convention of 1924

a. Problems with regard to the definition of "carrier" have mainly arisen in cases where the line or company that issues the bill of lading has chartered a vessel of another shipowner, by means of which the transport operation is subsequently effected. The practice adopted here has been to regard the action of the master by or on behalf of whom the bill of lading is issued as binding only on his own company. This may lead to situations which are very unsatisfactory from the point of view of the owner of the goods. Moreover, it must be observed that the ultimate result does not seem to depend on whether the bill of lading contains an "identity of carrier" clause or not. To improve the situation of the owner of goods adequately, the line or company, too, should be made responsible to him for any damage to the goods.

b. In this context, it should be observed that certain lines and companies may, in a near future, replace the use of bills of lading by a system in which the particulars traditionally contained by the bill of lading are transferred by an ADP machine to the port of destination. It may be questioned whether the definition in the Convention provides even for this type of cases. It would be important to make sure that any uncertainty would not arise as to whether or not the protection provided by the Convention of 1924 would be extended even in such circumstances to the parties concerned.

c. The definition of "ship" has not caused any significant difficulty in Finland. As to the amendment proposed to be made in Article I (e), it is evident that the addition implied

would eliminate certain considerable difficulties mainly in relation to the delivery of goods at the port of destination. It is, however, recommended that it be supplemented so as to define the concept "to take over" just as has been done in the case of "to deliver".

The period of limitation

a. The period allowed for presenting claims seems to be a satisfactory one from the point of view of the principle that the carrier should be informed of any claims against him within a relatively short time. In this respect, however, account should be taken of the Draft Convention on the International Combined Transport of Goods (E/CONF. 59/17, ANNEX II, Art. 15) and of the proposed amendment to the Visby Rules. If no modifications to the allowed periods are made, the situation will be satisfactory even in this respect.

b. The determination of the starting-point for the period has not caused difficulty in Finland.

c. No difficulty has been encountered as to the way in which the period should be interrupted.

d. The existing legislation has not raised any problems for Finland though the point mentioned is a source of dispute in certain other countries. The Visby Rules contain now a provision permitting the period of limitation to be extended by mutual agreement made by the parties concerned after an accident has taken place. But the period cannot be reduced by such agreement.

e. It seems advisable to set a specified period for bringing an action against a third person in the way done in the Brussels Protocol. It might be noted in this connection that in the drafts made for Nordic maritime legislation this period has been proposed to be one year.

f. No.

6. Elimination of invalid clauses

On the whole, the situation is considered to be satisfactory in this respect.

Iraq

I - TRANSSHIPMENT

Transshipment clauses contained in bills of lading are not satisfactory. Such clauses create problems because (1) the extent of the different carriers' responsibility is difficult to ascertain precisely; (2) goods might be transshipped at a port where the Hague Rules are not applicable, with the result that such Rules may not apply to non-carriage period; (3) the transshipment clause may state that each individual carrier's bill of lading is to apply while the goods are in such carrier's hands. This raises the question whether jurisdiction clause in each bill of lading along the route would be valid, so that a cargo owner might have to sue different carriers in different jurisdiction. These problems might be resolved by amending the Rules to make the original carrier liable for the entire period of a transit, and to apply the Rules during the whole period.

Moreover, certain conditions must be satisfied by the carrier in order to effect the carriage "properly and carefully". These conditions would provide:

(1) That transshipment is reasonable and proper in the circumstances;

(2) That the carrier notifies the cargo owner of the transshipment so as to enable him to insure any new risks which might be involved through the substitution of another ship for the original ship;

(3) That the carrier shall exercise due care for the goods during the transshipment;

(4) That the carrier continues to exercise due care and diligence to forward the goods as soon as possible and will not be excused if he delays the transshipment in order to avoid paying a high rate of freight for forwarding the goods;

(5) That the carrier would deliver the goods at his own risk or expense, or these may be shared with the cargo owners. The Hague Rules, where amended to make the original carrier responsible for the whole of the through transit, should also make it clear that the original carrier must seek indemnity from the on-carrier to satisfy a claim for loss or damage occurring while the goods are in the custody of the on-carrier.

II - DEVIATION

The Hague Rules neither define deviation nor indicate the results of an unreasonable deviation. This situation creates uncertainty and has raised complaints by cargo owners.

A leading case contained the following test to ascertain whether a deviation is reasonable:

> "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 obligation to consider the interests of any one as conclusive."

The burden of proof is also a source of uncertainty in cases of deviation. It is usually held that, because the carrier has greater access to the facts, he has the burden of proving the contractual route and that the loss took place while the ship was on that route. The claimant must then prove the deviation or the unreasonable change in the route.

Another uncertainty is that goods often are discharged elsewhere than at the port of destination. In such cases, it is uncertain who must bear the rising and expense of bringing the goods into the port of destination.

These problems might be clarified and simplified if deviations were presumed to be unjustified and carriers were held liable for all risk and expense of bringing the goods to the destination port, unless they could prove that compelling conditions for the benefit of both ship and cargo forced them to deviate. Uniformity could be secured by following the United States approach of raising a rebuttable presumption that any deviation for the purpose of loading or unloading cargo or passengers is unreasonable.

III - UNIT LIMITATION OF LIABILITY

Application of the Hague Rules relating to unit liability is felt to be unjust or unreasonable:

The terms of "package" and "unit", have not been interpreted uniformly.

Limitation of liability is composed of two elements:

(1) The stipulated amount;

(2) The quantitative unit of the goods by which to calculate the carrier's maximum liability.

The stipulated amount of £.100 is felt to be too low. But the amendments to the Rules in accordance with the 1968 Protocol improve the position of cargo owners with respect to the amount stipulated for the limitation of liability, for the new Rules raise such amount to 10.000 Francs Poincaré (£.270 sterling). The word "unit" may refer to physical shipping unit (an unboxed car or machinery), a bale barrel, or sack, etc., as this is called unit cargo, or it may mean the unit on the basis of which the freight is calculated. "Freight unit" problems also arise in applying the Hague Rules to containers or pallets. It is not clear, under the Hague Rules, whether a container or pallet constitutes a "package" for which the carrier's liability is limited to £.100 regardless of the number of smaller packages stowed inside the container or strapped to the pallet.

The limitation of liability applies (unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the B/L). This option for the shippers to secure a more complete protection has had little practical effect. Shippers have rarely declared cargo values in bills of lading since this can have the effect of attracting additional ad valorem freight rates. As ad valorem freight rate is usually a high percentage, cargo owners generally find it cheaper to obtain their own insurance cover than to declare value. As a result, cargo owners rarely declare value, and consequently the limitation of carrier's liability normally applies.

The 1968 Protocol, however, improves the position of cargo owners with regard to unit limitation by stating in the new article 4 (5) that 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 calculating the limitation of liability. Still the existing article 4 (5) is unsatisfactory and in need of considerable modification, although the 1968 Protocol amendments have made some improvements.

IV - DEFINITIONS UNDER ARTICLE (I) OF THE BRUSSELS CONVENTION OF 1924

(1) "Carrier" and "demise clause"

The definition in the Hague Rules states that the "carrier" includes the owner or the charterer who enters into a contract of carriage with shipper. Two problems arise: firstly, the term "includes" seems to mean that the designation of owners and charterers is not exhaustive, and that others might be considered carriers. To remove uncertainty, the definition of carrier might be clarified to confirm that "carrier" includes the owner, the charterer or any other person who enters into a contract of carriage with a shipper.

Secondly, suit can be brought against a charterer when there is a demise charter or whenever the charterer contracts in his own name with the shipper and issues a bill of lading. There is uncertainty where a vessel is time or voyage chartered and a bill of lading is issued with the name of the charterers heading the document which contains a so-called "demise" and "identity of carrier" or "agency" clause, and which is signed for the master of the vessel. Most bills of lading contain "demise" clauses to the effect that if the ship is not owned by, or chartered by demise to, the shipping company or line by which the bill of lading is issued, the bill of lading shall take effect as a contract with the shipowner or demise charterer and not with the charterer who has dealt directly with the shipper.

Injustice has often been caused to the shipper/consignee when courts in some countries have held that the shipper or consignee cannot sue the owner of the ship because he is not considered to be the "carrier", and charterers have been permitted to evade liability because they were not considered to be "carriers" either. Cargo owners expecting a shipping line to carry goods find instead that, by the use of demise clauses, the bill of lading terms allow the line to substitute a new carrier. They find that the line has not agreed to carry their goods at all, but merely to find a suitable carrier. The result is that shipping lines using bills of lading on their own forms and with their own headings, escape liability against shipper or consignee who have no reasonable means of believing other than that the shipping line is the real carrier of their goods. The uncertainty surrounding the effect of "demise" clause could be removed if, in

addition to expending the definition of "Carrier" as suggested above, the Rules were further amended to invalidate such a clause.

(2) Ship

The Hague Rules state that "Ship" means any vessel used for the carriage of goods by sea, which raises the question whether the Rules apply to barges or lighters when used for loading or discharging vessels. If barges or lighters are not to be considered "ships" within the meaning of article 1(d) of the Hague Rules then the Rules may not apply during the time when goods are on board such barges or lighters. It is 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. The proposed amendment to article 1(e) of the Brussels Convention of 1924, suggested by the UNCITRAL Working Group on International Legislation on Shipping at its third session might prevent uncertainty and overcome the difficulties arising of the definition of "Ship" in article 1(d) of the said Convention.

(iii)... servants, agents or other persons acting on behalf of the carrier or the consignee:

Of course reference to the carrier shall mean the agents, servants or other persons acting pursuant to the instructions of the carrier for the general principles of law relating to the Master/Servant or Principal/Agent when applied properly leave no doubt that the carrier shall be held liable for the acts done on his behalf of his servants or agents when these acts are performed by them within the authorities given to them. This reasoning, likewise, should apply to the servants and agents etc. of the consignee.

V - THE PERIOD OF LIMITATION

(a) One year period within which the suit can be brought against the carrier is satisfactory. This limitation is a uniform international practice all over the world.

(b) Yes, amending article 3 (6) to confirm that "delivery" means the moment when the consignee receives or should receive the goods would, in our opinion, solve the problem.

(c) Yes, to overcome the difficulties and avoid conflict, the term "Suit" may be defined to exclude arbitration proceedings.

(d) Extension of time bar is desirable and the amendments (the Visby Rules) to the Hague Rules state that the time-limit period may be extended if the parties so agree, even if they do so after the cause of action has arisen. Under the Iraqi Law the extension of time-limit has been held invalid. Therefore, the need is urgent to make such extension valid through an international action. Visby Rules serve this end after they come into force.

(e) The provisions of article 1, para. 3 of the Brussels Protocol of 1968 are satisfactory.

Khmer Republic

/Première partie/

1. Transbordement

Il faut distinguer ici deux cas de transbordement:

a) Transbordement d'un navire de haute mer à un caboteur;

b) Transbordement d'un caboteur à un autre caboteur;

Dans les deux cas, les connaissements actuellement en pratique ne sont pas satisfaisants, car ils ne protègent aucunement les destinataires de la marchandise c'est-à-dire les propriétaires finals.

En effet, dans le premier cas, même avec un connaissement direct (through bill of lading), le transporteur fait souvent des réserves sur sa responsabilité après le transbordement. Or, cette réserve constitue un non-sens puisque le premier transporteur s'engage à livrer la marchandise dont il a encaissé le fret jusqu'à destination finale.

Le transbordement et le choix du deuxième transporteur relèvent de sa responsabilité; s'en décharger sur le destinataire ou le propriétaire de la marchandise constitue une injustice criante, ce dernier n'est jamais intervenu dans le choix du deuxième transporteur. Des cas de ce genre ont été constatés. Le premier transporteur ayant touché le fret pour transport d'un port des Etats-Unis à un port de l'Extrême-Orient par exemple. Comme son navire ne peut naviguer vers un port fluvial à trafic maritime, il fait le transbordement sur un caboteur. Ce dernier, après avoir pris en charge la marchandise, disparaît de la circulation et ne livrera jamais au destinataire final la cargaison.

Le destinataire final, las d'attendre la livraison, fait la réclamation au premier transporteur; ce dernier répond qu'il lui appartient d'actionner le deuxième transporteur car une fois la marchandise transbordée, sa responsabilité prend également fin.

Une telle thèse n'est nullement soutenable. En effet, comment le destinataire final peut-il actionner le deuxième transporteur alors qu'il n'est en possession d'aucun document (B/L) prouvant qu'il est le propriétaire de la marchandise transportée par tel ou tel caboteur?

La thèse du premier transporteur, si elle est acceptée, ouvre la porte à tous les abus, soit de la part du premier transporteur, soit de celle du deuxième transporteur, agissant seul ou de concert pour spolier le propriétaire final.

Des cas illustrant cette façon d'agir ont été déjà constatés.

Vu ce qui précède, nous jugeons peu satisfaisantes les règles et la pratique actuelles en vigueur en matière de transbordement.

Nous souhaitons que le premier transporteur, qui encaisse le fret pour port final convenu, soit tenu pour entièrement responsable en cas de perte ou de diversion de la cargaison.

2. Déroutement

Enfin, il est également constaté qu'une pratique nouvelle est appliquée par les armateurs ou le consignataire du bateau.

Il s'agit de déclarer le bateau en avarie commune après avoir pris en charge la cargaison.

De nombreux bateaux se déclarent en effet en avarie commune, réclament les versements des "contributions" et, en attendant, refusent de délivrer la marchandise à son destinataire final ou la décharge dans un autre port, au détriment de son propriétaire.

3. Limitation de responsabilité par unité

La limitation pécuniaire de la responsabilité du transporteur telle qu'elle est fixée au paragraphe 5 de l'article IV de la Convention de Bruxelles de 1924 n'est pas satisfaisante.

Car cette limitation peut conduire les armateurs et les consignataires de bateau malhonnêtes à s'approprier des marchandises de valeur d'autrui en ne payant qu'un petit dédommagement.

4. Définition figurant à l'article 1er de la Convention de Bruxelles de 1924

Pas d'observations.

5. Délai de prescription

Pas d'observations.

6. Elimination des clauses frappées de nullité

Pas d'observations.

Norway

PART I

Question 1. Transshipment
Question 4 a. Definition of the term "carrier"

(1) In the Norwegian version of the Uniform Scandinavian Maritime Code (NMC) the term "bortfrakter" (= carrier) is used in the meaning contracting carrier. The definition contained in § 1 (a) of the Bills of lading Act (BLA), 1938 (the Norwegian enactment of the Convention on bills of lading, 1924), has been understood to have the same meaning Consequently, the rules on carriers' liability contained in this legislation are rules determining the liability of the contracting carrier towards the consignor or consignee. The question arises whether, according to these rules, the contracting carrier has vicarious liability for another carrier whose services he has made use of for the purpose of performing the carriage (actual carrier). This question arises of course in cases involving transshipment, where an initial carrier or an on-carrier has performed a part of the carriage. The same question also arises if the contracting carrier has performed no part of the carriage with his own ship(s), for instance, where a line has used a time-chartered ship to carry the goods. In either case the question also arises whether the contracting carrier may exempt himself from any such vicarious liability by inserting appropriate clauses in the bill of lading, e.g. a traditional transshipment clause or an "identity of carrier" clause.

Under Norwegian law, generally speaking, the contracting carrier has vicarious liability for any actual carrier whose services he makes use of for the purpose of performing the carriage. However, in certain cases involving goods carried by a time-chartered ship

Norwegian courts have held that the contracting carrier has no responsibility for goods covered by bills of lading signed "for the master", because such bills of lading are held to have been issued on behalf of the owner of the ship. Moreover, by NMC § 123 the contracting carrier is allowed to exempt himself from the vicarious liability for an actual carrier; this paragraph now reads:

> "If, according to the contract the carriage is wholly or partly to be performed by another carrier, or if the contracting carrier has the option of letting another perform, the contracting carrier shall ... be entitled to exempt himself from liability for loss or damage occuring while the goods are in the custody of the other carrier."

This provision has also been applied in cases where the contract of carriage is otherwise subject to the BLA.

(2) The chapter on affreightment of the NMC has been reviewed recently by a committee preparing the legislation required if Norway should ratify the Brussels Protocol 1968. This committee has worked in close co-operation with committees appointed in the other Nordic countries. The uniform [draft] legislation that has emerged from this joint Nordic work, contains proposals for important changes in the existing law on the subject here discussed. These proposals are intended to remedy certain defects in the law, in particular by preserving in most cases a right for the cargo owner to enforce his claim against the contracting carrier. The only exception to the latter rule relates to cases where it [has been agreed or otherwise made] clear to the cargo owner before the contract was concluded, that the goods would be entrusted to another carrier during the whole or a specified part of the carriage, and that the contracting carrier would assume no responsibility for the goods while in another carrier's custody. In all other cases, bills of lading clauses exempting the contracting carrier from liability for a performing carrier will be void. Consequently if, at his own initiative and subsequent to the making of the contract, the contracting carrier entrusts the performance of the carriage wholly or partly to another carrier, he will remain liable towards the cargo owner for loss or damage occurring while the goods are in the custody of the other carrier.

Thus the proposed rules on this subject are based on the following principles:

(i) the contracting carrier shall be liable for the performance of the entire carriage*/ and, consequently, be vicariously liable for any carrier whose services he makes use of for the purpose of performing the carriage;

*/ from the port of departure to the port of destination as determined in the contract.

(ii) the master of the carrying ship shall have authority to issue bills of lading on behalf of the contracting carrier;

(iii) the liability of any performing sea-carrier towards the consignor or consignee for loss or damage occurring while the goods are in his custody shall be governed by the same rules as those applicable to the contracting carrier;

(iv) the contracting carrier and the performing carrier shall have joint liability towards the consignor or consignee provided, however, the total extent of their liability shall not exceed the applicable limit of liability;

(v) the contracting carrier shall not be entitled to exempt himself from the 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.

The Norwegian Government considers that the above mentioned principles constitute a reasonable and satisfactory compromise between the interests of carriers and cargo owners, and that an international solution of the problems involved sould be attempted along these lines.

Question 2. Deviation

The doctrine of deviation, which originated in English American law, was eventually introduced in Norwegian law by the BLA § 4(4). As far as Norwegian law is concerned, this provision cannot be seen to have caused hardships or difficulties in practice. It is appreciated, of course, that in particular cases it may be difficult to decide whether a deviation is reasonable or not. However, provisions applying tests of reasonableness, proper conduct, due care or similar discretionary criteria are well known in Norwegian civil law, and the courts are well acquainted with the problems of administering rules of this kind. When the rules on deviation contained in the Brussels Convention, 1924, now shall be reviewed, it is in the opinion of the Norwegian Government important to bear in mind the following.

First, on the whole these rules are applicable only to carriage in liner trade. In such a trade, no doubt, there is a need for flexible rules leaving ample room for the carrier to choose what are the most appropriate and cost-saving ways and means for the performance of the liner service in which he is engaged. For economical and practical reasons the problems of liner trade in this respect cannot in the particular cases be isolated from the scope and nature of the entire liner service and the need for rational and expedient carriage of the entire volume of goods of that service.

Second, it is also typical for liner trade that, at the time when the goods are booked or received for shipment, it is often difficult to predict exactly how the particular consignment will be carried to the destination. In view of this, no particular course of performance is in advance likely to appear as the contractual one so as to make it possible to apply a concept of deviation in the traditional meaning of departure from the contractual course of performance. On the other hand, this does not mean that the carrier is at liberty to choose whatever course of performance he would like. What it means is that the course chosen by the carrier must be a reasonable one and not inconsistent with

proper carriage, having due regard to the interests of the cargo owner. In view of this, it may be questioned whether, in liner trade, the concept of deviation of the Convention art. 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 art. 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 owners 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.

Third, the Convention art. 4(4) does not spell out the legal consequences of an unreasonable deviation. In many countries where the particular nature of the liability incurred by the carrier in such cases is decided according to national law, deviation is regarded as a serious breach and may even result in unlimited liability. Under the law of other countries, e.g. Norway, considerable uncertainty exists as to whether the position is the same. The English and American doctrine of deviation has mainly historical reasons and "It is questionable whether the stringent application of the doctrine in carriage law is appropriate any more, unless insurance coverage is actually lost by cargo ..." (Gilmore & Black, The law of Admiralty, 1957, pp. 156 et seq). Moreover, in many cases deviation by departure from the contractual route does not expose the goods to appreciable additional risk of being damaged, lost or. At any rate, there are many other types of breach by the carrier which undoubtedly are of a far more serious nature. For these reasons, the Norwegian Government submits that the question whether particular serious breach by the carrier shall deprive him of the right to limitation of liability should be discussed and solved in a more general context. It should be noted that the Convention art. 4(5) as amended by the Brussels Protocol art. 2, contains in litra e) such a general rule which as model had certain provisions in the Warsaw Convention on carriage by air and other conventions

in the field of transportation law. However, by the Guatemala Protocol to the Warsaw Convention the concept of "unbreakable" limits of liability has been introduced in air law. The discussions of this problem in the context of the Guatemala Protocol show that the question of "unbreakable" limits, or of a rule relating to unlimited liability for serious breach, should be considered with reference to the particular limit of liability involved. It is difficult, therefore to express any definite opinion on this question until new limits of liability for carriage of goods by sea have been agreed on.

Question 3. Unit Limitation of Liability.

The Norwegian Government has for a long time considered that the provisions relating to limitation of carriers' liability in the Convention art. 4(5) are unsatisfactory. The reasons for this view have been set out in an explanatory note to an amendment submitted to the first session of the 1967-68 Diplomatic Conference in Brussels, in which the Government proposed that a simple weight unit limitation system should be introduced also in the law of carriage of goods by sea. The following views were then expressed:[1]

> The system of limiting the carrier's liability to a certain sum « per package or unit » has proved to be unsatisfactory.
>
> The term « package or unit » is vague and ambiguous and has been interpreted differently not only by the courts in the various Contracting States, but even in the national legislations effecting the Convention. The uniformity which was aimed at has, therefore, not been achieved.
>
> Frequently, the practical solutions arrived at under the « package or unit » system appear to be arbitrary and are considered unjust in the numerous cases where the compensation offered to the cargo owners is purely nominal. The raising of the sum per package or unit will not remedy this basic flaw in the system. Thus, it is still undecided in most countries how to apply the present system to « containers ».
>
> Since the Hague Rules were adopted the liability of the carrier by rail, by road and by air has become subject to a system of limitation which is more consistent with the intentions of the Rules, more easy to apply, and more satisfactory to the cargo owners.
>
> For the reasons stated it is submitted that the limitation system embodied in Article 4, § 5 of the Convention has outlived its usefulness and should now go. It is proposed that it be replaced by the simple weight unit limitation system already adopted in the interna-

1. Conference Diplomatique de Droit Maritime, Douzième Session (le Phase), Brussels 1967, p. 679.

> tional conventions for the carriage of goods by rail (CIM), by road (CMR) and by air (Warsaw).
>
> The limitation unit, thus, should be the equivalent of a certain amount of gold per kilogram of the goods.
>
> The question of the amount of gold to be stipulated is, of course, debatable, but it seems reasonable to look to the CMR which contains the most recent solution of the problem. Article 23 of the CMR provides for 25 gold francs (each franc containing 10/31 of a gramme of gold of millesemal fineness 900) per kilogram. As, however, all other maritime conventions, including the Stockholm Drafts, have adopted the Poincaré franc, it is submitted that this monetary unit be resorted to also in the Hague-Visby-Rules. The equivalent amount would then be 125 Poincaré francs.

During the first session of this Conference most delegations had serious objections to the proposed amendment. In an effort to reach the best compromise conceivable under the circumstances, the Norwegian delegation submitted an amendment containing in substance the combined unit/weight limitation system now embodied in the Convention art. 4(5) as amended by the Brussels Protocol.[2] However, the Conference was unable to reach agreement on any of the proposed amendments relating to limits of liability, and at the second session of the Conference the Norwegian delegation maintained its original position and - together with the delegations of Finland and Sweden - submitted an amendment for a simple weight unit limitation of liability.[3] In support of the proposed amendment these delegations submitted the following views on the combined unit/weight limitation system:[4]

> However, a combined solution would still include the present disadvantages of the package or unit limitation and would fail to establish an acceptable correspondance with the solutions adopted in the other international conventions on carriage of goods, first of all the CMR convention. In our view it is essential to reach a solution which does not create problems in modern combined transports and highly desirable to get rid of the disadvantages created by the package of unit limitation of the Hague Rules.

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2. Op. cit. p. 694.
3. Conférence Diplomatique de Droit Maritime, Douzième Session (2e Phase), Brussels 1968, p. 192.
4. Op. cit. p. 206-07.

> Investigations have been made in Scandinavia into the economic consequences of changing over to the CMR solution of limitation based on weight. The investigations were based on official Scandinavian statistics concerning foreign trade as well as on the private statistics of underwriters and shipping lines, Scandinavian and others. The results indicate that the CMR limitation would be sufficient to cover practically all damage to general cargo and that the increase in price to be paid in the form of insurance would indeed be negligible. This adds to the weight of the argument that limitation should be based on weight only and should be on the same level as in the CMR convention; it should be kept in mind that the limitation rule primarily was intended to apply in case of damage to exceptionally valuable goods.
>
> When the economical problems involved are small, more attention may well be paid to the legal technical aspects. The advantages of full correspondence between the two conventions concerned are obvious. To this should be added the fact that experience over the years has shown how difficult it is for the Courts to interprete the words « package or unit » and that no international uniformity can be achieved on that basis.

In accordance with the views expressed in the quoted passages the Norwegian Government again submits that the limit of liability should be fixed as a certain amount of Poincaré Francs per kilo of the gross weight of the goods lost or damaged. In accordance with usual practice the particular amount should perhaps be left to be discussed and decided by the future diplomatic conference, and the Government will not ask for a discussion of that question in the Uncitral Working Group. However, it is submitted that, in order to take care of certain problems relating to the carriage in small parcels of light-weight goods of relatively high value, there should be added a provision of the same type as that contained in the Draft Convention on Combined Transports (TCM) art. 1o(3): "The minimum gross weight of such goods shall be deemed to be ... kilos."

In the opinion of the Norwegian Government such a simple system of weight limitation of liability is clearly preferable both to the unit limitation system of the Convention art. 4(5) and to the combined unit and weight limitation system of the art. 4(5) as amended by the Brussels Protocol.

Question 4. Definitions

Question 4 a has been answered above.

Question 4 b.[5] The 1924 Convention deals only with contracts of carriage "covered by a bill of lading or any similar document of title" (art. 1 b). During later years, however, the bill of lading has lost some of its importance in international sales transactions. In some trades the use of documentary credits has decreased, and in many others there has been a substantial increase in the movement of goods which are not subject to sales transactions. Also, the increased speed of modern sea transportation has had the consequence that the goods often arrive at their destination before the bill of lading, which may cause delay and other difficulties as regards the delivery of the goods to the consignee.

These changes have lead to the introduction of transport documents of a non-negotiable legal character, for instance, simple receipts of the goods which in many respects are similar to the air way bill or the road consignment note. It is submitted that the scope of a new convention should by express provision be extended to cover also such contracts, and that the rules relating to carrier's liability should apply to contracts evidenced by the new non-negotiable receipt or the like.

No doubt, there will for years to come be a demand in many trades for negotiable bills of lading even though in other trades the use of non-negotiable documents may be expected to increase substantially. Whether the one or the other document would be needed in the particular cases, would on the whole depend on the character of the particular

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5. The reasons for the views here expressed are more fully set out in para. 6 of the memorandum submitted by the Norwegian delegation to the special session of the Uncitral Working Group on International Shipping Legislation, beginning 25 September 1972.

commercial transaction to which the movement of the goods relates. It is submitted, therefore, that it should be left to the shipper to decide what document he wants to be issued by the carrier.

In some instances of international carriage by sea no document is issued to evidence the contract. It has been questioned whether in such a case the carrier's liability is governed by the rules of the 1924 Convention. It is submitted that this question should be affirmatively solved in a new convention. One way to accomplish this would be to include a provision stating that the provisions of the convention remain applicable notwithstanding the absence, irregularity or loss of the transport document.

If the above mentioned suggestions are followed, the new convention would apply to every contract for the carriage of goods except contracts of the types evidenced by charter-parties. Even if such a rule were to be adopted, one would still need provisions relating to bills of lading issued under charter-parties of the same kind as the 1924 convention now contains, cf. art. 1(b) and art. 5(2).

As regards question 4 c relating to the definition of "ship" the Norwegian Government is of the opinion that an amendment to this definition will not solve the problems relating to the use of barges, lighters or similar crafts in port operations at the port of loading or the port of discharge. It is believed that most of these types of crafts are already included in the very wide definition of "ship" contained in the Convention art. 1(d). The problems arising in this context should be solved by the rules relating to the period of responsibility.

Question 5. The period of limitation

The question whether the period of limitation shall remain one year, or whether another period shall be chosen, is a question to which the Norwegian Government does not attach great importance. The time for bringing suits relating to carriage of goods by sea, however, should be relatively short as are the periods of limitations provided for in other conventions in the field of transportation law.

However, the Norwegian Government is firmly of the opinion that the rules relating to the calculation of the period of limitation should be as simple as possible so as to enable the parties concerned to ascertain in advance without any difficulty or uncertainty when the period will expire. For this reason consideration should be given to the question of finding, if possible, more definite starting points for the period of limitation fixed than those now contained in the Convention art. 3(6). If the length of the period is extended, one possible solution would be to use as starting point - in all or some cases - the date on which the bill of lading (or a non-negotiable transport document) is stated to have been signed by the carrier. An other possible solution appears in the Warsaw Convention art. 29, using the date of the arrival of the aircraft as the starting point for the period of limitation.

It is also submitted that a new provision should be adopted to make it clear that the term "suit" as used in art. 3(6) includes also arbitration proceedings. The main purpose of such an addition would be to invalidate provisions in arbitration clauses/stipulating that any claim must be brought before the arbitration tribunal within a period of time which is shorter than the period of limitation fixed by the convention itself.

/contained in bills of lading or incorporated therein by reference

Finally, the Norwegian Government considers that satisfactory amendments and additions to the Convention art. 3(6) were introduced by the Brussels Protocol art. 1(2) and (3), and that they should be retained in a future convention.

Question 5. Elimination of invalid clause

The Convention art. 3(8) invalidates bills of lading clauses by which the carrier excludes or limits his liability otherwise that provided in the Convention. It is presumed that provisions to the same effect will be retained in the new international regime for carriage of goods by sea so as to ensure that legal effect is not given to contractual provisions inconsistent with the rules relating to carriers' duties and liabilities. It is difficult to envisage what further measures can be adopted in this context for the purpose of preventing private parties from continuing to include invalid clauses in their contracts. The problems involved should be given serious consideration by the various organisations engaged in elaborating standard transport document for carriage of goods by sea.

PART II

1. In the reply to question 4 b above, it has been submitted that a new convention should apply also to carriage of goods under non-negotiable transport documents. If this suggestion is followed, there would appear to be a need for some special rules on the content and legal character of such documents because as regards these matters it is to some extent necessary to distinguish between such documents and bills of lading. It would seem, nevertheless, that provisions of the kind now contained in the Convention art. 3(3) and (4) should apply to both types of documents. However, the position is different as regards the provision which, for the purpose of protecting bona fide purchasers of bills of lading, was added to art. 3(4) by the Brussels Protocol art. 1(1). This provision is directly related to the legal character of bills of lading as negotiable documents and its scope of application should not be extended to the non-negotiable transport documents.

2. Under the Convention and the Brussels Protocol most of the questions relating to the legal character of the bills of lading are left to be decided by national law. It is submitted that, in order to provide international uniformity, the main rules on the negotiability of the bill of lading should be set out in a new convention for carriage of goods by sea. In the opinion of the Norwegian Government the most important rules would seem to be:

a) the bill of lading shall be transferable, if made out to bearer, by delivery and, if made out to the consignor or his order, by endorsement and delivery;

b) the bill of lading shall indicate the number of originals issued;

c) the carrier shall deliver the goods only against the surrender of the bill of lading properly endorsed;

d) if the carrier has in good faith delivered the goods against the surrender of the bill of lading or one original thereof, he shall be discharged of his obligation to deliver the goods; and

e) the bill of lading shall, when transferred to a third party in good faith, be conclusive evidence of the receipt by the carrier of the goods as described in the document.

3. If the bill of lading has been issued under a charter-party the question arises to what extent the provisions contained in the charter-party may apply in the relation between the carrier and a holder of the bill of lading other than the charterer. The answer to this question has significant bearing on the legal character of the bill of lading as a negotiable document. In accordance with the view expressed above para 2, it is submitted that appropriate rules on this subject should be included in a new convention. In this connection the Norwegian Government would like to draw attention to the provision contained in NMC §§ 112 and 16o, which are based on the following principles:

a) As between the carrier and the consignee according to a bill of lading the conditions for the carriage and the delivery of the goods are determined by the bill of lading. Terms of the contract of carriage which have not been set out in the bill of lading, does not bind the consignee unless referred to in the bill of lading.

b) By taking delivery of the goods the consignee according to a bill of lading becomes liable only for the payment of the freight and other charges to which the carrier is entitled according to the bill of lading; and

c) deadfreight or demurrage and other compensation for detention in connection with the loading cannot be claimed from the consignee unless the claim has been noted on the bill of lading. If the time for loading and discharge of the goods has been fixed as a total time, it cannot be ascertained against the consignee that too much time has been used for lading unless the time used has been noted on the bill of lading.

4. It has been a debatable question whether the rules on the carrier's liability contained in the Convention and the Brussels Protocol also govern the cargo owner's right to compensation in cases where the goods have been delayed during the carriage. In the draft legislation prepared to enable Norway to ratify the Brussels Protocol (see above in the reply to Questions 1 and 4a) a provision has been inserted to solve this question. According to the draft text the rules on carrier's liability apply to cases of "loss, economic which results from the goods being lost, damaged or delayed while they are in the charge of the carrier". The Norwegian Government considers this to be a useful clarification which it would appear to be appropriate to introduce in the new international law on carriage of goods by sea.

Oman

1. TRANSSHIPMENT

The existing rules and practice regarding transshipment seem to be quite satisfactory in that the carriers responsibility for loss or damage shall cease after transshipment has been affected. This is quite logical so long as other terms of the contract remain unaffected.

2. DEVIATION

The question of deviation needs clarification as to:

a) Deviation resulting from unforseen causes other than technical defects, such as wars, clausure of sea routes (canals etc.) for which the carrier will have no alternative but to deviate in search for safety regardless of the spell of time.

b) Deviation resulting from mechanical defects other than accidents of any nature. With regards to (a) deviation is beyond the carriers control and should receive the right consideration between the contrating parties. Instructions to return the goods to the port of loading may be given by mutual understanding or to remain in deviation until clearance is obtained. Again the type of goods should determine the duration of the deviation.

With regard to (b) after reasonable period of time has been allowed for the mechanical setup, the carrier should bear the responsibility of loss or damage because in all earnestness the

consignor expects that the carrier is in good condition to carry the goods safely to the destination within the specified time.

3. UNIT LIMITATION OF LIABILITY

a) In this age of containerization and loose storage facilities the notion of unit limitation is scarcely applicable. The safe method will therefore be to declare the nature and value of goods since this cannot be kept a secret as declaration has to be made for customs duties purposes etc. If the carrier knows the nature and value of goods loaded consciousness for liability will add to the efficiency.

b) The phrase "per package or unit" should read "per container or load" unless where units such as vehicles etc. become applicable.

c) Number of packages or units should be replaced by "number of containers or tons" as the case may be, because in case of containers the number of packages in a container will be specified, and if damage is caused to a package in a container, that will be the responsibility of the consignor who has failed to pack the packages carefully in a container. However units will still be applicable for such goods as vehicles and other machinery requiring final assembling after being unloaded.

For commodities loaded loose such as cement values per ton should be specified to determine carriers liability.

d) Definition of 'a franc' should remain unchanged but should include a provision allowing adjustments to be made in accordance with the prevailing parity at the time of the case.

e) Declaration of the nature and value of goods seems to be essential as that will decide the extent of responsibility of the carrier. Fragile goods, perishable goods, bulky and durable, small and valuable etc. should be the guiding lines in relation to liability. If nature and value of goods remain hidden to the carrier there may be loop-holes to evade the liability in case of loss. This may lead to a new condition of shipment that of value - but as far as that will add to the efficiency in sea transport it is worthwhile to reconsider the question of weight and space in relation to nature and value of goods.

4) a) Carrier seems to be satisfactory definition as this may mean anything carrying goods whether a ship, barge etc.

As long as mention will be made of parties bearing responsibility of the liability for loss or damage claimants should not encounter any problems in identifying the correct party against whom legal actions may be taken.

b) The definition "contract of carriage" is quite satisfactory so long as it is understood that by "carriage" is meant carriage of goods by ocean-carrying vessels.

c) It is proposed that instead of "ship" it becomes "cargo ship" and that definition be given to the effect that a cargo ship includes barges, lighters and similar crafts used to transport goods by sea.

The amendment to article I (e) of the Brussels Convention of 1924 should include a clause covering deviations caused by reasons beyond the control of carriers.

5) a) This should depend upon the nature of goods. In any case consignees and agents are supposed to ckeck the goods within a reasonable time after being discharged.

One year seems to be quite a reasonable time.

b) The starting point should be the end of the validity of the contract i.e. the date when the goods should have been delivered. A condition is needed to clarify the situation in connection with deviation.

Sweden

Part I

1. Transshipment

The obvious **reason** why present rules and practices with regard to transshipment clauses are unsatisfactory is the lack of foreseeability that they represent as far as the cargo owner (and his insurer) is concerned. The cargo owner does not know for how long the goods will be subject to the liability regime of the contracting carrier, nor does he know whether any person can be held liable for loss or damage after transshipment and, if the answer is in the positive, under what rules of liability. It is probable that the elements of uncertainty which the practice of transshipment clauses gives rise to raises the costs for cargo insurance. The fact that the cargo owner may have to bring action against a carrier, who may be unknown to him and resident in a distant country, also gives rise to considerable difficulties of a practical nature, e.g. when it comes to establishing where that carrier is resident and where a suit against him can be instituted.

In order to remedy this situation it is believed that future international rules on this subject should be based on the principle that the contracting carrier shall remain liable for the whole period of carriage that has been agreed upon.

This rule should apply not only in cases of transshipment but also when the contracting carrier does not perform any part of the carriage but charters a ship to fulfil the contract. Such a stringent rule would, however, entail difficulties in practice and it is necessary therefore to make exceptions to it. Since the disadvantages inherent in the generally framed transshipment clauses relate to the elements of unpredictability, it is submitted that the contracting carrier should be allowed to exempt himself from liability in cases where the parties have agreed expressly or impliedly that the whole or a specified part of the carriage will be performed by another carrier. By implied agreement is meant for instance the case where it is a well-established practice on a particular trade that goods are being transshipped for the last leg of the journey.

Turning again to the main principle, i.e. that the contracting carrier remains liable during the entire period of carriage, it is suggested that the introduction of this principle should not relieve the performing carrier from liability. In a number of instances it is in the interest of the cargo owner to be able to enforce his claim against the performing carrier, for instance because his ship can be arrested to secure the claim. The performing carrier should, therefore, for the part of the carriage performed by him, be liable under the same rules as the contracting carrier. However, the fact that action can be brought against the contracting as well as the performing carrier obviously should not have as a consequence that the cargo owner shall be able to recover more than he would have recovered had the contracting carrier performed himself the entire carriage. Consequently, the aggregate of the amounts recoverable should not exceed the limits provided for in the convention. So as to enable the cargo owner to bring one action only, the contracting and the performing carriers should be liable jointly and severally. Rules of the kind referred to are at present

under consideration in the Nordic states and will probably be introduced into their maritime codes within a near future.

What has been said above concerning performing carriers should in principle apply also to carriers by other modes of transport than sea-carriage as well as persons having charge of the goods while the goods are being moved from the first carrier to the on-carrier. If the contracting carrier unloads the goods at a port of call and arranges that the goods will be carried to the port of destination by road he should, according to the main principle referred to above, remain liable until the goods have reached the port of destination and liability should rest also with on-carriers and others having charge of the goods after transshipment. However, it may be argued that in such a case, the liability of the contracting carrier after transshipment should be governed by other rules than the rules applicable to the sea voyage. And it is evident that e.g. the road carrier can not be held liable under these latter rules but only under the rules ordinarily applicable to the road carriage. The legal problems connected with such de facto combined transports are extremely complex and should possibly not be dealt with in the convention on Bills of Lading.

Another point requiring clarification in the Bills of Lading convention is whether a Bill of Lading issued by the master of another carrier than the contracting carrier binds the contracting carrier. This question was at stake in a Swedish case (NJA 1960:742) where a shipowner had chartered a ship to fulfil part of a longterm shipping contract with a Swedish pulpindustry. The Supreme Court ruled that the bill of lading issued by the chartered ship did not give rise to any right of action against the contracting carrier but against the performing carrier only. Since this result does not appear satisfactory the Swedish Government is presently considering to introduce into our internal maritime code a rule to the

effect that the master of the carrying ship shall be deemed to have authority to issue bills of lading on behalf of the contracting carrier. It is suggested that this solution shoul be adopted also in the convention.

2. Deviation

The rules of the convention concerning deviation are not altogether satisfactory. It should be considered to amend the wording at art. 4 (4) so as to make it clear that also deviation in order to save or attempt to save property should be justified only when "reasonable". With regard to "any reasonable deviation", the implication is that the deviation must be consistent with proper carriage and that due regard must be paid to the interests of the cargo owner. It does not seem advisable to attempt to define in detail the situations in which these requirements shall be deemed to have been fulfilled. On the contrary, it is in the interests of the cargo owners, for reason's of transport economy, that the rules be kept flexible on this point.

The implication of the present text in art. 4 (4) - read e contrario - is that the carrier is liable "for any loss or damage" resulting from the deviation. A positive rule concerning liability in cases of deviation should be considered since the absence in the convention of positive rules in this respect has given rise to uncertainty on the international level. It is suggested that the substance of such a rule should be that the carrier shall in cases of unjustified deviation be strictly liable unless he can prove that the damage should have occurred even if the deviation had not been made. Furthermore, it should be stated that the rules on limitation of liability should apply also to liability for unjustified deviation. Lastly it should be made clear that compensation shall include compensation for delay which is of particular importance as far as unjustified deviation is concerned. (This clarification is desirable also with regard to other parts of the convention;

cf. reply to part II).

The fact that "saving or attempting to save life or property at sea" is mentioned as a specific exoneration ground in art. 4 (2) (1) may give rise to difficulties of interpretations. It is submitted that in any case the latter rule should be deleted as being superfluos.

3. Unit Limitation of Liability

a) The rules of the 1924 Convention concerning limitation of liability are not satisfactory. No uniformity exists today as regards the limitation amount due to the fact that only very few countries give effect to the gold clause in art. 9 Apart therefrom, 100 pounds sterling per package or unit does not in a number of cases afford the cargo owner sufficient compensation, in particular where large units are concerned. Cf. also reply to b).

b) The phrase "package or unit" is not a satisfactory means of measuring the carrier's liability. First of all it has been interpreted differently in different countries. Of even greater importance is that the rule leads to arbitrary results since a unit can be anything from a small parcel, perhaps of small value, to a container containing valuable goods. Corresponding rules in other international conventions in the field of law on transport are based on a weight system, i.e. a certain amount per kilo. It is considered that these rules offer a far better solution to the problem of limitation of liability and that the rules on carriage of goods by sea should be based on the same principle.

c) The rule of art. 2 (c) of the 1968 Protocol represents a step forward compared with art. 4 (5) of the 1924 Convention Nevertheless it is unnecessarily complicated and gives rise to certain difficulties of interpretation. It is for instance not altogether clear whether the container as such shall be

considered a package or unit when the contents of the container is enumerated in the bill of lading. A system based on weight only is preferable.

d) The rule referred to does not seem to have given rise to any particular difficulties.

e) The provisions on declaration of value and nature is, due to the difficulties mentioned, rarely applied in practice and could be deleted. The present practice whereby the cargo owner obtains coverage for the full value of the goods under his cargo insurance seems to function well and does not give rise to objections from a policy point of view.

f) Attention is drawn to a rule in the draft convention on combined carriage of goods (TCM) which provides that "the minimum gross weight of such goods shall be deemed to be 7 kilos". This provision has been introduced in order to remedy certain effects which the kiloweightsystem might otherwise result in, namely unsatisfactory compensation for goods of little weight but of fairly high value.

4. Definitions under Article I of the Brussels Convention of 1924

a) Reference is made to the reply to question No. 1. It is submitted that the definition should be amended so as to refer to persons entering into a contract of carriage with a shipper.

b) It is considered that the present definition of "contract of carriage" and thereby the scope of the convention is too restricted. The need for the issuance of bills of lading has been reduced in later years. With the introduction of fast-going vessels the bills of lading will often arrive at the port of destination later than the goods. For this and other

reasons it is becoming more and more usual that carriers issue non-negotiable documents (such as good's receipts) instead of bills of lading. It is submitted, however, that all transport of goods, charter parties excluded, should be governed by the rules of the convention. The definition of "contract of carriage" should be amended accordingly.

c) The definition of "ship" seems satisfactory and flexible enough in order to take into account present and future transport arrangements.

5. The period of limitation

a) One year may in certain instances be an insufficient period of time for investigation of claims, negotiation between the parties and other measures necessary before action can be brought against the carrier. On the other hand the present one-year period ensures a speedy settlement of claims. A two-year period might be envisaged like in the Warszaw Convention on carriage by air. It should, however, be recalled that the Warszaw Convention provides that action is precluded in case notice of loss or damage has not been given in time.

b) The day from which any period of limitation is running should be as clearly defined as possible in order to avoid litigation and the loss of rights. The present rule which provides that the period shall run from the day the goods were delivered or should have been delivered does not quite meet these objectives but does not seem to have given rise to difficulties in practice and could therefore probably be retained.

c) The institution of arbitral proceedings should be placed on equal footing with judicial proceedings for the purpose of limitation of action.

d) Through the 1968 Protocol a new rule was incorporated into art. 3 (6) to the effect that the parties may by agreement extend the limitation period after the cause of action has arisen. This rule should be retained since the claimant should not be forced in order not to loose his rights, to bring an action when negotiations for a friendly settlement are still going on at the end of the limitation period. Agreements for shortening of the period of limitation should not be allowed. It seems desirable that this be clarified in art. 3 (8); (cf. reply to question 6).

e) The new provision in art. 3 (6) on the period of limitation applicable to recourse actions is satisfactory.

6. Elimination of invalid clauses

In principle, the use of invalid clauses in standard bills of lading can only be eleminated through actions taken by persons and organizations representing the various transport interests. It is submitted, however, 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. This would entail deletion of art. 3 (8) to which a too restricted interpretation might be given since it relates to the rules of liability only. It is suggested that such a general provision should be patterned on art. 16 of the draft TCM Convention which reads.

"1. Stipulations which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such stipulations shall not affect the validity of the other provisions of the contract of which they form part

2. In particular, any clause assigning benefit of insurance of the goods in favour of the CTO shall be null and void.

3. Notwithstanding the provisions of paragraph 1 of this

Article, the CTO shall be at liberty to increase his responsibilities and obligations under this Convention."

Part II

The following questions should be dealt with in the future work on revision of the convention.

1. Liability for delay in delivery of the goods. Various opinions have been expressed as to whether and to what extent damage caused by delay in delivery, other than damage to the goods, is covered by the convention. This question ought to be answered in the affirmative and specific rules be elaborated, inter alia concerning the limit of liability.

2. The convention should contain rules concerning non-negotiable transport documents (cf. reply to question 4 b).

3. It should be considered to include in the convention substantive rules on the negotiable character of the bill of lading. This question is presently governed by the applicable national law but uniformity in this respect is desirable. Rules to this effect have been incorporated into the draft TCM Convention and could serve as a model. Art. 6 para. 1 of the draft Convention provides that

"Where the CT Document is issued in negotiable form:

(a) it shall be made out to order or to bearer;

(b) if made out to order, it shall be transferable by endorsement;

(c) it shall indicate the number of originals issued;

(d) each copy shall be marked "Non-Negotiable Copy";

(e) delivery of the goods may be demanded only from the CTO or his representative and against surrender of the CT Document."

Turkey

REPLIES: QUESTIONNAIRE ON BILLS OF LADING

1. TRANSSHIPMENT

Existing rules and practice regarding transshipment are not sufficient. However our present Bill of Lading which is prepared according to the 1924 Brussels Convention, includes the following clause according to which practice has been carried on to our satisfaction.

> "The voyage herein contracted for 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 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, may either with or without the goods on board, and before or after proceeding towards the port of discharge, adjust compasses, dry-dock, go on shipways or to repair yards, shift berth, take fuel or stores, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or prosperity, and may carry arms, ammunitions, war material and warlike stores, and every kind of goods and sale armed or unarmed and all of the foregoing are included in the contract voyage."

2. DEVIATION

Existing international legislation is found satisfactory. From our point of view limit of deviation should be left to the discretion of the ship master for each individual case.

3. (a) UNIT LIMITATION OF LIABILITY

The monetary limitation of ocean carriers liability established by the Brussels Convention of 1924 (100 pounds sterling per package or unit) is satisfactory. Because we have not met any difficulties in practice until now.

(b) The phrase "per package or unit" is satisfactory. Because until now there are no difficulties in our practice and the above phrase is in accordance with our law.

(c) Article 2(e) of the Brussels Protocol of 1968 is a satisfactory rule, since it concurs with our practice.

(d) Subject article is satisfactory for by means of this rule uniformity has been established.

(e) We do not agree with this suggestion.

(f) For the time being there are no other problems relating to the limitation of carriers liability.

4. (a) The definition of the term carrier in article I (a) of Brussels Convention of 1924 is satisfactory. And we do not agree with the suggestion because cargo claimants can identify the correct party who issues or authorized the issuance of the respective Bill of Lading.

(b)-(c) The existing definitions of "Contract of carriage" and "Ship" are satisfactory.

5. (a) The length of the period of limitation as per article III, paragraph 6, subparagraph 4 of the Brussels Convention 1924 is satisfactory and in accordance with our law and practice.

(b) In fact many difficulties have been encountered as to the starting point for the period of one year time limit.

In order to have a clear-cut starting point, the date of completion of discharge, at port of destination of cargo is to be taken as the base.

(c) No.

(d) Yes, existing legislation is satisfactory.

(e) No, because period of one year limitation should also bind third person.

(f) For the time being no.

Yes, we do consider the present situation as satisfactory in regard to the continuing use by ocean carriers of Bill of Lading clauses which are null and void under the Brussels Convention of 1924, for countries who have endorsed Brussels Convention 1924.

USSR

I. Перегрузка

В настоящее время ни Конвенция 1924 года, ~~ни~~ Брюссельский Протокол 1968 года не содержат норм, регулирующих отношения в связи с перегрузкой перевозимого груза. Если Рабочая группа по международному законодательству в области морских перевозок сочтет нужным подготовить и включить в проект Конвенции соответствующую норму, то следовало бы отразить, что перегрузка может быть осуществлена с соблюдением следующих условий:

1. перегрузка должна быть целесообразной и необходимой при данных обстоятельствах;

2. перевозчик обязан сообщить грузовладельцу о перегрузке;

3. в ходе перегрузки перевозчик обязан проявлять должную заботу о грузе;

4. перевозчик обязан проявлять должную заботу о доставке груза в порт назначения как можно быстрее.

2. Девиация

Представляется, что исчерпывающий перечень обстоятельств, при наличии которых девиация считается разумной, не может быть дан. Лишь в каждом конкретном случае с учетом особенностей данного рейса можно решить, существовала ли для судна действительная необходимость отклонения от намеченного пути. В этом отношении п.4 ст.4 Конвенции 1924 г. не вызывает никаких замечаний.

Исходя из того, что каждой стороне легче доказать положительные факты, чем факты отрицательные, бремя доказывания того, что девиация имела место, должно быть возложено на грузовладельца. При доказанности этого факта обязанность доказывания наличия разумных оснований для отклонения от курса переносится на перевозчика.

Если в результате девиации грузы выгружаются в ином порту, чем порт назначения, вопрос о рисках и расходах, связанных с доставкой груза в порт назначения, решается в зависимости от того, может ли быть девиация признана разумной. При признании девиации разумной перевозчик не несет ответственности за убытки и потери, возникшие вследствие девиации. Напротив, при недоказанности того, что девиация была правомерной, перевозчик несет весь риск и возмещает все расходы по доставке груза в порт назначения. Положение о распределении бремени доказывания и последствиях неправомерной девиации должны получить отражение в соответствующей норме Конвенции.

В советском морском праве девиации посвящена ст.150 Кодекса торгового мореплавания СССР 1968 г. В ней содержится примерный перечень обстоятельств, дающих основания для отклонения судна от намеченного пути (спасание на море людей, судов и грузов, а равно иное разумное отклонение). Разумное отклонение от курса не считается нарушением договора перевозки, если оно не вызвано неправильными действиями перевозчика. В ряде других статей Кодекса торгового мореплавания СССР приводятся другие обстоятельства, которые могут рассматриваться как основания для девиации (ст.ст. 145, 146, 148, 232 и др.).

3. Ограничение ответственности перевозчика

а) При ответе на вопрос о том, является ли удовлетворительным предел ответственности перевозчика, установленный ст.4 п.5 Конвенции 1924 года, необходимо иметь в виду перманентное падение курса валют ряда стран, в частности, фунта стерлингов.Помимо того, многие государства широко используют предоставленное им ч.II ст.9 Конвенции 1924 г. право перевода выраженных в фунтах стерлингов сумм в денежные единицы своей валютной системы. В связи с этим реальный предел ответственности перевозчика в настоящее время гораздо ниже того уровня, который был установлен в 1924 году.

Поэтому предложение об использовании при установлении предела ответственности франков Пуанкаре (ст.2 п."а" Брюссельского протокола 1968 года) как более стабильного стандарта, чем валюта той или иной страны, представляется приемлемым в качестве основы для дальнейшего обсуждения.

В советском морском праве ответственность перевозчика за утрату или повреждение груза ограничена 250 руб. "за место или обыч-

ную единицу груза" (ст.165 Кодекса торгового мореплавания СССР). Эта норма применяется лишь а) при перевозке груза в заграничном сообщении по коносаменту; б) если стоимость груза не была объявлена и включена в коносамент.

в) Ограничение ответственности перевозчика установлено в отношении места или единицы поврежденного либо утраченного груза. Употребляемое в ст.4 п.5 Конвенции выражение "место или единица груза" нельзя признать определенным.Особенно это относится к понятию "единица груза". Трудно решить, что следует понимать под единицей груза - физическую грузовую единицу или единицу, на основе которой исчисляется фрахт, т.е. фрахтовую единицу.

Этот вопрос не получил разрешения и в п. "а" ст.2 Брюссельского Протокола 1968 года, в котором также говорится об одном месте или одной единице груза. Учитывая историю подготовки приведенных норм Конвенции 1924 года, нужно сделать вывод о том, что под единицей груза при перевозках штучных грузов должна пониматься физическая грузовая единица, при перевозках грузов наливом, насыпью или навалом - единица веса либо объема, используемая для описания груза в коносаменте.

с) Вопрос о том, что считать грузовым местом или единицей груза при использовании для перевозки контейнера, поддона или аналогичного средства транспортировки, обсуждался на XII Конференции в Брюсселе и получил закрепление в п. "с" ст.2 Брюссельского Протокола 1968 года. Эта норма значительно улучшает положение грузовладельца, так как дает ему возможность указать в коносаменте количество мест или единиц груза, перевозимых в контейнере или аналогичном средстве транспортировки. В этом случае предел ответственности перевозчика будет исчислен, исходя из указанного числа мест или единиц груза. Указанное правило в последнее время широко применяется судами многих стран. Подобная практика представляется правильной.

е) Правило об ограничении ответственности перевозчика должно применяться лишь тогда, когда грузоотправитель перед отправлением не заявил о характере и стоимости подлежащего перевозке груза. В этом отношении ст.4 п.5 Конвенции 1924 г. и ст.2 п. "а" Брюссельского Протокола 1968 г. не нуждаются в каких-либо изменениях. Изменение уровня фрахтовой ставки в связи с объявлением характера и стоимости перевозимого груза представляется вполне естественным и не может рассматриваться как препятствие для объявления характера и стоимости груза.

4. Определения, даваемые в ст.I Брюссельской Конвенции 1924 года

а) Определение понятия "перевозчик", содержащееся в ст.I Конвенции 1924 года, нельзя признать удовлетворительным. В Конвенции необходимо отразить, что под перевозчиком понимается судовладелец, фрахтователь или любое другое лицо, которое заключает с грузоотправителем договор перевозки груза от своего имени. В Конвенцию необходимо внести также такого рода дополнения, в силу которых оговорки **"demise", "identity of carrier", "agency"** признавались бы недействительными.

с) Под судном следует понимать не только "любой вид судна, используемого для перевозки грузов морем", но и баржи, лихтеры и тому подобные плавучие сооружения, служащие для транспортировки грузов от судна и к судну, если перевозчику принадлежат эти плавучие сооружения или он использует их для выполнения части договора перевозки.

5. Исковая давность

Продолжительность периода, в течение которого может быть предъявлен иск о возмещении ущерба, причиненного утратой или повреждением груза, целесообразно определить в I год. Этот срок в соответствии с Конвенцией 1924 г. исчисляется с момента доставки груза или дня, когда груз должен быть доставлен. Следует уточнить, что под этим понимается момент передачи груза получателю или момент, когда груз должен был быть передан получателю. Точное определение этого момента будет зависеть от того, как будет сформулировано понятие перевозки грузов, и, в частности, как будет решен вопрос о моменте ее окончания в п. "е" ст.I Конвенции 1924г.

В советском праве отношения, связанные с применением срока исковой давности, регулируются ст.ст. 303 - 308 Кодекса торгового мореплавания СССР. В частности, в соответствии со ст.305 КТМ СССР к требованиям, вытекающим из договора перевозки грузов в заграничном сообщении, применяется годичный срок исковой давности. Этот срок исчисляется со дня выдачи груза, а если груз не был выдан - со дня, в который он должен был быть выдан.

По советскому праву исковая давность применяется как в тех случаях, когда требования рассматриваются судом, так и тогда, когда защита гражданских прав осуществляется арбитражем или тре-

тейским судом. Установленные законом сроки давности, а равно порядок их исчисления не изменяются в зависимости от того, рассматриваются ли требования судом, арбитражем или третейским судом. К требованиям, вытекающим из договоров перевозки грузов в заграничном сообщении, применяется предусмотренный ст.305 КТМ СССР годичный срок исковой давности безотносительно к тому, где рассматриваются эти требования.

Все нормы советского права об исковой давности носят императивный характер. Поэтому изменение, продление, перерыв сроков исковой давности по соглашению сторон не допускается (ст.80 Гражданского Кодекса РСФСР и соответствующие нормы Гражданских Кодексов других союзных республик).

Суд, арбитраж или третейский суд имеет право восстановить пропущенный срок исковой давности, если признает уважительной причину пропуска срока давности (ст.16 Основ гражданского законодательства Союза ССР и союзных республик, ст.87 Гражданского Кодекса РСФСР).

6. Устранение недействительных условий в коносаменте

Вопрос о недействительности тех или иных условий коносамента в силу их противоречия императивным нормам Конвенции может быть решен только с учетом всех особенностей данного конкретного случая при рассмотрении спора в судебном порядке. Обеспечение предварительного контроля за тем, чтобы в коносаменты не включались подобные условия, представляется нереальным. Включение в Конвенцию примерного перечня оговорок, не имеющих силы, вряд ли уместно.

Translated from Russian

1. Transshipment

At the present time, neither the 1924 Convention nor the Brussels Protocol of 1968 contains provisions regulating relations arising out of the transshipment of goods being carried. If the Working Group on International Legislation on Shipping considers it necessary to formulate an appropriate provision for inclusion in a draft convention, it should be laid down that transshipment may be carried out under the following conditions:

1. The transshipment must be advisable and necessary in the circumstances;
2. The carrier must notify the owner of the goods of the transshipment;
3. In the course of the transshipment, the carrier must take due care of the goods;
4. The carrier must exercise due care in delivering the goods to the port of destination as soon as possible.

2. Deviation

It would appear impossible to give an exhaustive list of circumstances in which deviation is regarded as reasonable. Only in each concrete case, account being taken of the characteristics of the voyage in question can it be decided whether there was a genuine need for the sale to deviate from the expected route. In this connexion, article IV (4) of the 1924 Convention does not call for any comment.

On the assumption that it is easier for each party to prove that something has happened than to prove that something has not happened, the burden of proving that deviation took place must lie with the owner of the goods. Where there is proof of deviation, the responsibility for proving that there were reasonable

grounds for deviating from course shifts to the carrier.

If as a result of a deviation goods are unloaded in a port other than the port of destination, the liability for risks and expenses incurred in delivering the goods to the port of destination depends on whether the deviation may be regarded as reasonable. Where the deviation is so regarded, the carrier is not liable for loss occurring as a result of the deviation. On the other hand, in the absence of proof that the deviation was proper, the carrier bears all risks and reimburses all expenses of delivering the goods to the port of destination. The situation regarding the allocation of the burden of proof and the consequences of improper deviation should be reflected in appropriate provisions of the convention.

Under Soviet maritime law, deviation is covered in article 150 of the USSR Merchant Shipping Code of 1968. That article gives examples of circumstances constituting grounds for deviation from the expected route (saving persons, vessels or goods, as well as any other reasonable deviation). A reasonable deviation from the route is not deemed to be a breach of the contract of carriage unless it resulted from the improper actions of the carrier. A number of other articles of the USSR Merchant Shipping Code set forth other circumstances which may be deemed to be grounds for deviation (articles 145, 146, 148, 232, etc.).

3. Limitation of the carrier's liability

(a) In response to the question whether the limitation of the carrier's liability established by article IV (5) of the 1924 Convention is satisfactory, it should be pointed out that the value of the currencies of a number of countries, particularly the pound sterling, is constantly declining. Furthermore, many States widely invoke the right granted them in the second paragraph of article IX of the 1924 Convention of translating the sums indicated in terms of pound sterling into terms of their own monetary system. In this connexion, the limit of the carrier's liability in real terms is much lower at the present time than when it was established in 1924.

Consequently, the proposal in article 2 (a) of the Brussels Protocol of 1968 relating to the use, in establishing the limit of liability, of Poincare francs as a standard that is more suitable than the currency of any particular country appears to be acceptable as a basis for further discussion.

Under Soviet maritime law, the carrier's liability for loss of or damage to goods is limited to 250 roubles "per package or customary unit of goods" (article 165 of the USSR Merchant Shipping Code). This provision is invoked only (a) in the carriage of goods in foreign commerce under a bill of lading and (b) if the value of the goods was not declared and inserted in the bill of lading.

(b) The limitation of the carrier's liability is established in relation to the package or unit of goods lost or damaged. The expression "package or unit" used in article IV (5) of the Convention is imprecise. In particular, it is difficult to decide whether the term "unit" signifies the physical unit of goods or the unit used as a basis for calculating the freight, i.e., the unit of freight.

Furthermore, this question was not resolved in article 2(a) of the Brussels Protocol of 1968, in which reference is also made to a package or unit. In view of the history of the drafting of these provisions of the 1924 Convention, the conclusion must be drawn that, in the carriage of goods composed of separate pieces, a "unit" of goods must signify a physical unit and, in the carriage of bulk goods (liquids and solids), it must signify the unit of weight or volume used in describing the goods in the bill of lading.

(c) The question of what to regard as a package or unit of goods, when a container, pallet or similar article of transport is used for the carriage of goods, was discussed at the twelfth Conference in Brussels and was dealt with in article 2 (c) of the Brussels Protocol of 1968. This provision considerably improves the position of the owner of the goods, since it affords him the opportunity of indicating in the bill of lading the number of packages or units carried in the container or similar article of transport. Where he has done so, the limit of the carrier's liability is calculated on the basis of the number of

packages or units indicated. This rule has recently been widely invoked by courts in many different countries. Such a practice appears to be correct.

(e) The rule regarding the limitation of the carrier's liability should apply only when the shipper, before shipping the goods, did not declare the nature and value of the goods to be carried. In this connexion, article IV (5) of the 1924 Convention and article 2(a) of the Brussels Protocol of1968 do not require any amendment. A change in the freight rate as a result of a declaration of the nature and value of the goods carried would appear to be quite natural and cannot be regarded as a difficulty hampering the declaration of the nature and value of the goods.

4. Definitions under article I of the Brussels Convention of 1924

(a) The definition of the term "carrier" set forth in article I of the 1924 Convention cannot be regarded as satisfactory. In any new Convention, it must be stated that the term "carrier" signifies the shipowner, the charterer or any other person who, acting on his own behalf, concludes with a shipper a contract for the carriage of goods. The convention should also include an additional provision that would render "demise", "identity of carrier" or "agency" clauses invalid.

(c) The term "ship" should signify not only "any vessel used for the carriage of goods by sea", but also barges, lighters and similiar craft used to transport goods to and from the ship, if such craft belong to the carrier or are used by him to execute part of the contract of carriage.

5. The period of limitation

One year is an appropriate length for the period during which suit may be brought for damages suffered as a result of loss of or damage to the cargo. Under the 1924 Convention, this period is calculated from the time of delivery of the goods or from the date when the goods should have been delivered. It should be specified that this signifies the time when the goods are handed over to the consignee or the time when they should have been handed over to him. An exact definition of that time will depend on how the term "carriage of goods" is defined and, in particular, how the question raised in article I (e) of the 1924 Convention regarding the time when the carriage terminates is resolved.

Under Soviet law, relations arising out of the application of the period of limitation are dealt with in articles 303 to 308 of the USSR Merchant Shipping Code. In particular, under article 305 of that Code, a one-year period of limitation applies in the case of claims arising out of a contract of carriage of goods in foreign commerce. This period is calculated from the date of delivery of the goods or, if the goods were not delivered, from the date when they should have been delivered.

Under Soviet law, the period of limitation applies both in cases where claims are considered by courts of law and in cases where civil rights are protected by arbitration courts or tribunals. The periods of limitation established by law and the method of calculating them do not depend on whether claims are considered by a court of law or by an arbitration court or tribunal. In the case of claims arising out of contracts of carriage of goods in foreign commerce, the one-year period of limitation laid down in article 305 of the USSR Merchant Shipping Code applies without regard to the place in which such claims are considered.

All the provisions of Soviet law relating to the period of limitation are of a mandatory character. No modification, extension or interruption of periods of limitation by agreement between the parties is therefore permitted (article 80 of the Civil Code of the RSFSR and corresponding provisions in the Civil Codes of the other Union Republics).

A court of law or an arbitration court or tribunal has the right to renew an expired period of limitation, if it accepts as valid the reason for the expiry of that period (article 16 of the Principles of the Civil Law of the USSR and the Union Republics, and article 87 of the Civil Code of the RSFSR).

6. Elimination of invalid clauses in bills of lading

The question of the invalidity of particular clauses in the bill of lading which contradict the mandatory provisions of the Convention may be resolved only if account is taken of all the peculiarities of each case during judicial consideration of the dispute. It would appear to be impracticable to inspect bills of lading beforehand in order to ensure that they do not contain any such clauses. It would hardly be appropriate to include in a convention a list of examples of invalid clauses.

INTERNATIONAL CHAMBER OF SHIPPING

Transshipment

In considering the question whether it would be desirable to include a provision in the Hague Rules concerning responsibility for transshipment, it would seem important to bear in mind the distinction between through bills of lading in which it is stated that there will be a second carrier, and ocean bills for part of the performance of which the carrier for his own convenience makes use of the services of a second carrier.

For through bills, ICS believes that there should be no change in the present position since the shipper has full knowledge of the carriers who will ship his cargo. If, for example, a carrier issuing a through bill were to be liable to the shipper for loss or damage caused by the named second carrier but were unable to exercise a right of recourse against that second carrier, shipowners might be discouraged from issuing bills covering other than the first leg of the journey.

Concerning ocean bills in which the first carrier alone is named, it is for consideration whether it would be appropriate to introduce some clarification of the question of responsibility into the Hague Rules.

Deviation

At present it is possible for a ship to deviate provided that the deviation is allowed by the contract of carriage. This flexibility is of advantage to cargo owners; for example, in the event of sudden congestion at a port, it is possible for a ship to vary the planned itinerary so that cargo owners at later congestion-free ports do not suffer. This possibility of deviation is of advantage even to cargo owners in ports likely

to be congested since, without it, liner owners might find it necessary to reduce the number of calls at such ports. The ability to deviate is also useful in other circumstances. For example, if a long strike is threatened at one port, the ship may change its itinerary to call at that port before the strike breaks out. It is sometimes suggested that the ability to deviate is open to abuse; in practice, competition or the threat of competition is a good protection against abuse and the practical advantages of deviation outweigh any theoretical disadvantages.

Unit limitation of liability

It is recognised that the provisions in the 1924 Brussels Convention on the subject of unit limitation are no longer wholly adéquate. However, ICS would like to emphasise that the problems to which these provisions may have given rise have been resolved by the 1968 Brussels Protocol. Several States are in the process of ratifying this Protocol and it should come into effect during the next year.

UNCITRAL is invited to endorse the Protocol so as to ensure that it comes into force as widely as possible in the near future.

Definitions

"Contract of Carriage". It is believed that the existing definition of this phrase, applying to contracts covered by a bill of lading, remains satisfactory. The great value of the Hague Rules to international commerce is that they provide those who buy goods while they are in transit with certain knowledge of the terms and conditions subject to which the goods are being shipped.

Period of limitation

It is believed that the limitation period of one year remains appropriate since it ensures that the settlement of claims is not long delayed, and yet provides sufficient time for suits to be presented. In this connection it should be noted that Article 1(2) of the 1968 Brussels Protocol makes it clear that the limitation period may be extended in individual cases if the parties so agree after the cause of action has arisen.

INTERNATIONAL UNION OF MARINE INSURANCE

Part I

1. Transshipment

The length of the voyage, the number of transshipments etc influences the premium of the cargo insurance. The existence of a transshipment-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. Such a clause may influence the possibility of recourse action by the marine insurer against the carrier. As recoveries against carriers are performed only when the negligence seems to be evident, and as the amounts recovered represent only a very small portion of the claims paid a transshipment-clause has no major effect on the costs for the cargo insurance.

2. Deviation

Article 4, paragraph 4, of the Hague-Rules is based on the necessity to leave to the captains of ocean-going vessels freedom of decision in cases of unforeseen circumstances making a deviation imperative. It is difficult to establish general rules in this respect without provoking the danger of cumbersome legal controversions. In case of simple "reasonable" deviation - not one necessitating to save life or property at sea - the duty of the carrier to indemnify the shipper for loss of or damage to goods as well as loss caused through delay could be considered.

3. Unit limitation of liability

3a) The actual unit limitation of Article 4, paragraph 5, of the Hague-Rules is unsatisfactory. Article 2, lit. a) of the Brussels Protocol of 1968 would improve the situation as it provides reasonable limits per package or unit as well as per kilo of gross weight. For the time being we consider the increase of the limit of liability to US $ 2.- per kilo as being adequate to the present-day requirements.

Any higher limit would lead, due to the large accumulations of goods and values occurring particularly on modern container ships, to enormous liability sums which could only be covered by liability insurance with the help of worldwide reinsurance arrangements increasing the overall costs of transportation.

3b) An argument for maintaining the term "package or unit" is the fact that the weight of the cargo is not always known or can, at the time of loading, not be accurately ascertained.

3c) We likewise consider the regulation of Art. 2, lit. c) of the Brussels Protocol of 1968 as a good solution. It is flexible enough to meet the requirements of the shippers, and it does not unduly increase the costs for the carrier's liability insurance.

3d) We consider the rules for fixing the value of the currency in which the limitation amount is stated to be satisfactory. What is of primary importance is the fact that the contracting states cannot fix at any certain time the foreseen limits in their own currency.

3e) The possibility of value declaration has, in everyday practice, only rarely been made use of because the increase in freight demanded is generally higher than the corresponding premium for cargo insurance. We would, however, point out that the possibility of an agreement between all parties for an extended liability exists in all transport conventions.

3f) For goods loaded on deck - at least if they are packed in containers - the regulations of the Hague Rules should apply.

4. No comments.

5. As regards the period of limitation differences of opinion exist in our circles. The view of the majority is that the period of one year is too short and that two years would be more adequate to circumstances. We would however also be satisfied with the prescription of the Brussels Protocol of 1968 following which the parties are at liberty to extend by mutual agreement the period after the cause of action has arisen. Equally satisfactory is the regulation of the Brussels Protocol to extend the period of limitation in case of recourse actions.

Part II

For various reasons we have no further wishes for alterations: The list of UNCITRAL already contains a large number of problems which have to be clarified by thorough studies. Yet, if only part of the propositions for alterations will be accepted,

commercial practice will be influenced in such a way that it is completely impossible to ascertain, even to some extent, the economical consequences.
The main advantage of the international conventions regarding sea transports so far concluded and ratified is the unification of law achieved thereby. Only a far-reaching unification of law can avoid the juridical insecurity which is detrimental to commerce. The Diplomatic Conference in Brussels of 1968 has, for good reasons, restricted its work to a few topics to be revised hoping that the alteration protocol would be ratified in the same manner as the Hague Rules. Regrettably this has so far not been the case. It is to be feared rather that it was exactly the large number of propositions for alterations which has prevented many states from ratifying the 1968 protocol.

It is our considered opinion that alterations which have not the chance to be accepted by a large number of states increase the difficulties and juridical insecurity - which is contradictory to the original intentions of those demanding such reforms.
