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UNITED NATIONS COMMISSION ON
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Working Group on International
Legislation on Shipping
Sixth session
Geneva, 4 February 1973

THIRD REPORT OF THE SECRETARY-GENERAL ON RESPONSIBILITY OF OCEAN
CARRIERS FOR CARGO: BILLS OF LADING

Addendum

Comments and suggestions by Governments and international
organizations on the topics to be considered at the sixth
session of the Working Group

1. The UNCITRAL Working Group on International Legislation on Shipping, at its fifth session, held in New York from 5 to 16 February 1973, "requested comments and suggestions from the members of the Working Group and from the observers at the present [fifth] session on the topics to be considered at the next [sixth] session" for utilization by the Secretariat in the preparation of the necessary documentation for the sixth session of the Working Group. Accordingly, the Secretary-General prepared and circulated a request for comments and suggestions concerning the topics to be taken up by the Working Group at its sixth session, to members of the Working Group and observers present at its fifth session. A copy of the request for comments and suggestions is attached hereto as annex I.

2. The report by the Secretary-General entitled "Third report on responsibility of ocean carriers for cargo: bills of lading (delay, geographical scope of convention, documentary scope of convention, invalid clauses)" (A/CN.9/WG.III/WP.12, vols. I-III) has drawn on material contained in those replies to the request for comments and suggestions that were received before 15 December 1973. Attached hereto as annex II are all substantive replies received in one of the working languages of the United Nations before 31 December 1973. Replies are reproduced in the original language. An English translation is attached to the text of the Russian language reply.

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Annex I

REQUEST OF MAY 1973 FOR COMMENTS AND SUGGESTIONS ON THE TOPICS
TO BE CONSIDERED AT THE SIXTH SESSION OF THE WORKING GROUP

Introduction

The UNCITRAL Working Group on International Legislation on Shipping, at its fifth session held in New York from 5 to 16 February 1973, decided on the topics that would be considered at its sixth session (A/CN.9/76, paras. 73-76). The Working Group further decided (para. 75), that "with respect to the topic of delay, the Secretary-General should be requested to prepare a report setting forth proposals, indicating possible solutions". The Working Group also decided (para. 75) to request the Secretariat to prepare a working paper on the scope of application of the Convention. The Working Group requested "comments and suggestions from the members of the Working Group and from the observers at the present session on the topics to be considered at the sixth session" and expressed the hope that such comments and suggestions could be transmitted to the Secretariat sufficiently in advance of the session so that they may be used in the preparation of the necessary documentation".

Pursuant to this decision of the Working Group, the Secretary-General has the honour to request His Excellency's Government for its comments and suggestions on the following topics:

(1) Liability of the carrier for delay

In this connexion, it would be appreciated if His Excellency's Government, in making its comments and suggestions on the subject, would indicate whether it agrees with the suggestion that the Convention should contain a provision specifically directed to the carrier's liability for delay and, if so, the proposed content of such a provision.

(2) The scope of application of the Convention

(a) One question with respect to the scope of the Convention relates to the provisions on geographical applicability in article 10 of the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 25 August 1924) and in article 5 of the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1968). (See A/CN.9/WG.III/R.1, paras. 9-10.) It would be appreciated if His Excellency's Government, in making its comments and suggestions on this subject, would indicate whether either of these provisions is satisfactory, and, if not, the proposed content of a provision dealing with this question.

(b) A second question with respect to the scope of the Convention is presented by article 1 (b) of the Brussels Convention of 1924 which states: "Contract of carriage applies only to contracts of carriage covered by a bill of lading or any

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similar document of title ..." Questions have been raised regarding the applicability of the Convention to ocean carriage under informal documents (which may be similar to air-way bills or road consignment notes) that evidence a contract of carriage but may not be regarded as a "document of title". The question has also been raised as to the applicability of the Convention to ocean carriage when no document is issued to evidence the contract (see A/CN.9/WG.III/R.1, para. 12). It would be appreciated if His Excellency's Government, in making its comments and suggestions on this subject, would indicate the extent to which ocean carriage under the conditions described above, should be governed by the Convention and the content of any provisions which should be considered in this regard.

The Working Group has expressed the hope that the comments and suggestions made by members of the Working Group and by observers will be transmitted sufficiently in advance of the sixth session to be used in the preparation of the documents to be considered at that session. In accordance with a decision of UNCITRAL at its sixth session, the sixth session of the Working Group will be held from 4 to 22 February 1974. It would be appreciated if comments and suggestions that His Excellency's Government may wish to make were transmitted to the Secretary-General by 1 August 1973.

Annex II

REPLIES TO THE REQUEST FOR COMMENTS AND SUGGESTIONS BY
GOVERNMENTS AND BY INTERNATIONAL ORGANIZATIONS

AUSTRALIA

Liability of the carrier for delay

1. The letter from the Secretary-General stated,

"Liability of the carrier for delay. In this connexion, it would be appreciated if His Excellency's Government, in making its comments and suggestions on the subject, would indicate whether it agrees with the suggestion that the Convention should contain a provision specifically directed to the carrier's liability for delay and, if so, the proposed content of such a provision."

2. Australia considers that the Convention should expressly provide for carrier liability for delay and would find article 19 of the Warsaw Convention a proper precedent in this regard. However, a defence should be available to the carrier to the effect that the delay was unavoidable in the sense that it was not occasioned by the carrier's fault or negligence or that the delay was necessary, in the interests of all parties involved, to preserve the cargo or minimize the loss arising from damage already suffered. It should also be a defence that the delay was caused by deviation permitted under the Hague Rules.

3. As to the difficult problem of a definition of delay, if the consignor was, at the time of entering into the contract of carriage, given a specified date or dates for the arrival and discharge of cargo at a specified port, then delay shall occur if arrival and discharge is effected after the specified date or dates. If no specified date or dates were given at the time of entering into the contract of carriage delay can only be deemed to have occurred if a date or dates could reasonably have been in the contemplation of both parties and arrival and discharge is effected after those dates.

4. The Convention may need to include a formula for the determination of loss or damage arising out of delay.

Scope of application of the Convention

5. The letter from the Secretary-General stated,

"(a) One question with respect to the scope of the Convention relates to the provisions on geographical applicability in article 10 of the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 25 August 1924) and in article 5 of the Protocol to amend the

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International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1968). (See A/CN.9/WG.III/R.1, paras. 9-10.) It would be appreciated if His Excellency's Government, in making its comments and suggestions on this subject, would indicate whether either of these provisions is satisfactory and, if not, the proposed content of a provision dealing with this question."

6. It is considered that the provisions of the Convention should apply uniformly to all contracts for the carriage of goods between ports in two different States if at least one of those ports is situated in the territory of a contracting State. This proposition would seek to extend the provisions of article 5 of the Brussels Protocol to cover carriage destined for as well as departing from a port in a contracting State, on the basis that, in practice, most litigation arising out of the relevant contracts is commenced in the port of destination. Moreover, as will be amplified in the answer to (b) below, it is considered that the geographical scope of the Convention should not be tied to the use of bills of lading, but should relate to "contracts for the carriage of goods by sea".

7. If the above-mentioned propositions were incorporated within the framework of Article 5 of the Brussels Protocol, Australia would find such a provision more satisfactory than the existing article 10 of the Hague Rules. Further, Australia would like to raise a question as to the necessity of article 5 (c) of the Brussels Protocol which seems to have no substantive effect.

8. The letter from the Secretary-General further stated,

"(b) A second question with respect to the scope of the Convention is presented by article 1 (6) of the Brussels Convention of 1924 which states: 'Contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title ...'. Questions have been raised regarding the applicability of the Convention to ocean carriage under informal documents (which may be similar to air-way bills or road consignment notes) that evidence a contract of carriage but may not be regarded as a 'document of title'. The question has also been raised as to the applicability of the Convention to ocean carriage when no document is issued to evidence the contract (see A/CN.9/WG.III/R.1, para. 12). It would be appreciated if His Excellency's Government, in making its comments and suggestions on this subject, would indicate the extent to which ocean carriage under the conditions described above, should be governed by this Convention and the content of any provisions which should be considered in this regard."

9. Australia has previously stated its view that the Hague Rules should apply to all contracts for the carriage of goods by sea, whether or not caught by the current definition of "contract of carriage" in article 1 (b) - see the Australian replies to the First and Second UNCITRAL Questionnaires on Bills of Lading. It should also be noted that Australia would wish to apply the Hague Rules irrespective of whether the terms of the contract of carriage are evidenced.

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BELGIUM

1. Responsabilité du transporteur en cas de retard

Bien que le Gouvernement belge n'ait en principe aucune objection à formuler contre l'insertion d'une disposition prévoyant expressément la responsabilité du transporteur en cas de retard et puisse même sous un certain angle à savoir pour éviter une application ou interprétation divergente des dispositions de la Convention, appuyer pareille insertion, il est dans le stade actuel de la révision de (certaines dispositions de) la Convention de Bruxelles 1924 sur les connaissements difficile d'établir la nécessité absolue de pareille insertion.

Les discussions tenues jusqu'à présent au sein du groupe de travail de la CNUDCI s'occupant de la matière ont révélé qu'une tendance se manifeste pour :

1° renverser l'économie actuelle de la Convention en remplaçant dans le chef du transporteur le principe de l'obligation des moyens par une obligation de résultat ;

2° instituer au moins un système généralisé de présomption " juris tantum " de la faute du transporteur ou de ses préposés pendant toute la période pendant laquelle celui-ci a les marchandises sous sa garde ;

3° d'amenuiser les possibilités du transporteur dans le domaine de la déviation, question qui est en grande partie liée à celle de la responsabilité du transporteur pour retard.

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Signalons que les conséquences dommageables d'un retard se traduisant dans une perte des ou dommages matériels directs aux marchandises pourraient de toute façon être considérées comme étant couvertes par la formule générale de la responsabilité du transporteur, comme c'est d'ailleurs le cas sous le régime actuel. Le seul doute peut donc subsister pour les conséquences dommageables indirectes.

Une question se pose dès lors si une disposition expresse séparée relative à la responsabilité du transporteur pour retard devrait couvrir soit toutes les conséquences dommageables nées du retard (aussi bien les dommages directs qu'indirects) soit les conséquences dommageables indirectes.

Il nous semble préférable que si une disposition expresse séparée devrait être insérée dans la Convention celle-ci ne devrait traiter que des conséquences dommageables indirectes laissant ainsi tomber les dommages directs sous le régime général.

Quoiqu'il en soit, si une formulation expresse devait être adoptée la question devrait être traitée et résolue d'une façon nette et simple afin d'éviter que la formulation expresse ne donne pas lieu à plus de litiges qu'en absence de pareille formulation.

Plusieurs aspects importants sont ainsi à examiner :

- 1) Quelles espèces de retard pourraient entraîner la responsabilité du transporteur ?
- 2) La responsabilité du transporteur est-elle engagée à la suite du retard comme fait en soi ou uniquement quant aux conséquences dommageables du retard ?
- 3) Quelles conséquences dommageables devraient donner lieu à la réparation et en ordre subsidiaire quels seraient les rapports entre le montant de cette réparation et le montant général de limitation prévue par la Convention ?

Une réponse à la première question pourrait être puisée dans les formules générales déjà présentées par le Groupe de travail. Le transporteur ne peut être rendu responsable que du retard dû à sa faute ou à celle de ses préposés et ce pour la période durant laquelle les marchandises se trouvent sous sa garde. De ce fait serait exclu tout retard causé par une délivrance retardée des marchandises par le chargeur au transporteur ainsi que par une réception retardée des marchandises par le réceptionnaire ou destinataire.

En ce qui concerne la deuxième question seules les conséquences dommageables d'un retard devraient être prises en considération et non pas le retard comme fait en soi.

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Enfin, en ce qui concerne la troisième question et sous réserve des observations formulées ci-dessus, seul le préjudice immédiat, directement et exclusivement né du retard devrait donner droit à des dommages-intérêts. Bien sûr dans ce domaine chaque législateur national ou bien reste jaloux de ces prérogatives et prétend à une appréciation exclusive des conséquences dommageables donnant droit à la réparation ou bien se cantonne dans un silence respectueux des sentences judiciaires, ce qui n'est pas de nature à favoriser l'unification des règles en droit maritime.

De toute façon si une disposition expresse est insérée dans le texte de la Convention en matière de responsabilité pour retard, la disposition devrait également contenir une formule séparée de la limitation de cette responsabilité.

2. Domaine d'application de la Convention.

a. Application géographique.

La position du gouvernement belge est bien connue : il suffit de lire à cet égard les procès-verbaux de la Conférence diplomatique de Bruxelles de 1968.

Aucun élément ne semble depuis lors être intervenu qui permet de se départir de cette position.

Si l'article 5 du Protocole de modification du 23 février 1968 améliore, sur le plan de la Convention, le texte ambigu de l'article 10 de la Convention de 1924, il ne peut, sur le plan de l'unification des règles en matière de responsabilité pour le transport maritime, donner entière satisfaction.

Le Gouvernement belge voudrait donc voir élargie d'office l'application des dispositions de la Convention également aux transports de marchandises à l'entrée d'un port d'un Etat Contractant et ce en dépit de certains arguments formulés contre pareille extension d'application.

Certes, l'adoption d'une formule d'application généralisée va à l'encontre du principe de la "lex loci contractus" et enfreint dans une certaine mesure la liberté contractuelle des chargeurs et transporteurs. C'est ce pendant perdre de vue que cet aspect du problème ne peut en effacer une autre à savoir, la protection efficace du réceptionnaire ou du destinataire des marchandises directement intéressé au transport. L'évolution dans les conceptions juridiques font croire que cet aspect gagne en importance.

Ce dernier aspect rend au surplus toute analogie avec des situations où les autorités du port d'entrée du navire et des marchandises exigent à tort ou à raison un droit de regard sur les contrats régissant le transport en question, inopérante.

On réalise parfaitement le " background " économico-commercial d'une opposition à une application plus généralisée de la Convention. On reste néanmoins convaincu que si on veut réaliser une politique d'harmonisation et de simplification du droit maritime elle implique nécessairement une application aussi générale que possible de la Convention.

Il faut, bien sûr, signaler qu'il reste dans ce contexte un problème technique à résoudre qui consiste à concilier le principe de l'application générale de la Convention avec la question de la responsabilité des transporteurs successifs en cas de connaissance direct.

b. Application " razione materiae ".

Bien que dans le droit belge l'application des " Règles de la Haye " soit liée à l'existence d'un connaissance négociable afin de rendre à ce document toute sa valeur de titre représentatif des marchandises et d'en faciliter la circulation, le Gouvernement belge peut bien concevoir un système de responsabilité régissant le contrat de transport en soi, quel que soit le document ou la qualité du document constatant ce contrat. Il peut même l'imaginer sans qu'il soit exigé pour l'application de ce système une preuve documentaire du transport.

Il est donc possible d'élaborer un ensemble de dispositions prévoyant, d'une part, d'une façon indépendante un système général de responsabilité du transporteur des marchandises et, d'autre part, des règles sur le constat facultatif du contrat de transport dans le sens du § 3 de l'article 3 actuel de la Convention, en les élargissant à tout document utilisé dans la pratique du transport maritime même à tout document non-négociable.

L'émission d'un connaissance négociable par le transporteur devrait toutefois être rendue obligatoire si le chargeur la demande, celui-ci agissant soit à sa propre initiative soit à la demande du réceptionnaire ou destinataire. Ce document devrait être délivré par le transporteur en un seul original et ce après la prise en charge par les marchandises.

Il serait d'autre part très opportun de déterminer dans le contexte de la Convention la signification exacte du constat, à savoir, que ce document constate l'existence d'un contrat de transport et la réception par le transporteur des marchandises (cfr. article 3 § 4 de la Convention 1924), et qu'il donne droit à la délivrance des marchandises au porteur du document.

Il reste enfin une question à régler à savoir si les transports de marchandises en vertu d'un contrat d'affrètement (d'une charte-partie) devraient être couverts par les nouvelles dispositions de la Convention.

Tout en reconnaissant la connexité des problèmes le Gouvernement belge voudrait suggérer à cet égard de laisser provisoirement cette question en suspens jusqu'au moment où le Groupe de travail (la CNUDCI) soit parvenue(e) à élaborer un ensemble cohérent des dispositions régissant le transport de marchandises en dehors d'un affrètement total ou partiel d'un navire.

FRANCE

1.- Responsabilité du transporteur pour retard -

Lors de sa 5ème session, le groupe de travail avait estimé lors de l'examen de la question du déroutement, que la nouvelle formulation adoptée sur la responsabilité du transporteur maritime (au cours de sa 4ème session) faisant peser sur celui-ci une présomption générale de responsabilité, rendait inutile une disposition particulière sur le déroutement : il appartenait au transporteur d'écarter cette présomption en apportant la preuve que lui-même ou ses préposés ont pris les mesures nécessaires pour éviter l'évènement (le déroutement en l'espèce) qui a causé le dommage. Mais il fut admis que les effets juridiques du déroutement devaient être traités avec la question plus générale de la responsabilité du transporteur pour retard.

La Convention de Bruxelles de 1924 ne contient aucune disposition sur le retard contrairement aux autres conventions internationales en matière de transport de marchandises (C.M.R., art. 17 et 19, C.I.M., art. 27 et 49, Varsovie-La Haye, art. 19 et 22). Le projet de convention sur le transport combiné de marchandises qui englobait donc les transports maritimes, dans le texte élaboré au cours des réunions conjointes OMCI/CEE contenait une disposition relative à la responsabilité pour retard.

Aussi conviendrait-il de prévoir dans la convention une définition du retard, analogue à celle qui figure dans la Convention sur le transport des marchandises par route (C.M.R.), mais tenant compte des particularités du transport maritime : il y a retard si la marchandise n'a pas été livrée dans le délai convenu, ou en l'absence de délai convenu, lorsque la durée effective du transport dépasse, compte tenu des circonstances de fait et notamment en cas de transbordement forcé ou de déroutement fait ou de mesures raisonnables prises pour sauver ou tenter de sauver des vies ou des biens en mer, le temps qu'il est raisonnable d'allouer pour l'accomplissement diligent d'un tel transport maritime.

La responsabilité du transporteur en cas de retard devrait être soumise à limitation comme l'ensemble de sa responsabilité, mais le mode de calcul de la limitation de la responsabilité du transporteur ne paraît pas du tout approprié pour sanctionner le retard (sur la base d'un montant par colis ou au poids). Aussi pour couvrir les dommages

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résultant du retard, il vaudrait mieux prévoir à titre de sanction le paiement soit du montant du fret, soit du double du montant du fret. Il va de soi, dans le système de responsabilité tel qu'il a été retenu par le groupe de travail, qu'il appartiendrait au transporteur, présumé responsable, d'apporter la preuve que s'il n'a pu respecter le délai c'est pour des raisons qui l'exonèrent de sa responsabilité.

2.- Champ d'application de la Convention -

A) - Le Protocole de Bruxelles du 23 février 1968 a étendu la champ d'application de la Convention de 1924 qui s'applique à tout connaissement émis dans un état contractant ; outre ce cas, il y aura selon le Protocole, application de la Convention aux transports au départ d'un port d'un état contractant, et aux transports pour lesquels le connaissement prévoit expressément que la convention régira le contrat (clause dite paramount). En outre, le Protocole prévoit que chaque état contractant aura le droit d'appliquer la convention dans les cas non visés par celle-ci.

et La loi française du 18 juin 1966 sur les contrats d'affrètement/de transport maritimes, qui dans une formulation différente reprend le régime de la Convention, va déjà au devant de la possibilité d'extension prévue au Protocole ; elle est en effet applicable aux transports au départ ou à destination d'un port français. De la sorte le régime de la Convention est également applicable aux transports maritimes extérieurs à l'arrivée dans les ports français (en l'absence de convention internationale à laquelle la France est partie).

Un certain nombre d'autres états contractants ont des dispositions analogues dans leur législation nationale et ont ainsi procédé, comme la Convention le leur permet, à l'extension de son champ d'application aux transports à destination d'un état contractant.

Cette solution mérite d'être uniformisée. Il apparaît en effet tout à fait souhaitable d'étendre ainsi le champ d'application de la Convention qui recouvrerait aussi bien les transports maritimes pour lesquels le connaissement a été émis dans un état contractant que ceux au départ et ceux à destination d'un état contractant ; enfin les parties pourraient prévoir expressément dans le connaissement que la Convention régira le contrat de transport (clause paramount).

B) - L'article 1er de la Convention de 1924 précise que par contrat de transport (visé par la Convention) il faut entendre le contrat constaté par un connaissement ou tout document similaire formant titre pour le transport de marchandises par mer. En conséquence, il est admis que la Convention ne s'applique pas aux transports maritimes pour lesquels il a été délivré des documents autres qu'un connaissement et qui ne constituent pas un "document formant titre", ni aux transports maritimes pour lesquels il n'a été délivré aucun titre.

Le connaissement en effet, outre qu'il constitue un reçu des marchandises ainsi que le titre établissant le contrat de transport, a l'avantage d'être un titre représentatif de la marchandise ; le porteur du connaissement est un ayant-droit à la marchandise et le connaissement est le titre qui donne droit à la possession de la marchandise.

Or, à défaut de connaissement, ayant seul cet avantage précis de représenter la marchandise, il arrive que d'autres documents soient délivrés : bordereaux, ou ordres ou avis d'expédition, reçus ou bons d'enlèvement ; parfois certains transporteurs dressent des connaissements collectifs ou le transporteur est désigné à la fois comme transporteur et comme chargeur ; ces documents qui regroupent des ordres d'expédition émanant de chargeurs différents ne sauraient être considérés comme des connaissements.

Selon la législation française, l'appellation du document importe peu : du fait qu'il s'agit d'un contrat de transport maritime, celui-ci est impérativement soumis à la loi. Celle-ci est donc plus large que la Convention de Bruxelles qui ne s'applique qu'aux seuls transports pour lesquels il y a eu délivrance d'un connaissement ou d'un document similaire formant titre pour le transport de marchandises. Des difficultés peuvent s'élever sur ce point. Dans quel cas s'agit-il d'un document formant titre pour le contrat de transport ? Les solutions peuvent être variables et les jurisprudences diverses sur le point de savoir s'il y a lieu ou non à application de la Convention. Il en résulte une insécurité pour le chargeur.

Aussi la loi française, qui ne rattache pas son application à celle de la délivrance d'un document, paraît bien préférable. Du moment qu'il s'agit d'un transport maritime, quel que soit le document délivré ou même en l'absence de document, la loi s'applique. Il conviendrait d'adopter une solution analogue en droit international, ainsi la Convention ne porterait plus sur les règles relatives au connaissement mais sur le contrat de transport maritime.

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NORWAY

These observations appear after consultations with the other Nordic countries.

1. Liability for delay

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. The Norwegian Government considers it desirable that this uncertainty be replaced by rules regulating the question in the new international law on carriage by sea. Such a regulation will ensure that the question of liability for delay is solved in the same manner in all contracting States. A uniform regulation of this question is in the interest of the international commerce.

In the absence of uniform international regulation, a provision solving the question of liability for delay has been inserted into the legislation recently adopted (in co-operation among the Nordic countries) to enable Norway to ratify the Brussels Protocol. According to this amendment to the Maritime Code, the rules relating to the basis and limits of the carrier's liability shall apply to cases of "economic loss which results from the goods being lost, damaged or delayed while they are in the charge of the carrier" (sec. 118). However, in accordance with the Convention article I (e), section 168 provides that the carrier may exempt himself of liability for loss caused by an event occurring before loading or after discharge. It is expected that the new legislation will enter into force 1 January 1974.

As already stated above, the Norwegian Government is of the opinion that the new international law on carriage should contain explicit rules on delay. Such provisions should deal with the following matters:

(a) The definition of delay - the Convention for the International Carriage of Goods by Road, 1956, (CMR) article 19 may provide appropriate guidance.

(b) The basis for the carrier's liability for delay - it is envisaged that this should be the same as for loss of or damage to the goods, cf. the draft text prepared by the Working Group at its fourth (special) session.

(c) The limit of the carrier's liability for delay - it should be considered whether the limit should be the same as for liability for loss of or damage to the goods or whether a special limit should be fixed, either as in the CMR or otherwise.

2. Geographical scope of application

The Norwegian Government considers that this question has been satisfactorily solved in the Brussels Protocol article V, amending the Convention article X. In the new legislation based on the Protocol, Norway - like the other Nordic countries - has exercised the option contained in the last paragraph of article V

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to extend the scope of application and make the rules applicable also to carriage from a non-Contracting State to any of the Nordic States.

3. The definition of the contract of carriage

Reference is made to the Memorandum Concerning the Structure of a Possible New Convention on the Carriage of Goods by Sea (document A/CN.9/WG.III (XV)/WP.9), paragraphs 6 and 7. In accordance with the views there expressed, the Norwegian Government submits that the new international law on carriage of goods by sea should apply not only when the contract of carriage is evidenced by a bill of lading or a consignment note or other non-negotiable transport document, but also when the parties have not issued any document at all. In other words, the new international law should in principle apply to any contract for carriage of goods by sea. However, charter parties should be expressly exempted from the scope of the international law, cf. the Convention article V, paragraph 2; and contracts for successive shipment of a certain quantity of goods (Quantum contracts) should be treated in the same manner as charter parties for the purposes of the Convention.

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PAKISTAN

Liability of the carrier for delay. In this connexion it would be appreciated if, in making your comments and suggestions on the subject, you would indicate whether you agree with the suggestion that the Convention should contain a provision specifically directed to the carrier's liability for delay and, if so, the proposed contents of such a provision.

It is suggested that instead of having various defences available to the carrier a sole defence on the terms that are available in the case of loss or damage to goods (i.e. proof of absence of the fault on the part of the carrier, his servants and agents, the burden of proving which rests on him) could replace the defences now available to the carrier. This should be supplemented by specific reference to the case of the delay which ensued by an attempt to save life or property at sea.

The following proposals are made in this respect:

1. The carrier shall be liable for all loss or damage caused by delay, whether the delay consists of the late arrival of the vessel for the purpose of performing the contract of carriage.

2. The carrier shall be so liable to any lawful holder or transferee of a bill of lading or other similar document of title, or to anyone succeeding to the rights of such a person, and to all persons to whom loss or damage could reasonably be foreseen at the time the delay occurred.

3. (a) The carrier shall not be liable where he proves that the delay resulted from measures to save life or from reasonable measures to save property at sea. (Provided that where such measures to save life or property at sea result in financial gain to the carrier, the carrier shall pay to any person or persons who would otherwise be entitled to claim compensation from the carrier for loss or damage caused by such delay a sum not exceeding one half of the financial gain so accruing, and in any event not exceeding the loss or damage actually suffered by such person.)

(b) The carrier shall not be liable where he proves that he, his servants and agents, took all measures that could reasonably be required to avoid the delay and its consequences.

(c) The carrier shall not be liable for any loss or damage which could not reasonably be foreseen at the time the delay occurred as likely to result from the delay.

4. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce delay resulting in any loss or damage, the carrier shall be liable only for that portion of the loss or damage attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss or damage not attributable thereto.

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5. The burden of proof shall be on the claimant to establish
 - (a) His status to maintain the action
 - (b) Delay in terms of the contract of carriage, and
 - (c) The monetary value of the loss or damage.

2 (a)

One question with respect to the scope of the Convention relates to the provisions on geographical applicability set forth in article 10 of the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 25 August 1924) and in article 5 of the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1968). (See A/CN.9/WG.III/R.1, paras. 9-10.)

It would be appreciated if, in making comments and suggestions on the subject, you would indicate whether either of these provisions is satisfactory and, if not, the proposed content of a provision dealing with this question.

(i) Article 10 as modified by article 5 of the 1968 Brussels Protocol does not make the Convention applicable to a bill of lading where the carriage is to a port in a Contracting State, unless either subparagraphs (a) or (c) apply. However, the last sentence of the modified article 10 permits a Contracting State to apply the Convention even to such a bill of lading. It is suggested that the application of the Convention may be made mandatory to such "inward" bills of lading. Where goods are shipped to the ports of a Contracting State, the questions relating to the contract of carriage will generally arise between the consignee in the Contracting State and the carrier. The Contracting State would therefore have a legitimate interest in seeing that such a relationship is regulated by the Convention.

(ii) The opening words of article 10 as modified by article 5 of the 1968 Brussels Protocol limit the applicability of the Convention to "carriage of goods between ports in two different States". Through bills of lading, however, may relate to the carriage of goods from one inland town, or from an inland town to a port. It might be argued that in such cases the Convention cannot apply even where sea carriage is involved. Under the earlier formulation of article 10 the Convention was construed as applicable to the sea carriage involved. Considering the commercial advantages involved in the practice of having a single through bill of lading, this wording in the Protocol may be reconsidered.

(iii) Even where the carriage is entirely between ports, the question has been raised as to the applicability of the Convention when the conditions for its applicability are satisfied at the port of origin, but the goods are trans-shipped at another port, at which point the conditions for applicability would not be satisfied, if the carriage was deemed to originate there. The converse case,

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i.e. where the Convention is inapplicable at the port of origin but applicable at the port of trans-shipment, can also be imagined. Trans-shipment can be under a general liberty clause under a bill of lading, or under a bill of lading specifically indicating trans-shipment at a specific port by an on-carrier. Under whichever type of clause the trans-shipment occurs it was generally agreed at the Working Group that the liability of both the contracting carrier and the on-carrier should be subject to the Convention, on the tacit assumption that the Convention was applicable at the commencement of the carriage to the contractual carrier. There has been a difference of view as to whether, in the case where the on-carrier is specifically designated, the contractual carrier can avoid liability for the period when the goods are in the charge of the on-carrier. But it would appear that even on that view, it is conceded that the on-carrier who is then solely liable is to be subject to the Convention. A single legal régime for the entire voyage, despite carriage by a number of carriers, is desirable, particularly from the point of view of the shipper. If this view is accepted, it is suggested that specific provision be made immediately after subparagraph (c), on the lines of the following proposal:

"Where this Convention applies by reason of the above provisions to a bill of lading, it shall continue to apply to the carriage by sea of the goods covered by such bill of lading until their discharge at the final port of destination contemplated in the carriage, notwithstanding their trans-shipment, the issue of a different bill of lading, or their carriage by a carrier different from the original contracting carrier."

(iv) By reason of the definition of "contract of carriage" in article 1 (b), the Convention is applicable to contracts of carriage covered by a bill of lading "or other similar document of title". However, article 10 mentions bills of lading only. It is suggested that it should also apply where the document involved is a "similar document of title".

(v) The sentence "Each Contracting State shall apply the provisions of this Convention to the bills of lading mentioned above" appears to perform a double duty. It imposes an obligation on Contracting States to see that their domestic law giving effect to the Convention is applicable to bills of lading in the three cases set out in subparagraphs (a), (b) and (c). It also appears to create a mandatory choice of law rule which the courts of the Contracting States must observe. Considering the diverse interpretations given to the present article 10, the following alternative wording may be considered:

"Each Contracting State shall make applicable, and the courts of each Contracting State shall apply, the provisions of this Convention to the bills of lading mentioned above."

(vi) The last sentence of the modified article 10 states that "This Article shall not prevent a Contracting State from applying the Rules of this Convention to bills of lading not included in the preceding paragraphs". If this liberty used by Contracting States, different national laws may have very different ambits of application, which may produce some uncertainty, e.g. the most convenient fora for

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litigation regarding a contract of carriage are contracting States C and D. Under the law of C, the Convention applies to the bill of lading, but not under the law of D. Results will differ depending on the forum chosen.

It has been shown that the Convention is presently reproduced in diverse forms in national legislation. It may be considered therefore whether this clause should not be deleted.

2 (b)

A second question with respect to the scope of the Convention is presented by article 1 (6) of the Brussels Convention of 1924 which states: "Contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title" Questions have been raised regarding the applicability of the Convention to ocean carriage under informal documents (which may be similar to airway bills or road consignment notes) that evidence a contract of carriage but may not be regarded as a "document of title". The question has also been raised as to the applicability of the Convention to ocean carriage when no document is issued to evidence the contract (see A/CN.9/WG.III/R.1, para. 12).

It would be appreciated if, in making your comments and suggestions on the subject, you would indicate the extent to which ocean carriage, under the conditions described above, should be governed by the Convention and the content of any provisions which should be considered in this regard.

- (i) The applicability of the Convention to ocean carriage under informal documents (which may be similar to airway bills or road consignment notes) that evidence a contract of carriage but may not be regarded as a "document of title"

Under article 1 (b) of the Convention, "contract of carriage" is defined to apply "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". This definition has effect, directly or indirectly, in other articles of the Convention. Thus "Carrier" is defined by article 1 (a) as including "the owner or charterer who enters into a contract of carriage with a shipper", and the word "carrier" is used in most of the articles of the Convention. Again, article 2 which creates the area of compulsory regulation of the relation between shipper and carrier, and article 3 (8) which prevents a carrier from exempting himself from the duties imposed by the Convention, use the phrase "contract of carriage". Again, under article 3 (7), when the Convention applies in certain circumstances despite the absence of an issue of a bill of lading, the transaction is covered by a document of title, which is later deemed to constitute a "shipped" bill of lading. It is thus a fair inference that the Convention does not apply when the document evidencing the contract is also not simultaneously a document of title. There is also some authority in English shipping law for this view.

In the context of bills of lading, the view that it is a "document of title" refers to the fact that by an appropriate endorsement the rights of the holder can

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be transferred. It is true that having a fixed nexus of minimum legal obligations between carrier and shipper is most important where the contract is transferable, for the contract then affects several parties, and transference is facilitated when the important aspects of the contract are settled and unalterable. Nevertheless it is suggested that sufficient grounds exist for an equitable balancing of the interests of carrier and shipper even where the contract is not transferable. Since an obligation to deliver a bill of lading depends on the terms of the contract of carriage, carriers are now free to create trade practices under which bills of lading are not issued, thus restoring to themselves unlimited freedom of contract. It is, therefore, submitted that those articles which balance the interests of carrier and shipper can usefully be made applicable to contracts of carriage evidenced by non-negotiable documents.

On this view, article 1 (b) will have to be amended so as not to tie the definition of "contract of carriage" to one covered by a document of title, and other appropriate amendments made creating a limited legal régime for such contracts, and oral contracts.

(ii) The applicability of the Convention to ocean carriage when no document is issued to evidence the contract

The Convention at present only applies to contracts of carriage "covered" by documents. Article 1 (b) refers to a bill of lading and to "similar documents of title".

In principle the argument in favour of extending the applicability of the Convention to contracts of carriage covered by receipts and other informal documents which are not documents of title, i.e. furthering the equitable balancing of the interests of shipper and carrier over as wide a range of contracts as possible, would apply also in the case of oral contracts of carriage.

Although oral contracts of carriage are likely to be extremely rare, it may be argued that a fixed minimum "statutory" contract is even more important in such cases to avoid uncertainty. Further, if oral contracts are excluded, the applicability of the Convention to contracts evidenced by informal documents suggested above may create difficulty as regards contracts partly oral and partly in writing, which may have to be forced into one or the other category. An alternative approach would be to make the issue of a bill of lading or standardized form of receipt obligatory in all contracts of carriage by sea, unless they fall into certain excepted categories, thus eliminating oral contracts. Either approach would also eliminate the possibility of abuse which exists at present where the applicability of the Convention depends on the issue of a particular form of document.

UNION OF SOVIET SOCIALIST REPUBLICS

1. Liability of the carrier for delay

In view of previously adopted decisions to the effect that the responsibility of the carrier for failure to ensure the safekeeping of a cargo should be based on the principle of fault (A/CN.9/74, p. 10), it would, in our view, appear possible also to provide in the Convention for similar responsibility of the carrier for delay in delivery of the cargo.

In that case it would be logical, in relation to the liability of the carrier for delay, also to apply the rules concerning restricted responsibility which are provided for in the preliminary draft (A/CN.9/74, sect. I B, p. 8).

2. Scope of application of the Convention

The aims of unification sought in the preparation of a Convention on bills of lading in international shipping would, in our view, best be served if the scope of application of the provisions of such a Convention was defined as broadly as possible. Article 5 of the 1968 Brussels Protocol would serve as the basis for resolving the question in this way.

The only natural exception should be the exclusion from the sphere of application of the Convention of purely "internal" transport or cabotage, which is usually understood to mean transport between ports of a single country. In this connexion, however, it would appear useful for the Working Group, at its forthcoming session, to give particular attention to cabotage operations in which organizations from various countries participate as cargo owners and carriers and which therefore in a certain sense take on the character of international transport.

As to the applicability of the Convention provisions depending on the nature of the documents which constitute evidence of the contract of carriage of goods by sea, we believe that the arrangements provided for in article 1 (b) of the 1924 Brussels Convention on bills of lading, whereby the Convention is valid in respect of carriage covered by a bill of lading or similar document, does not cause any practical difficulties.

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UNITED KINGDOM

1. Delay

1. The United Kingdom does not consider that the wording of the existing Hague Rules precludes claims for damage resulting from delay.

2. As a matter of English law there is no difference between carriage by sea and any other contract regarding loss or damage caused by delay. However, the factual circumstances are such that claims for delay are rarely successful. The position was perhaps most clearly expressed by Collins M. R. in Dunn v. Bucknall (1902 2 K.B.614):

"There can be no absolute peremptory rule taking voyages by sea out of the principles which regulate the measure of damages on breach of other contracts. It is only because the possible length of voyages, and the consequent uncertainty as to the times of arrival, may in many cases eliminate the supposition of any reasonable expectation as to the state of the market at the time of arrival that, as a general rule, damages for loss of market by late delivery are not recoverable from the carrier by sea ... Wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of a land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases."

3. It is therefore perhaps surprising, in view of the increasing exactness of the shipping industry particularly in the container trade, that there has been no dramatic increase in actions for delay. The answer is probably that the goods normally carried in the containers are not sold in a "market" in the sense that the carrier should have reasonably contemplated the damage flowing from his breach (Czarnikow, Ltd. v. Koufos 1969 1 A.C.350). Thus, in the case of private subsale, the carrier has no knowledge of its terms and, generally, no knowledge of the damage that may flow from delay. It is this consistency with the rule in Hadley v. Baxendale that, as a general matter, protects the carrier by sea from liability.

4. The United Kingdom has no objection to the carrier being made liable for damage due to delay on the same grounds that he is made liable for physical loss or damage. However, the United Kingdom wishes to emphasize that this liability would be similar to liability for such loss or damage in that a shipper will still have to prove his damages in the manner referred to in paragraphs 1 and 2 above. To ensure this result it might perhaps be desirable to speak of "liability for damage resulting from delay" rather than just "liability for delay" (cf. Article 23 (5) of the CMR Convention).

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5. The United Kingdom does not think it necessary to have a special limitation figure for delay, as is the case in the CMR and CIM Conventions. Nor is it considered necessary to attempt to define delay.

2. Deck cargo

1. The United Kingdom considers that the new Article which sets out the basic liability of the carrier would be sufficient to deal with problems of loss arising from carriage on deck both from the carrier's point of view and the shipper's. Accordingly the United Kingdom would be prepared to see no reference to deck cargo in the revised Rules.

2. Furthermore the United Kingdom considers a provision such as paragraphs 25.4 (a)-(c) of A/CN.9/63 unnecessary, since it will be for the carrier to show, if damage occurs to deck cargo, that such damage was not the result of his fault - and such fault could include stowing on deck in circumstances when this was not usual. If such provision were included it would be appropriate to allow an exemption for loss or damage resulting from the risks inherent in carriage on deck where there was prior agreement that the goods should be so carried. The United Kingdom would be opposed to any proposal such as that contained in subparagraph (e) of the same paragraph.

3. As regards the proposal in subparagraph (d) of the same paragraph, and also in paragraph 2 of foot-note 19 to A/CN.9/63, the United Kingdom feels that this can be discussed under the topic of reserve clauses and guarantees.

3. Live animals

The United Kingdom remains firmly of the view that these should not be included in the Rules.

4. Scope of application of convention

(a) GEOGRAPHICAL APPLICABILITY

The United Kingdom is satisfied with Article 5 in the 1968 Brussels Protocol (which replaced Article 10 of the 1924 definition), and considers it should remain. The United Kingdom could accept the 1924 solution; it would oppose any extension of the 1968 definition to include the port of discharge as a place creating mandatory application of the Rules.

5. Article 1 (b) scope of application of convention

1. Whilst the United Kingdom recognizes the validity of extending the Hague Rules to cover other contracts of carriage than those evidenced by bills of lading or other similar documents of title, it considers that such a provision, without

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qualification, might be unduly rigid, to the disadvantage of shippers as well as shipowners. Examples of the sort of case where both parties may prefer not to apply the Hague Rules are:

(a) Where goods of no commercial value, but of a value which might be difficult to quantify, are carried.

(b) Where experimental forms of packing are used. (A case in point was a recently introduced form of refrigeration for carriage of meat from New Zealand.)

(c) Where the special nature of the cargo makes application of the Hague Rules undesirable. (A recent case involved the carriage of highly miscellaneous goods which had been adjudged by a Prize Court. The cost of surveying the goods in order to identify them for the purpose of issuing a Bill of Lading would have been out of proportion to the value of the goods. It was therefore agreed that they should be carried at the risk of the cargo Owner.)

The above cases are merely examples: the essence of the problem is that the "specialness" of the contracts concerned makes them difficult to categorize.

2. It may be noted that Article VI of the present Hague Rules recognizes these special cases. In an attempt to provide a simpler, and narrower, text, the following wording is put forward:

"1. These Rules shall apply to all contracts for the carriage of goods by sea where a bill of lading or similar document of title is issued.

"2. These rules shall apply to all other contracts for the carriage of goods by sea unless the parties have expressly agreed otherwise and a statement to that effect is inserted in the document evidencing the contract of carriage.

"3. These Rules shall not apply to charterparties."

3. It is thought that the qualifications in paragraph 2 of the above text prevent any abuse of the proposal.

UNITED STATES

1. Scope of Application of the Convention

Article X of the Hague Rules simply states: "The provisions of this convention shall apply to all bills of lading issued in any of the contracting States." By the terms of the U.S. Carriage of Goods by Sea Act the provisions of the domestic law are not to apply to domestic transport but only to foreign commerce. 46 U.S.C. 1300 states: "... every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States in foreign trade shall have effect subject to the provisions of this Act." (Emphasis added.) Because of the apparent conflict between these provisions the reservation entered by the United States upon ratification of the Hague Rules Convention requires that the contracting State limitation be ineffective in United States courts.

Despite the great number of ratifications and adhesions to the Hague Rules there has never been universal acceptance. Many nations have adopted the liability scheme and much of the actual language of the Hague Rules without becoming contracting States. Furthermore the process of ratification may be quite lengthy; accordingly, it is submitted that Article X of the Hague Rules is unsatisfactory and should be deleted from the Revised Rules.

Article 5 of the unratified Brussels Protocol of 1968 provides for replacement of Article X with the following:

"The provisions of this Convention shall apply to every Bill of Lading relating to the carriage of goods between ports in two different states if:

- a - The Bill of Lading is issued in a contracting state or
- b - The carriage is from a port in a contracting state or
- c - The contract contained in or evidenced by the Bill of Lading provides that the rules of this convention or legislation of any state giving effect to them are to govern the contract whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.

"Each contracting state shall apply the provisions of this Convention to the Bills of Lading mentioned above. This article shall not prevent a contracting state from applying the Rules of this Convention to Bills of Lading not included in the preceding paragraphs."

Our domestic legislation gives the broadest reach for domestic cargo interests in its application to carriage of goods to or from the United States and we would support a further expansion of the application of the Convention in that direction. If such a solution should not be generally acceptable, however,

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it is believed that the text of Article 5 of the Brussels Protocol (set out in the preceding paragraph) should be adopted to replace Article X of the Hague Rules.

2. The Scope of the Convention

At the present time the Hague Rules are designed to cover the problems of ocean transport financed through documentary credits - a method of procedure which began in the nineteenth century and reached its greatest development in the middle years of the twentieth. The existing limitations of the Convention are found in the "tackle to tackle" rule of Art. 1 (e) and the provisions of Art. 1 (b) limiting the applicability to the contract of carriage covered by a bill of lading or to bills of lading issued under a charter party but negotiated to a third party. The Working Group has agreed that the coverage of the Convention must be expanded beyond the "tackle to tackle" period and it is believed that a further expansion of the coverage of the Convention to the various types of informal documents which are now found in maritime transport would be appropriate. With respect to those shipments for which no actual documentation is issued because the shipment is tracked through computer tapes the present requirement is an unnecessary complication. In addition there is the problem of common carriage under charter parties involving an abuse of the charter party exceptions in Art. V and I (b) of the Hague Rules. See Jefferson Chemical Co. v. M/T Grena, 413 F2d 864 (5th Cir., 1969) where the court, after examining the nature of the carrier operations and extent of use by the shipper under a charter party, found that the shipowner actually provided common carriage and subjected the transaction to the terms of COGSA, thereby invalidating the exculpatory clauses.

Accordingly it is submitted that the scope of the revised convention be "carriage of goods" rather than carriage of goods by sea or bills of lading or contracts of carriage. This will permit maximum utilization of the provisions. Nevertheless, a carefully phrased exception for true private carriage under charter parties should be retained. Language to accomplish this might be:

"The carriage of goods governed by this Convention does not include carriage under charter whereby the entire carrying capacity or a very substantial portion of such capacity is employed for a stated period of time or for a particular voyage. Nevertheless, this Convention shall apply to the carriage of goods for which the vessel is under charter from the moment at which a bill of lading or similar document issued under or pursuant to a charter party regulates the relations between a carrier and a holder of the same."

3. Delay Damages

Prior to the partial codification of the law on carriage of goods by sea in the Harter Act of 1893 the carrier was held liable for physical damage to cargo caused by delay. The legal doctrine used to justify this liability was the doctrine of Deviation, so that the carrier became liable for loss caused by

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delays in the beginning of the voyage and during the continuation thereof. This liability for deviation might not be excused by exculpatory clauses in the bill of lading since the bill of lading itself was ousted by the deviation. S.S. Willdomino v. Citro Chemical Co., 272 U.S. 718 (1927). See also The Caledonia, 157 U.S. 124 (1895) where the Supreme Court held the carrier liable for physical deterioration of live animals (cattle) caused by a short supply of food for them due to delay of the voyage by the unseaworthiness of the ship.

The point at issue in delay cases before and after the Harter Act was the validity of a "liberties" clause exculpating the carrier from liability to the shipper owing to delays from various types of incidents. Two grounds of attack have been employed successfully against clauses exculpating the carrier from delay damage: (1) Construing the clause so as not to apply to the case, as in Florida Grain and Elevator Co., v. U.S.S.B., 3 F2d 314 (S.D. Fla. 1924); The Hermosa, 57 F2d 20 (9th Cir. 1932); (2) avoiding the clause because ousted by deviation. General Hide and Skin v. U.S., 24 F2d 736 (E.D.N.Y. 1928; Kemsley Millbourn and Co. Ltd. v. U.S., 19 F2d 441 (2d Cir. 1927).

Since enactment of COGSA in 1936, the problem has been whether delay is simply deviation which must be an unreasonable deviation in order to justify any liability, the liability itself being limited to the \$500 Per Package amount of COGSA 1304 (5). At the present time there is a difference of opinion between the circuits. In Atlantic Mutual Ins. Co. v. Poseidon Schiffahrt, 313 F2d 872 (7th Cir. 1963) the court found the delay to be an unreasonable deviation but limited the amount of recovery to the Package Doctrine limit. The Court of Appeals for the Second Circuit, however, has indicated that the type of deviation caused by on-deck stowage of cargo not designated as such will oust the bill of lading so as to deny the carrier the protection of the \$500 limit. Encyclopedia Britannica, Inc. v. SS Hong Kong Producer, 422 F2d 7 (2d Cir. 1969).

There remain, however, problems connected with the type of damage caused by delay: physical or economic.

4. Physical Damage to Cargo

When the goods have been damaged physically by decay, rot or other types of deterioration by reason of delays in the voyage or the commencement of the voyage, the shipper can state a prima facie case for carrier liability and the carrier must then attempt to prove one of the defences in COGSA 1304. Recovery for physical damage has long been upheld. SS Willdomino v. Citro Chemical Co., 272 U.S. 718 (1927). See also The Citta di Messina, 169 F. 472 (S.D.N.Y. 1909); The Ile De Sumatra, 169 F. 472 (S.D.N.Y. 1922); U.S.S.B. v. Texas Star Flour Mills, 12 F2d 9 (5th Cir. 1926); The Hermosa, 57 F2d 20 (9th Cir. 1932); Romano v. West Indies Fruit and SS Co., 151 F2d 727 (5th Cir. 1945); Wayne v. Inland Water Ways Corp., 92 F. Supp. 276 (S.D. Ill. 1950); General Foods Corp. v. U.S., 104 F. Supp. 629 (S.D.N.Y. 1952); Norjac Trading Corp. v. The Mathilda Thorden, 173 F. Supp. 23 (E.D. Pa. 1959); Karobi Lumber Co. v. SS Norco, 249 F. Supp. 324 (S.D. Ala. 1966).

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5. Economic or Pecuniary Loss from Delay

In tort law the public policy which permits the recovery of loss of money alone or loss of profits alone or of market value alone in cases of intentional tort "those actions arising out of the Writ of Trespass), deceit, defamation and interference with contract or prospective advantage is not present in cases of negligent damage. (Petition of Kinsman Transit Co., 388 F2d 821 (2d Cir. 1968); Trans World Airlines Inc. v. Curtiss-Wright Corp., 1 Misc. 2d 477, 148 N.Y.S. 2d 284 (1955). At best this is a doctrine not based on the inherent requirements of the risk theory of negligence, but rather it is a policy choice to limit the liability of defendants in cases where the proof is likely to be inconclusive.

In contract law the courts have been guided by the principle from English common law that pecuniary loss from breach of contract may not be recovered unless such consequences are foreseen by the defendant before or at the time of contracting. Hadley v. Baxendale, 9 Exch. 341 (1854). Recovery of pecuniary loss damage therefore involves questions of fact whether the carrier has knowledge or is put on notice of special needs of the shipper so that loss to the shipper would be foreseeable if the cargo is delayed.

Accordingly, some courts have denied recovery for pecuniary loss caused by delay. U.S.S.B. v. Pensacola Lumber and Timber Co., 290 Fed. 358 (5th Cir. 1923); A/S Stavangeren v. Hubbard Zemurray SS Co., 250 Fed. 67 (5th Cir. 1918). In the latter case the court said:

"The damages resulting by reason of the existence of such special circumstances, of which the party sought to be charged was not made aware, are disallowed, not because they are merely consequential or remote, but because they cannot fairly be considered as having been within the contemplation of the parties at the time of entering into the contract." (250 Fed. 70)

However, see General Hide and Skin Corp. v. U.S. 24 F2d 736 (E.D.N.Y. 1928) for a recovery of decline in market value accompanying physical damage occurring through other causes. Further, there is language in Commercio Transito Internazionale Ltd. v. Lykes Bros. S.S. Co., 243 F2d 683 (2d Cir. 1957) from which it can be argued that there is a cause of action for loss of market due to delay. This case turned on the question of the application of the one-year statute of limitations of COGSA 1303 (4).

It might be noted in passing that in land carriage the carrier is liable for both physical damage and economic loss due to delay, under both the common law and the Carmack Amendment. See Great Atlantic and Pacific Tea Co. v. Atchison, Topeka and Santa Fe Ry. Co., 333 F2d 705 (5th Cir. 1961) Cert. den 379 U.S. 967.

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Recommendation:

It is considered that under the revision of the Hague Rules approved at the Fourth Session of the UNCITRAL Working Group on Shipping Legislation in October 1969 the shipper may state a claim for physical damages or economic loss due to delay. That language provides as follows:

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

The question then becomes whether an exception should be enacted removing either physical damage due to delay or economic loss due to delay from the coverage of the Convention - and the unit limitation rule. In view of the definite nature of our domestic law the United States is not prepared to accept the position that physical damages due to delay should be excluded. The United States would support liability for economic loss from delay provided that adequate provision is included to ensure that such loss is insurable.

ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE
(SECRETARIAT)

1. Liability of the carrier for delay. In this connexion it would be appreciated if, in making your comments and suggestions on the subject, you would indicate whether you agree with the suggestion that the Convention should contain a provision specifically directed to the carrier's liability for delay and, if so, the proposed content of such a provision.

The law at present prevailing will be considered, and thereafter comments will be made as to modification which may be desirable.

The subject may be considered under the following heads:

1. Parties concerned and existing bases of liability
2. What amounts to delay
3. Defences available to the carrier.

1. Parties concerned and existing bases of liability

- (i) Contract:

Where contractual stipulations exist between the carrier and another party under which the carrier is under a duty to perform by a certain time, he will prima facie be liable to the other party if he delays. Loss or damage need not be physical loss of or damage to the goods. 1/ The ordinary principles of the law of contract, including remoteness of damage, will apply. Normally a term is implied in the contract of affreightment that the voyage will be prosecuted without delay in all its stages, but the term may be express or implied. It has been held, after the passing of the Bills of Lading Act, 1855, 2/ that an indorsee of the bill can also sue for delay. 3/ Although the implication of a term against delay is well settled for English law yet an argument can always be advanced that in the particular circumstances no implication should be made, and some uncertainty generally surrounds the question as to when a term will be implied in a contract.

- (ii) Tort or Delict:

The carrier would be liable to any person to whom he owes a duty not to delay under the law of tort or delict. No difference in liability is likely to

1/ G. H. Renton and Co. v. Palmyrah Trading Corp. of Panama (1957) A.C. 149 at 166, 169 and 173.

2/ Carver, Carriage by Sea, 11th ed. para. 749.

3/ Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co. (1924) 1 K.B. 675. However, there is some suggestion that the special facts of that case operated to give the indorsee the right to sue, per Bankes L.J. at pp. 569-570.

result where a person with whom the carrier has entered into a contract of affreightment chooses to sue in tort. On the other hand, persons with whom the carrier is not in contractual relations may only have this remedy, and in such a case the carrier may not be able to rely on exemption clauses in the contract relating to delay. The liability will normally depend on proof of negligence by the carrier.

(iii) Statutory Liability: 4/

It is uncertain whether there is a liability under the Convention in case of delay. It has been stated in relation to bills of lading that "Prolonged and unjustified delay would render the carrier liable, as in such a case the receiver would accuse him of not having "Properly and carefully" executed the contract of carriage". 5/ This would appear to depend on article 3(2) of the Convention which states that "subject to the provisions of article 4, the carrier shall properly and carefully load, handle, store, carry, keep, care for, and discharge the goods carried". 6/ This view, if correct, has an important bearing on the question of liability, since a carrier cannot in terms of article 3 (8) exempt himself from liability in respect of the duties imposed by article 3. It is submitted, however, that on a consideration of the entire clause, the view may be taken that the duty imposed on the carrier by article 3 (2) to carry properly and carefully relates to the physical mode of carriage (e.g. in a suitably designed ship), and not the timely performance of the carriage. Some English judicial dicta support this view. 7/

It is suggested that sufficient grounds exist, both because of the importance of the topic and the uncertainty relating to it in some jurisdictions, for making specific provision in the Convention. Although general rules have already been

4/ This phrase is used in a loose sense. Strictly speaking the Convention imposes duties within the context of the contract of carriage, and the liability is based both on the Convention and the Contract.

5/ S. Dor, "Bills of Lading clauses and the International Convention of Brussels, 1924 (Hague Rules)", at p. 58.

6/ The words underlined in article 3 (2) quoted have been thought to impose liability for loss caused by deviation on the basis that by deviating the carrier is not properly and carefully carrying the goods. This interpretation would also be applicable to delay by the carrier, vide A/CN.9/76/Add.1, para. 4, p. 51; Reply of Norway, A/CN.9/WG.III/WP.10/Add.1, at 104, which however suggests that the duty of proper carriage should be expressed in a more explicit form to make clear that it includes carriage without deviation.

7/ Properly carrying means "in accordance with a sound system"; per Viscount Kilmuir in *G. H. Renton v. Palmyrah Trading Corp. of Panama* (1957) A.C. 149 at 166; "physical incidents of carriage", per Lord Morton of Henryton at p. 170.

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adopted by the Working Group in regard to carrier liability, 8/ it is suggested they do not deal adequately with the case of delay for the following reasons:

(1) The general rule already adopted confines liability to the case of "loss of or damage to goods carried". Delay might cause other types of loss also deserve compensation (e.g. loss in the market price occurring between the due date and the actual date of arrival, although there is no loss of or damage to the goods.) 9/

(2) The general rule already adopted only comes into operation upon actual carriage of the goods and after the goods are in the carrier's charge. But delay, which may be a legitimate ground of complaint, may occur in arrival of the vessel for loading, which may prevent the carriage.

In the imposition of liability, the following matters may be considered:

(1) On a functional basis, it may be asked whether the carrier should be strictly liable, or on the basis of fault. It would appear that the attempt to make the carrier strictly liable (in the sense that he would be liable regardless of his responsibility for the delay) would be unacceptable as imposing too harsh a standard. Further, it is likely to result in an increase in freight rates. On the other hand, it has been shown that regulating the burden of proof can have an effect on the standard of liability. 10/ It has also been argued that in the matter of caring for the cargo, the imposition of strict liability would not significantly reduce the administrative costs of insurance, 11/ and these arguments also appear to apply in the case of delay. An approach based on "fault" would also harmonize with that already adopted by the Working Group in the case of loss of or damage to goods. 12/

(2) At present, the Convention imposes duties on the carrier towards the holder for the time being of the negotiable document of title. But if, as is suggested, non-negotiable documents are brought within the scope of the Convention, consignees may be left in such cases with a doubtful action in tort, and their status to sue may need consideration.

(3) While the Working Group has made a decision on the burden of proof on the carrier in relation to the avoidance of liability in respect of loss of or damage to the goods, it does not appear to have reached a conclusion in regard to

8/ A/CN.9/74, para. 28

9/ A/CN.9/76, para. 46.

10/ A/CN.9/WG.III/WP.4 (Vol. iii), para. 260.

11/ Ibid., paras. 190-204.

12/ "The carrier shall be liable for all loss of or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [] , unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences" - A/CN.9/74, para. 28.

the burden of proof on the claimant, although this has been discussed. ^{13/} Subject to the question of the status of the claimant mentioned above, the suggestions made appear to be acceptable with modifications suitable to the case of delay.

(4) In the case of loss of or damage to goods, the compensable loss has been defined and limited by the Working Group in terms of such loss or damage. ^{14/} It has been suggested above that this limitation, which is not presently adopted in English law, is inappropriate to delay. If there is to be no such limitation, it may be considered whether a rule relating to remoteness of damage should be inserted in the interests of standardization of liability.

2. What amounts to delay

It is suggested that it is impractical to attempt to define the circumstances that amount to delay entailing liability. What will amount to late untimely performance will depend on the facts of each case, and the contract of affreightment in question. It is unlikely that the addition of a qualifying adjective to indicate when delay will entail liability (e.g. "unreasonable" delay) will be of much assistance: the phrase "unreasonable deviation" in article 4 (4) has led to uncertainty. ^{15/} In every case the Court will have to determine whether the particular delay is such as to entail liability. ^{16/} The limitation on liability sought to be created by the insertion of qualifying adjectives may instead be clarified, and taken into account in formulating a defence. ^{17/} The

^{13/} The suggestion in A/CN.9/74, Annex 1, alternative proposal A, article 4 (2), and A/CN.9/WG.III/WP.4 (Vol. iii) para. 269, at p. 116 states that "The burden of proof shall be on the shipper to show: that the claimant is the owner of the goods or is otherwise entitled to make the claim." This is perhaps an attempt to enable a contracting party to sue for loss suffered by a third party. If this is so it is suggested that the use of the word claimant is unhappy, since presumably the shipper is making the claim. Further, if the claimant is entitled to make the claim, there seems to be no reason for the shipper to intervene. For a full discussion, see A/CN.9/WG.III/WP.4 (Vol. III), paras. 263-264, 269.

^{14/} A/CN.9/74, para. 28, p. 10.

^{15/} TD/B/C/ISL/6/Rev.1, para. 258; Carver, Carriage by Sea, 11th ed., para. 296.

^{16/} It may be noted that the Warsaw Convention, while imposing liability for delay, does not seek to define it: article 19 of the Convention for the Implication of certain Rules relating to International Transportation by Air, 1929.

^{17/} Thus, in *Stag Line v. Foscolo Mango* (1932) A.C.329 views were expressed that a deviation might be reasonable if (i) it was to avoid an imminent peril, (ii) was in the joint-interests of cargo-owner and ship or (iii) would be reasonably contemplated by both cargo-owner and ship-owner.

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extent of the delay, and its resulting consequences, may affect the remedies available to the other party.

Delay and deviation

One aspect which requires consideration is the statement often made in authoritative sources that "delay may amount to deviation". 18/ One important consequence of equating delay in certain circumstances to deviation is to attract the heavy liability imposed in English law for deviation. If a carrier deviates, the shipper is entitled to treat the contract as at an end. The carrier will be liable for any loss or damage which the goods may have sustained on the footing of a common carrier, i.e. he will be liable for any loss or damage sustained by the shipper, unless he can show that

- (a) it occurred as a result of an act of God; or
- (b) it occurred as a result of action by the King's enemies; or
- (c) it occurred owing to the inherent vice of the goods, and that the loss or damage would have equally occurred but for such deviation. 19/

It is suggested that delay and deviation should be kept apart, for the following reasons:

(1) Delay and deviation are separable concepts. Delay consists in late untimely performance of the voyage. Deviation consists of conducting the voyage by a route which is not the direct or customary route, or not proceeding to the agreed terminal port. Thus there can be delay without deviation and deviation without delay.

The present trend appears to be to confine deviation to geographical deviation, and the practice of making other breaches of contract "amount" to deviation appears to be viewed with disfavour. 20/

(2) The current suggestion of the Working Group is to dispense entirely with reference to deviation, on the basis that the general rule on responsibility and

18/ Carver, Carriage by Sea, eleventh ed., para. 743; Scrutton on Charter parties seventeenth ed., p. 260, "... and it appears to me that the result of those two unreasonable acts is that there is sufficient delay to amount to deviation; ..." per Scrutton L.J. in Brandt v. Liverpool, Brazil and River Plate Navigation Co. (1924) 1 K.B. 575 also per Atkin L.J. at p. 601.

19/ Scrutton on Charterparties, seventeenth ed. pp. 260-261, Carver Carriage by Sea, eleventh ed., para. 734 et. seq.

20/ A/CN.9/76, paras. 50-53.

burden of proof, as agreed to by the Working Group at the fourth session, would adequately cover the relevant questions. 21/

(3) The reason for equating the two is to attract to cases of delay the stringent liability described above which is imposed on the carrier in case of deviation. But there is considerable doubt as to whether this form of liability is desirable at the present time even in regard to deviation.

The reason for its imposition in the case of deviation appears to be that formerly a deviation resulted in the marine insurance not applying to the goods after the deviation. 22/ But this no longer applies under the "held covered" clauses frequently inserted in marine policies today. Nor does it appear to be consonant with a fair balancing of interests to hold the carrier liable for loss causally unconnected with the delay. 23/ While it may be desirable to provide for cases of serious breaches of contract, the view that these cases should be covered by other rules is preferable. 24/

Delay and transshipment

The validity of transshipment either under bills of lading containing a general liberty clause to transship, or under bills of lading specifically indicating transshipment on the vessel of another carrier, does not appear to be seriously disputed. The shipper, or consignee, is however faced with serious difficulties of a legal and practical nature as a result of transshipment. 25/ There appears to be nothing special to delay caused by transshipment to single it out for treatment outside the general treatment of loss caused by transshipment. Agreement has been reached that where the bill of lading on its face does not indicate an on-carrier, the contracting carrier is to be liable for all loss occurring on the

21/ A/CN.9/76, paras. 54-55. The general rules of the carrier's liability adopted by the Working Group are restricted to "loss of or damage to goods". (A/CN.9/74, para. 28) Apart from such loss, deviation may cause other types of financial loss, e.g. (1) Goods are shipped from Port A to Port B in State B. The vessel deviates and touches at Port C in State C, but arrives without delay at Port B. Because of hostility between States B and C, the dockers at Port B refuse to unload the cargo; (2) Port C in the above example is suspected as a source of infection of contagious disease. The vessel is quarantined at Port B, and when the goods are finally unloaded the market has fallen.

It may be considered whether there should not be liability for deviation in these cases.

22/ Gilmore and Black, "The Law of Admiralty" (1957), p. 59.

23/ The reply of the United Kingdom, while noting the traditional effect of deviation in English law on the contract, does not commit itself on its desirability. (A/CN.9/WG.III/WP.10/Add.2, p. 19)

24/ A/CN.9/76, para. 52.

25/ A/CN.9/76/Add.1, paras. 15-19 contain a clear summary.

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voyage, and this formulation would cover loss caused by delay. 26/ The general solution to be later adopted in relation to liability for loss caused by transshipment where the on-carrier is indicated should also deal with loss caused by delay.

3. Defences available to the carrier

The defences at present available to the carrier in the case of delay appear to be the following:

(a) The catalogue of exceptions

Under the Convention where any of the causes of loss or damage specified in article 4 (1), 4 (2), or 4 (4) causes delay and consequent loss, the carrier will be under no liability except in the cases and under the circumstances specified therein. In such cases the delay is only a link in the chain of causation where loss has arisen from an excepted cause. 27/ It has been pointed out that the present formulation of the Working Group on the question of liability for loss of or damage to the goods is not satisfactory where delay is in question.

(b) Exemption clauses

There appears at present to be nothing to prevent a carrier from exempting himself from liability for loss by an appropriate exemption clause, except where such exemption is rendered void by the Convention in a case where it applies. 28/ The qualifications which need to be made to this statement appear to be as follows:

(a) It will always be a matter of construction whether an exemption clause is apt to cover the occurrence in question. Such exemption clauses are construed restrictively. 29/

26/ A/CN.9/76, page 19, article D.

27/ S. Dor, op. cit., p. 59.

28/ One such instance is where the carrier by agreement seeks to limit his liability for delay to an extent less than £100 per unit or package, since the implication of article 4 (5), para. 3 is that no maximum less than £100 can be fixed by agreement. S. Dor. op. cit. p 165: Scrutton on Charterparties, p. 419. However, the statement that "Some bills of lading expressly provide that in the event of a delay in delivery of the goods resulting from a fault of the carrier, the latter shall be required to indemnify the shipper or the holder of the bills of lading for his delay only if it exceeds a certain time limit. Such a clause of course, must be considered null and void, for it contravenes the provisions of article 3, para. 8, which does not permit the carrier to lessen his liability as incurred under the Convention" (S. Dor. op. cit. p. 165) is more doubtful, as the Convention does not appear to deal with the duty of the carrier not to delay.

29/ Carver, Carriage by Sea, eleventh ed. para. 719 (with respect to deviation; but it is submitted the same principle will apply to delay).

(b) An exemption clause "purporting to enable the shipowners to delay indefinitely the performance of the contract voyage simply because they choose to do so" would be void. 30/

It is suggested that the complete freedom presently given to the carrier to exempt himself by an appropriate clause from liability for loss caused by delay does not strike a proper balance between the interests of shippers and carriers.

(c) Justification

The English common law presently gives the carrier several excuses for delay. These are:

- (i) Necessity, i.e. where delay is caused involuntarily. 31/
- (ii) The threat of imminent danger to the ship or cargo (e.g. from pirates, hostile capture). 32/
- (iii) Delay in saving or attempting to save life. 33/
- (iv) Delay caused by the default of the shipper (e.g. delay in loading the cargo).
- (v) Delay necessitated by unseaworthiness. 34/

Generally speaking, it would appear that all excuses available under the common law in case of deviation would apply in the case of delay, and many of these cases are already covered by the catalogue of exceptions of the Convention.

It is suggested that a sole defence on the same terms as that available in the case of loss of or damage to goods (i.e. proof of absence of default on the part of the carrier, his servants and agents, the burden of proving which rests on him) could replace the defences described above. This should be supplemented by

30/ Per Jenkins L. J. *Renton and Co. v. Palmyrah Trading Corp. of Panama* (1956) 1 Q.B. 462 at 502, cited with approval in the same case on appeal to the House of Lords (1957) A.C. 149 at 164, at 172, and at 174. If this statement is an opinion that a substantive rule of law exists that a party cannot by an exemption clause exempt himself from liability for breach of a fundamental term, then it will have to be reconsidered in the light of the decision in *Suisse Atlantique Societe d'Armement Maritime S.A. v. N.Y. Rotterdamsche Kolen Centrale* (1967) 1 A.C. 361.

31/ Scrutton on Charterparties, seventeenth ed. p. 259.

32/ *Ibid.*, p. 266, *et seq.*

33/ On an analogy with deviation; Carver, *Carriage by Sea*, eleventh ed. para. 717.

34/ On an analogy with deviation, Carver, *Carriage by Sea*, eleventh ed. para. 716.

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specific reference to the case of delay which ensues by an attempt to save life or property at sea. Special provision is also made where delay for the purpose of saving life or property results in financial gain to the carrier.

Proposals

(These leave out of account questions arising from transshipment.)

1. The carrier shall be liable for all loss or damage caused by delay, whether the delay consists of the late arrival of the vessel for the purpose of performing the contract of carriage, or late performance of the contract of carriage.
2. The carrier shall be so liable to any lawful holder or transferee of a bill of lading or other similar document of title, or to anyone succeeding to the rights of such a person, and to all persons to whom loss or damage could reasonably be foreseen at the time the delay occurred.7
3. (a) The carrier shall not be liable where he proves that the delay resulted from measures to save life or from reasonable measures to save property at sea.
7 Provided that where such measures to save life or property at sea result in financial gain to the carrier, the carrier shall pay to any person or persons who would otherwise be entitled to claim compensation from the carrier for loss or damage caused by such delay a sum not exceeding one half of the financial gain so accruing, and in any event not exceeding the loss or damage actually suffered by such person.7

(b) The carrier shall not be liable where he proves that he, his servants and agents, took all measures that could reasonably be required to avoid the delay and its consequences.

7(c) The carrier shall not be liable for any loss or damage which could not reasonably be foreseen at the time the delay occurred as likely to result from the delay.7
4. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce delay resulting in any loss or damage, the carrier shall be liable only for that portion of the loss or damage attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss or damage not attributable thereto.
5. The burden of proof shall be on the claimant to establish
 - (a) His status to maintain the action
 - (b) Delay in terms of the contract of carriage, and
 - (c) The monetary value of the loss or damage.

2 (a)

One question with respect to the scope of the Convention relates to the provisions on geographical applicability set forth in article 10 of the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 25 August 1924) and in article 5 of the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1968). (See A/CN.9/WG.III/R.1, paras 9-10).

It would be appreciated if, in making comments and suggestions on the subject, you would indicate whether either of these provisions is satisfactory and, if not, the proposed content of a provision dealing with this question.

(i) Article 10 as modified by article 5 of the 1968 Brussels Protocol does not make the Convention applicable to a bill of lading where the carriage is to a port in a Contracting State, unless either subparagraphs (a) or (c) apply. However, the last sentence of the modified article 10 permits a Contracting State to apply the Convention even to such a bill of lading. It is suggested that the application of the Convention may be made mandatory to such "inward" bills of lading. Where goods are shipped to the ports of a Contracting State, the questions relating to the contract of carriage will generally arise between the consignee in the Contracting State and the carrier. The Contracting State would therefore have a legitimate interest in seeing that such relationship is regulated by the Convention.

(ii) The opening words of article 10 as modified by article 5 of the 1968 Brussels Protocol limit the applicability of the Convention to "carriage of goods between ports in two different States". Through bills of lading, however, may relate to the carriage of goods from one inland town to another in different States, or from a port to an inland town, or from an inland town to a port. It might be argued that in such cases the Convention cannot apply even where sea carriage is involved. Under the earlier formulation of article 10 the Convention was construed as applicable to the sea carriage involved. Considering the commercial advantages involved in the practice of having a single through bill of lading, this wording in the Protocol may be reconsidered.

(iii) Even where the carriage is entirely between ports, the question has been raised as to the applicability of the Convention when the conditions for its applicability are satisfied at the port of origin, but the goods are transshipped at another port, at which point the conditions for applicability would not be satisfied, if the carriage was deemed to originate there. ¹ The converse case i.e. where the Convention is inapplicable at the port of origin but applicable at the port of transshipment, can also be imagined. Transshipment can be under a general liberty clause under a bill of lading, or under a bill of lading specifically

¹/ A/CN.9/76/Add.1, paras. 13 and 19.

indicating trans-shipment at a specific port by an on-carrier. Under whichever type of clause the trans-shipment occurs it was generally agreed at the Working Group that the liability of both the contracting carrier and the on-carrier should be subject to the Convention, 2/ on the tacit assumption that the Convention was applicable at the commencement of the carriage to the contractual carrier. There has been a difference of view as to whether, in the case where the on-carrier is specifically designated, the contractual carrier can avoid liability for the period when the goods are in the charge of the on-carrier. But it would appear that even on that view, it is conceded that the on-carrier who is then solely liable is to be subject to the Convention. 3/ A single legal régime for the entire voyage, despite carriage by a number of carriers, is desirable, particularly from the point of view of the shipper. If this view is accepted, it is suggested that specific provision be made immediately after sub-paragraph (c), on the lines of the following proposal:

"Where this Convention applies by reason of the above provisions to a bill of lading, it shall continue to apply to the carriage by sea of the goods covered by such bill of lading until their discharge at the final port of destination contemplated in the carriage, notwithstanding their transshipment, the issue of a different bill of lading, or their carriage by a carrier different from the original contracting carrier."

(iv) By reason of the definition of "contract of carriage" in article 1 (b), the Convention is applicable to contracts of carriage covered by a bill of lading "or other similar document of title". However, article 10 mentions bills of lading only. It is suggested that it should also apply where the document involved is a "similar document of title".

(v) The sentence "Each Contracting State shall apply the provisions of this Convention to the bills of lading mentioned above" appears to perform a double duty. It imposes an obligation on contracting states to see that their domestic law giving effect to the Convention is applicable to bills of lading in the three cases set out in sub-paragraphs (a), (b) and (c). It also appears to create a mandatory choice of law rule which the courts of the contracting states must observe. Considering the diverse interpretations given to the present article 10, 4/ the following alternative wording may be considered:

"Each Contracting State shall make applicable, and the courts of each Contracting State shall apply, the provisions of this Convention to the bills of lading mentioned above."

(vi) The last sentence of the modified article 10 states that "This article shall not prevent a contracting state from applying the Rules of this Convention to bills of lading not included in the preceding paragraphs". If this liberty used

2/ A/CN.9/76, paras. 37, 38 and 39.

3/ A/CN.9/76, para. 37.

4/ Yiannopoulos "Conflict of Laws and Unification of Law by International Convention: the experience of the Brussels Convention of 1924" 21 Louisiana Law Review 553 at 577.

by contracting States, different national laws may have very different ambits of application, which may produce some uncertainty, e.g. the most convenient fora for litigation regarding a contract of carriage are contracting States C and D. Under the law of C, the Convention applies to the bill of lading, but not under the law of D. Results will differ depending on the forum chosen.

It has been shown that the Convention is presently reproduced in diverse forms in national legislation. 5/ It may be considered therefore whether this clause should not be deleted.

2 (b)

A second question with respect to the scope of the Convention is presented by article 1 (6) of the Brussels Convention of 1924 which states: "Contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title ..." Questions have been raised regarding the applicability of the Convention to ocean carriage under informal documents (which may be similar to air-way bills or road consignment notes) that evidence a contract of carriage but may not be regarded as a "document of title". The question has also been raised as to the applicability of the Convention to ocean carriage when no document is issued to evidence the contract (see A/CN.9/WG.III/R.1, para. 12).

It would be appreciated if, in making your comments and suggestions on the subject, you would indicate the extent to which ocean carriage, under the conditions described above, should be governed by the Convention and the content of any provisions which should be considered in this regard.

- (i) The applicability of the Convention to ocean carriage under informal documents (which may be similar to air-way bills or road consignment notes) that evidence a contract of carriage but may not be regarded as a "document of title".

Under Article 1 (b) of the Convention, "contract of carriage" is defined to apply "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". This definition has effect, directly or indirectly, in other Articles of the Convention. Thus "Carrier" is defined by Article 1 (a) as including "the owner or charterer who enters into a contract of carriage with a shipper", and the word "carrier" is used in most of the articles of the Convention. Again, Article 2 which creates the area of compulsory regulation of the relation between shipper and carrier, and Article 3 (8) which prevents a carrier from exempting himself from the duties imposed by the Convention, use the phrase "contract of carriage". Again, under Article 3 (7), when the Convention applies in certain circumstances despite the

5/ Yiannopoulos: "The Uniform Rules Governing Bills of Lading" (1961), 10 Am. J. of Comp. Law 374.

absence of an issue of a bill of lading, the transaction is covered by a document of title, which is later deemed to constitute a "shipped" bill of lading. It is thus a fair inference that the Convention does not apply when the document evidencing the contract is also not simultaneously a document of title. There is also some authority in English Shipping law for this view. 1/

In the context of bills of lading, the view that it is a "document of title" refers to the fact that by an appropriate endorsement the rights of the holder can be transferred. It is true that having a fixed nexus of minimum legal obligations between carrier and shipper is most important where the contract is transferable, for the contract then affects several parties, and transference is facilitated when the important aspects of the contract are settled and unalterable. Nevertheless it is suggested that sufficient grounds exist for an equitable balancing of the interests of carrier and shipper even where the contract is not transferable. Since an obligation to deliver a bill of lading depends on the terms of the contract of carriage, 2/ carriers are now free to create trade practices under which bills of lading are not issued, thus restoring to themselves unlimited freedom of contract. It is, therefore, submitted that those Articles which balance the interests of carrier and shipper can usefully be made applicable to contracts of carriage evidenced by non-negotiable documents.

On this view, Article 1 (b) will have to be amended so as not to tie the definition of "contract of carriage" to one covered by a document of title, and other appropriate amendments made creating a limited legal régime for such contracts, and oral contracts. 3/

(ii) The applicability of the Convention to ocean carriage when no document is issued to evidence the contract

The Convention at present only applies to contracts of carriage "covered" by documents. Article 1 (b) refers to a bill of lading and to "similar documents of title".

In principle the argument in favour of extending the applicability of the Convention to contracts of carriage covered by receipts and other informal documents which are not documents of title i.e. furthering the equitable balancing of the interests of shipper and carrier over as wide a range of contracts as possible, would apply also in the case of oral contracts of carriage. 4/

1/ Harland and Wolff v. Burns and Laird Lines (1931), 40 Ll.L.Rep.286; Hugh Mack and Co. v. Burns and Laird Lines (1944) 77 Ll.L.Rep.377. The preamble to the English COGSA expressly confines its application to carriage of goods under a bill of lading.

2/ Carver, Carriage by Sea, 11th ed. para. 53, note 25.

3/ See below.

4/ This view is expressed in the reply of Norway (A/CN.9/WG.III/WP.10/Add.1, p. 109) and of Australia (A/CN.9/WG.III/WP.10/Add.1, p. 40).

Although oral contracts of carriage are likely to be extremely rare, it may be argued that a fixed minimum 'statutory' contract is even more important in such cases to avoid uncertainty. Further, if oral contracts are excluded, the applicability of the Convention to contracts evidenced by informal documents suggested above may create difficulty as regards contracts partly oral and partly in writing, which may have to be forced into one or the other category. An alternative approach would be to make the issue of a bill of lading or standardized form of receipt obligatory in all contracts of carriage by sea, unless they fall into certain excepted categories, thus eliminating oral contracts. Either approach would also eliminate the possibility of abuse which exists at present where the applicability of the Convention depends on the issue of a particular form of document.

BALTIC AND INTERNATIONAL MARITIME CONFERENCE

(1) Liability of the carrier for delay

Most European jurisdictions do not at present allow damages for delay and shipowners are anxious that a Convention should not make special reference to liability for delay. In this respect it should also be mentioned that it may be difficult to foresee the combined consequences if, for instance, shipowners later on should become liable for navigational and management faults. If, for instance, liability for delay is coupled with this new basis of liability, it may have very heavy financial consequences for shipowners and give rise to innumerable disputes and lawsuits.

It should also be mentioned that, for instance, under English law cargo interests are not prevented from recovering damages for delay provided they prove that the shipowner at the time of entering into the contract should reasonably have known that any delay in the voyage would cause loss to the cargo interests. For instance, the receivers must establish that the shipowner knew, or ought to have known, that the goods were intended for a special market which would be lost if they arrived late. In any case, if a reference to delay is inserted in a Convention, there should be a number of safeguards; first, it must be made clear that even if there is a delay the cargo interests must prove their loss and that the shipowner ought to have known of the special market, etc., at the time of issue of the bill of lading. Furthermore, the limit of liability per package or unit must apply to claims for delay as well as claims for physical loss or damage.

(2) The scope of application of the Convention

There would definitely seem to be no valid reason for changing the principle set down in article 5 of the Brussels Protocol of 1968.

Neither would there seem to be any valid reason whatsoever for imposing strict rules to informal documents or transport under no documents when it is quite obvious under the present system that any shipper can, if he wants to, demand an ordinary bill of lading.

COMITE MARITIME INTERNATIONAL

The CMI International Subcommittee on the Hague Rules met at Stockholm on 21 August to consider i.a. the questions raised in your letter to me of 21 May. Present at the meeting were delegates from the Democratic Republic of Germany, the Federal Republic of Germany, France, Italy, Norway, the United Kingdom and the United States. Needless to say, divergent views appeared on basic questions but, nevertheless, some indications can be made which would fairly well reflect the majority opinion within the CMI.

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1. Liability of the carrier for delay

It is a well-known fact that the Hague Rules in their present wording permit the interpretation that liability for delay is already covered although this is a much-debated question (cf. "the Saxonstar" (1958) 1 Lloyd's Rep. 73) which needs to be clarified. It must be born in mind that marine transports are more apt to result into delays than transportation by air, rail or road. Nevertheless, in view of the general importance of the time factor in modern transportation, it might be desirable to specifically regulate the liability for delay in the Hague Rules.

The following matters need to be particularly considered:

- (a) What type of damage following from delay should be covered?
- (b) Which is the proper definition of delay in marine transportation?
- (c) What type of liability should apply with respect to delay?
- (d) Should there be any limitation of liability and, if so, what type of limitation should be chosen?

The views prevailing within the CMI International Subcommittee can be briefly summarized as follows.

Type of damage

First, it should be mentioned that "physical" loss of or damage to the goods themselves following from delay should be treated in the same manner as when other circumstances have caused the loss or damage. The discussion merely concerns liability for delay causing other types of damage.

It was pointed out that under some national laws consequential losses flowing from delay would not be compensated as they would be considered too remote to be taken into consideration by the carrier at the time of the conclusion of the contract (cf., e.g., from English law Hadley v. Blaxendale (1854) 9 Ex. 341). This "doctrine of remoteness" might exclude compensation for damage such as "loss of profit", "loss of market", "seller's loss following from his duty to pay liquidated damages under contracts of sale or from extra costs caused by substituted deliveries", etc. It appears that the solution of these problems under various national laws might vary considerably. In order to reach uniformity it might be desirable to specifically spell out the type of damage which could be compensated. This would better clarify the issue, provide a better basis for an insurance coverage, tend to limit the practical difficulties in the handling of claims and reduce litigation. Thus, a provision to the effect that compensation for delay is limited to "direct and reasonable expenses which, at the time of the conclusion of the contract, could reasonably have been foreseen by the carrier as a probable consequence of the delay" would facilitate for the contracting parties and the courts of law to determine whether in each specific case the damage has been "too remote" to be compensated. It would, perhaps, somewhat diminish the cargo-owners'

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possibilities to get compensation but it would certainly suffice to deter the carrier from unduly delaying the transport; it would fulfil the function of prevention. And, with respect to the function of the liability rule to repair the damage, it may be considered less important which one of the contracting parties must carry the risk than that we may know the risk distribution sufficiently well beforehand.

Definition of delay

It does not seem possible to enumerate situations when delay exists; this must be covered by some kind of a general formula (cf. CMR art. 19 "... exceeds the time it would be reasonable to allow a diligent carrier"). But it should be stressed that the sea carrier, particularly in the terminal stages of transportation, often has to rely on services of parties whom he has no possibility to effectively control. Considering the intended extension of the period of liability to encompass the time until the actual or "constructive" delivery of the goods to the consignee, a liability for delay may cause hardship to the carrier unless, when the "standard" of a diligent carrier is determined, due regard is taken to the factual circumstances prevailing in the respective ports.

Type of liability

The delegates of the International Subcommittee unanimously suggested that the type of liability should be the same as applies to loss of and damage to the goods.

Limitation of liability for delay

There exist principally two alternatives for the limitation of liability for delay namely

- to follow the same rules as apply to loss of or damage to the goods or,
- to limit the liability in relation to the freight amount.

The first alternative would mean no change of the present Hague Rules, provided they in their present wording, as seems to be the case in some convention countries, include a regulation of liability for delay. Further, it would correspond to the principle of the Warsaw Convention (arts. 19 and 22).

The second alternative is better warranted commercially, since there is an interrelation between the freight amount and the time used for the transportation. A mandatory regulation of delay with a limit corresponding to the unit or a weight limitation might even interfere with a system of "time-guaranteed" transports envisaged by some shipping lines, whereby the cargo-owner would get a kind of "freight rebate" if the line cannot fulfil its guarantee. Further, the technique to limit the liability to the freight amount, or to a dividend or a multiple of the freight amount, corresponds to the rules of CIM and CMR (arts. 11, 34 and arts. 19, 23.5 respectively).

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In some cases, a "freight limitation" might be better for the cargo-owner than a "unit" limitation, particularly when the carriage concerns larger units over long distances. However, a weight, or a combined unit/weight limitation, would modify the consequences considerably in the cargo-owner's favour and, "on average", he would be better off if such limitation was made applicable to delay as well.

The views of the delegates were divided but the majority favoured a limitation related to the freight amount. This would necessitate "conversion provisions" of the same kind as exist in CIM and CMR (art. 30, sect. 1 and art. 20 respectively) to the effect that the goods are deemed to have been lost when a certain period has elapsed after the expiry of the agreed, or normal, delivery time. In view of the longer time customarily used for carriage of goods by sea, and the greater risk for hindrances of various types delaying delivery, the period required for conversion should be considerably longer than the corresponding period in CIM and CMR (30 and 60 days depending upon whether a fixed time for delivery has been agreed or not).

Further, in cases when the cargo-owner suffers "physical" loss of or damage to the goods as well as loss caused by delay, a "freight limitation" provision should clarify that the cargo-owner cannot recover more than either the maximum unit, weight, or unit/weight limitation or the maximum freight limitation.

2. The scope of application of the convention

(a) The geographical applicability

The delegates of the International Subcommittee unanimously favoured the extension of the geographical applicability achieved by article 5 of the 1968 Hague/Visby Protocol, replacing article 10 of the 1924 Hague Rules. It would be possible to further widen the scope by adding "carriage to a port in a Contracting State" but this suggestion has previously met strong opposition from some convention countries and therefore had to be withdrawn in order not to endanger the international uniformity.

(b) Contracts covered by the Hague Rules

It is clear, and follows already from the very title of the convention, that the ratio of the Rules is the strengthening of the bill of lading as a commercial document. In addition, a kind of "consumer's protection" is achieved by the rule that the carrier has to issue a bill of lading on the shipper's demand. Consequently, there is a unilateral option in his favour to decide whether or not the Hague Rules should apply to the contracts of carriage. So far, the delegates of the International Subcommittee unanimously agreed that the system of the present Hague Rules should remain unchanged.

However, since the shipper may always obtain the protection of the Hague Rules by demanding a bill of lading, it does not seem necessary to make the rules mandatorily applicable to all contracts of carriage, even when such contracts are not covered by a bill of lading or similar documents. Nevertheless, it seems

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possible to change the scope of application of the Hague Rules to the effect that all contracts of carriage by sea are covered, unless the parties expressly agree that the Rules should not apply. This would mean that the principle of freedom of contract governs within the "extended" scope of application instead of a unilateral option in the shipper's favour. Such a system may lead to abuses of the freedom of contract so as to diminish or destroy the protection which is customarily achieved by mandatory rules. But it is equally clear that the shipper, who in the vast majority of cases is covered by a cargo-insurance, may see no reason at all to further increase or to maintain the present system of recourse actions from his cargo-insurers against the carrier and his P and I-insurers. In the end he would have to pay the total price of transportation inclusive of the relevant part of the P and I-insurance which must indirectly be reflected in the freight. Furthermore, if there should be a unilateral option in the shipper's favour to require all contracts of carriage to be subjected to the mandatory system of the Hague Rules he may, nevertheless, be induced to refrain from exercising his option by a differentiation of the tariffs.

A further alternative would be to somewhat extend the scope of application but not to all contracts of carriage. The delegates of the International Subcommittee unanimously agreed that a mandatory system was not suitable for time-charters, volume contracts, contracts for consecutive voyages and voyage charters. Possibly, general booking agreements covering certain periods of time should also fall outside the scope of a mandatory regulation. From a juridical-technical viewpoint it appears difficult to draw the borderline between situations where charterparties have been issued and situations when this has not been the case, although, admittedly, such a distinction may create a workable solution under the practices in present international maritime commerce. However, these practices may be changed. Therefore, if the scope of application should be extended, it seems to be the better solution to let the rules apply to all contracts of carriage by sea, unless the parties expressly agree that they should not apply and with the further proviso that such an agreement should not have any effect if a bill of lading has been, or is intended to be, issued (cf. art. 6 of the Hague Rules).

If the present definition of "contracts of carriage" in article 1 (b) is retained, it may very well be that the scope is diminished in practice with an increased use of teletype/data transmission systems intended to have the same function as bills of lading. Although it would appear difficult from a juridical-technical viewpoint it may nevertheless, perhaps, be possible to obtain the same legal effects with such systems as with the bills of lading. On the other hand, if no document, or another document than a bill of lading, or a teletype/data transmission system not intended to replace the function of the bill of lading to transfer title to the goods is used, there seems to be good reasons supporting the view that the Hague Rules should apply but with a possibility for the parties to contract out by express agreement (see above).

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INTERNATIONAL CHAMBER OF COMMERCE

1. Liability for delay

All the commercial interests represented in the ICC agree that the question should be discussed whether a provision on delay should be included in the International Convention for the Unification of Certain Rules Relating to Bills of Lading. Many of the commercial interests represented in the ICC would welcome the inclusion of such a provision on delay in the Convention. The consequences of delay for the shipper would seem to fall into two general categories: the first where delay results in loss or damage to the cargo and the second where delay only entails the payment of a penalty. At least in the second case the liability for delay should be relatively low, limited, perhaps, to the freight charge. Furthermore, liability for delay should be restricted to damage which is "reasonably foreseeable" by the carrier.

On the other hand, the commercial interests agree that if it is decided to include a provision on delay in the Rules, it will be necessary to ensure that the provision was not of such a kind as to promote disputes or litigation.

2. Scope of the Convention

(a) Geographical applicability

The ICC considers the provisions of Article 5 of the Protocol to Amend the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1968) to be satisfactory.

(b) Carriage under informal documents

The use of informal documents which evidence a contract of carriage but which may not be documents of title is in certain trades becoming a more widespread practice and the ICC supports this trend to the extent that it facilitates international trade and so long as the shipper's right to require a bill of lading is respected. The original purpose in adopting unified Hague Rules was to ensure that a third party purchaser of a bill of lading could rely on uniform terms and conditions of carriage. However most commercial parties in the ICC accept that there is a case for considering whether the 1924 Convention should be extended to ocean carriage under informal documents as well as to carriage when no document is issued to evidence the contract. The Chamber does not consider on the other hand that the Convention should contain provisions relating to charter parties.

INTERNATIONAL UNION OF MARINE INSURANCE

We have submitted your questions to the member associations of the IUMI. The answers so far received allow us to form only a preliminary opinion. As the annual meeting of the IUMI, where also your problems will be discussed, will only take place in the last week of September, we must ask you to allow us to give you a more definite answer after this meeting.

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1. Liability of the carrier for delay

The majority of our members is of the opinion that it would not be opportune to introduce provisions into the Convention specifically directed to the carrier's liability for delay and to place this risk on the shoulders of carriers.

With the huge capital sums invested in the construction of modern vessels it is inconceivable that shipowners would deliberately delay the prosecution of voyages and the turnaround of their ships. Moreover in certain countries the actual wording of the articles 8 (5) and 4 (5) of the Hague Rules has been interpreted to include loss and damage to the goods caused by delay through the fault of the carrier. Any extension of the liability of the carrier - and the liability for delay would be a considerable extension compared with the status quo - must also lead necessarily to increased costs of transportation. The carrier will have to bear the extended risk himself or to take out an appropriate insurance cover. In both cases he will have to add his corresponding costs to the freight. The fact that other Conventions as CIM, CMR or the Warsaw Convention stipulate a liability for delay is rejected as an argument, as the circumstances in the sea-traffic - in spite of all technical innovations - are still not comparable with those in the road-, rail- and air-traffic where the duration of travel is certainly easier to determine in advance.

Even those which do not decline altogether a liability of the carrier for delay, state that any such provision would have to be very carefully considered since there would be an adverse effect on the shipping community if liability reached into any areas not clearly within the control of the carrier.

There is yet unanimity that an eventual liability for delay should be based upon fault of the carrier. Moreover this liability should be limited on a relatively low basis. The most reasonable basis of limitation would be in our opinion the freight amount. This basis is already used in the CIM and CMR. A liability per package or unit or per kilo would lead in connexion with consequential losses to difficulties in interpretation and definition.

If under special circumstances a cover for the risk of delay is needed by the shipper, he can obtain it already today by separate policies with conditions based on his special needs.

2. Scope of application of the Convention

(a) All answers we received expressed satisfaction with article 5 of the Brussels Protocol of 1968 that is judged to be a definite step in the right direction.

(b) Many of our members suggest that all transports - except shipments under charter parties - shall be subject to the Convention, irrespective of whether a Bill of Lading or other document has been issued or not.

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Others are more cautious and recommend that the expression "any similar document of title" occurring in article 1 (b) of the present Hague Rules should in an amendment to that article, be precisely defined on the lines of section 1 (4) of the U.K. Factors Act of 1889 which reads:

"The expression 'document of title' shall include any Bill of Lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the documents to transfer or receive goods thereby represented."

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OFFICE CENTRAL DES TRANSPORTS INTERNATIONAUX
PAR CHEMINS DE FER

1. Responsabilité du transporteur pour retard

Nous sommes, en principe, pour l'insertion des clauses concernant la responsabilité du transporteur pour retard dans la Convention de Bruxelles. Quant aux autres moyens de transport, les transporteurs éprouvent également des difficultés à respecter les délais de livraison; néanmoins, il doivent, en principe, répondre des conséquences dommageables du retard. D'ailleurs, la responsabilité du transporteur maritime ne devrait point être absolue. Il serait justifié de prévoir des causes d'exonération raisonnables, en tenant compte également des particularités du transport maritime.

D'autre part, le transporteur maritime pourrait avoir la possibilité de convenir de délais raisonnables; dès lors, il ne serait pas obligé d'assumer un risque exorbitant.

Cette question doit également être considérée, à notre avis, sous l'angle des transports combinés. Lors de l'élaboration du projet TCM, elle a été largement débattue et, dans le dernier projet, on a inséré des clauses concernant la responsabilité de l'ETC en cas de retard. L'ETC se trouverait, en effet, dans une situation désavantageuse s'il devait répondre du retard causé par ses sous-traitants tandis qu'il n'aurait pas la possibilité de recours contre le transporteur maritime.

En ce qui concerne la rédaction des clauses respectives, on devrait s'inspirer, à notre avis, des clauses pertinentes du dernier projet TCM.

2. Champ d'application de la Convention

a) Le texte figurant à l'article 5 du Protocole portant modification de la Convention de Bruxelles de 1968 est, à notre avis, convenable.

b) Nous ne voyons pas de raisons pour lesquelles il serait indiqué de prévoir l'application de la Convention de Bruxelles en cas d'établissement d'autres documents de transport que ceux prévus à l'article premier, § b), de la Convention. Le connaissement, titre représentatif de la marchandise, répond en effet à tous les besoins du commerce.

Cependant, le cas où aucun document attestant le contrat de transport n'est délivré devrait être examiné avec soin. Il nous semble que l'application de la Convention de Bruxelles pourrait être prévue même pour ce cas, à la condition que le contenu du contrat de transport convenu entre les parties puisse être attesté d'une autre façon convenable.

Comme nous ne connaissons pas les détails de la procédure de l'expédition des marchandises sans établissement de documents de transport, nous ne sommes pas à même de faire des propositions concrètes à ce sujet. De toute façon, il nous semble que l'admission des transports sans établissement de documents de transport sous régime de la Convention de Bruxelles exigerait des changements profonds dans le texte de la dite Convention.

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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF
PRIVATE LAW (UNIDROIT)

1. A titre préliminaire, il serait souhaitable que le travail entrepris par la CNUDCI en matière de législation maritime internationale débouche sur la négociation d'une Convention nouvelle qui, comme les Conventions analogues du droit des transports (p.ex. la CMR), devrait affirmer son objet dès l'abord, dans son titre même, c'est-à-dire le contrat de transport international de marchandises par mer, tel qu'il sera défini dans la disposition correspondant à la lettre b) de l'art. 1^{er} actuel de la Convention de Bruxelles du 25 août 1924 pour l'unification de certaines règles en matière de connaissance. On ne peut donc qu'approuver le principe qui se trouve à la base du Mémoire de la Norvège (A/CN.9/WG.III(V)/WP.9). On suggérerait à cet égard: "Convention relative au contrat de transport international de marchandises par mer - Convention on the contract for the international carriage of goods by sea" et aussi un sigle, p.ex. soit "CMM" soit "ICOGSCO".

2. Point n° 1: Il serait opportun que la Convention nouvelle contienne des dispositions spécifiques sur le retard et ne laisse plus les questions de retard aux lois nationales et aux clauses d'adhésion imposées à cet égard dans les documents de transport. Dans les transports maritimes actuels, où dominent désormais les transports par lignes et surtout par conteneurs, la ponctualité est un élément commercial essentiel, notamment aux fins d'une saine compétition avec les autres modes de transport.

Abstraction faite des autres problèmes soulevés par le projet de Convention TCM, il faut rappeler qu'un accord avait pu être atteint sur l'opportunité d'inclure dans ce dernier projet une disposition sur le retard (v. art. 11 et 11 A). Au cas où cette inclusion serait décidée, il ne faudrait pas perdre de vue les répercussions qu'elle peut avoir sur les réclamations et sur la présomption éventuelle de perte au cas où le retard dépasserait un certain délai. Il est à remarquer qu'un accord semble atteint sur l'inclusion de dispositions relatives au retard dans le Groupe de travail de la CCI qui est en train de préparer des conditions minimales uniformes dont l'insertion serait recommandée dans les documents de transport combiné. Dans l'élaboration d'un texte destiné à la Convention nouvelle, il serait suggéré de s'inspirer des art. 19 et 20 de la CMR, 11 du projet de Convention TCM et, pour simplifier les calculs, de choisir comme limitation du préjudice subi en cas de retard une indemnité qui ne pourrait dépasser le prix du transport (art. 23, par. 4 CMR).

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3. Point n° 2 a) En ce qui concerne le champ d'application de la future Convention, l'UNIDROIT se permet de recommander, comme dans la CMR (qui tire son origine des travaux accomplis en son sein), la solution simple et nette consacrée dans l'art. 1^{er}, par. 1^{er} CMR (reproduit ci-après), qui a fait désormais ses preuves et qui correspond d'ailleurs substantiellement à la tendance implicite dans l'art. 10 de la Convention de Bruxelles de 1924 et dans le Protocole de Bruxelles de 1968: "La présente Convention s'applique contrat de transport de marchandises par route lorsque le lieu de la prise en charge de la marchandise et le lieu prévu pour la livraison, tels qu'ils sont indiqués au contrat, sont situés dans deux pays différents dont l'un au moins est un pays contractant. Il en est ainsi quel que soient le domicile et la nationalité des parties".

4. Point n° 2 b) La position prise au paragraphe qui précède, porte logiquement à ne pas axer, comme dans la Convention de Bruxelles de 1924, la Convention future sur un document dont la fonction - puisqu'il sert à la fois au contrat d'affrètement et au contrat de transport - est d'ailleurs ambiguë. Il faudrait accepter tout document quelconque servant comme reçu de la marchandise et comme preuve du contrat de transport et, le cas échéant, aussi comme titre représentatif de la marchandise. En raison de la rapidité grandissante des transports et des développements des méthodes de traitement électronique ou automatique des données, on devrait accueillir non seulement les documents correspondant à la lettre de voiture traditionnelle dans les transports non maritimes, mais aussi de simples reçus ou documents d'ordinateur.

5. Il s'ensuit qu'il faudrait aussi assurer l'applicabilité de la Convention pour le cas où aucun document n'aurait été émis. A cet égard, il faut à nouveau attirer l'attention sur le modèle concluant de la CMR dont l'art. affirme que le contrat de transport est constaté par un document dont "l'absence l'irrégularité ou la perte n'affectent ni l'existence ni la validité du contrat de transport qui reste soumis aux dispositions de la (présente) Convention". Une telle disposition doit être assortie d'une obligation d'insérer dans le document une clause "paramount" (art. 6, par. 1^{er}, lettre K) CMR) et d'une disposition assurant le respect de ces obligations, en rendant le transporteur responsable de tous frais et dommages que subirait l'ayant-droit à la marchandise en raison de l'omission de la mention de la clause "paramount" (art. 7, par. 3 CMR): une sanction plus efficace que celle que contient la Convention de Varsovie (art. 9 mod. à La Haye). Il faudrait naturellement agencer les dispositions juridictionnelles de telle sorte que l'ayant-droit ait toujours la possibilité de trouver un for dans un Etat contractant, lui permettant de faire valoir ses droits ex lege en cas d'absence de document ou d'omission de la clause "paramount" au cas où un document aurait été émis.