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UNITED NATIONS COMMISSION ON
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Working Group on International
Legislation on Shipping
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WORKING PAPER BY THE SECRETARIAT

INTRODUCTION

1. This working paper, prepared subsequent to the second session of the UNCTAD Working Group on International Legislation on Shipping, is designed to assist the UNCITRAL Working Group in the performance of the mandate given it by the Commission "to indicate the topics and method of work on the subject" giving full regard to the recommendations of the United Nations Commission on Trade and Development and any of its organs.

I. BACKGROUND - ACTIVITIES OF UNCITRAL AND THE UNCTAD WORKING GROUPS
IN THE FIELD OF INTERNATIONAL LEGISLATION ON SHIPPING

A. Establishment and mandate of the UNCITRAL Working Group

2. The Commission at its second session included international legislation on shipping among the priority items in its programme of work,^{1/} and set up a working group of seven members.
3. The Working Group met during the third session of the Commission. In response to a recommendation by the Working Group, the Commission decided that a

^{1/} UNCITRAL, Report of the second session (1969), para. 133.

meeting of the Working Group should be convened in Geneva after the session of the UNCTAD Working Group and before the opening of the fourth session of the Commission.^{2/} Under this decision, the terms of reference given to the Working Group, as noted in paragraph 1, supra, were to "indicate the topics and method of work on the subject ... giving full regard to the recommendations of the United Nations Conference on Trade and Development and any of its organs". The Chairman of the UNCITRAL Working Group was requested to attend the second session of the UNCTAD Working Group as a Special Representative.^{3/} The Commission also requested the Working Group to submit its report to the fourth session of the Commission.

4. The UNCITRAL Working Group on International Legislation on Shipping as presently constituted consists of the following members: Chile, Ghana, India, Union of Soviet Socialist Republics, the United Arab Republic, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

B. The UNCTAD Working Group on International Legislation on Shipping

5. The first session of the UNCTAD Working Group was held in Geneva from 1 to 12 December 1969. The Working Group adopted a programme of work that listed bills of lading as the first of six items.

6. The secretariat of UNCTAD was requested to prepare a report on the economic and commercial aspects of certain areas in the field of bills of lading. This report^{4/} was prepared for the second session of the UNCTAD Working Group, which met from 15 to 26 February 1971.

7. At its second session, the UNCTAD Working Group discussed extensively the economic and legal problems regarding existing rules of law on bills of lading, using the UNCTAD secretariat Report on Bills of Lading as a working paper.^{5/} At the conclusion of its session the UNCTAD Working Group adopted the following resolution hereinafter referred to as the UNCTAD Working Group resolution:

^{2/} UNCITRAL, Report of the third session (1970), para. 166.

^{3/} The Report of the Special Representative will be available as a conference room paper.

^{4/} Report of the UNCTAD secretariat on Bills of Lading, TD/B/C.4/ISL/6. This report will be available to members of the Working Group.

^{5/} See Report of UNCTAD Working Group on International Shipping Legislation on its second session from 15 to 26 February 1971, TD/B/G.4/ISL/8. This report will be available to members of the Working Group.

The Working Group on International Shipping Legislation,

Taking note with appreciation of the secretariat report entitled "Bills of Lading" (TD/B/C.4/ISL/6),

Having examined and discussed the existing rules and practices concerning bills of lading and their effect on cargo interests,

Considering that some of these rules and practices create uncertainties in the application of laws and the interpretation of terms and that the removal of these uncertainties is expected to reduce in various instances costs in international trade which are onerous for cargo-owners, especially in developing countries,

Recalling that the General Assembly, in its resolution 2205 (XXI) establishing the United Nations Commission on International Trade Law (UNCITRAL), in particular operative paragraphs 8 and 10 of part II thereof, provided for close co-operation between UNCITRAL and UNCTAD,

Further recalling that the Committee on Shipping, in its resolution 7 (III), having noted the decision of UNCITRAL to include international legislation on shipping among the priority items in its programme of work, included in the terms of reference of this Working Group a provision to the effect that it may make recommendations and prepare related documentation to be submitted to UNCITRAL for the drafting of new legislation or other appropriate action,

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

2. Further considers that the examination referred to in paragraph 1 should mainly aim at the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others, should be considered for revision and amplification:

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

(b) the scheme of responsibilities and liabilities, and rights and immunities, incorporated in articles 3 and 4 of the Brussels Convention 1924, and their interaction and including the elimination or modification of certain exceptions to carrier's liability;

(c) burden of proof;

(d) jurisdiction;

(e) responsibility for deck cargoes, live animals, and transshipment;

(f) extension of the period of limitation;

(g) definitions under article 1 of the Convention;

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

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

3. Recommends that in the spirit of co-operation between UNCITRAL and UNCTAD enjoined by the above-mentioned resolutions of the General Assembly and the Committee on Shipping, UNCITRAL should be invited to undertake the examination referred to in paragraph 1, and, as appropriate, prepare the necessary draft texts, taking into account the report of this Working Group and the UNCTAD secretariat report (TD/B/C.4/ISL/6);

4. Expresses the wish that, in the same spirit of co-operation, the outcome of the work of UNCITRAL on the subject of bills of lading will be conveyed to this Working Group for its comments;

5. Invites the Chairman of this Working Group to attend, as its special representative, the meeting of the Working Group on International Legislation on Shipping of UNCITRAL, which is scheduled to be held in Geneva from 22 to 26 March 1971 and to report on its proceedings to the Committee on Shipping at its fifth session and to this Working Group at its third session;

6. Requests the UNCTAD secretariat, without prejudice to the consideration by the Committee on Shipping of this resolution, to convey it, together with the reports on the first and second sessions of this Working Group, to the UNCITRAL Working Group to be available to that Group at its next meeting.

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II. INDICATION OF TOPICS

8. The Commission requested the Working Group to indicate (1) "the topics" and (2) "the method of work" for this subject. This part of the working paper considers the first of these two tasks.
9. The Commission's decision further stated that the Working Group should give "full regard to the recommendation of the United Nations Conference on Trade and Development and any of its organs", and established the above-described procedures for contact and co-ordination between the working groups of UNCTAD and UNICTRAL. The recommendations by the UNCTAD Working Group are set out in the resolution quoted above. These include the recommendation, in paragraph 3 of the resolution, that UNICTRAL should be invited to undertake the examination of the rules and practices concerning bills of lading referred to in paragraph 1 of the resolution, and, as appropriate, to prepare the necessary draft texts. The examination, referred to in paragraph 1 of the resolution, is supplemented by references in paragraph 2, to specific areas which, among others, should be considered; this paragraph of the resolution then sets forth a list of nine such areas in sub-paragraphs (a) through (i).
10. In response to the Committee's request to indicate the topics for work in this field, this Working Group will probably wish to commence with an examination of the above recommendations. To aid with this examination, this working paper will suggest certain groupings or organization of related topics within the above list, and will indicate the possible implications, with respect to further work, that might be drawn from items on this list.
11. Paragraph 2 of the UNCTAD resolution states two principal objectives of the examination of the applicable rules and practices. These are: (1) "the removal of such uncertainties and ambiguities as exist" and (2) "establishing a balanced allocation of risks between the cargo owner and the carrier". Further study may show that these two objectives relate to the same topic; it may, however, be helpful to inquire as to which of the areas specified in paragraph 2 of the resolution primarily concern each of these two objectives.

A. Uncertainties and ambiguities

12. The objective of the "removal of such uncertainties and ambiguities as exist" is probably relevant to certain aspects of the following areas listed in paragraph 2 of the UNCTAD resolution:

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- "(c) burden of proof
- "(d) jurisdiction
- "(f) extension of the period of limitation
- "(g) definitions under article 1 of the Convention
- "(h) elimination of invalid clauses in bills of lading."

13. The reference in sub-paragraph (c) to "burden of proof" may be intended to relate, in part, to the fact that the Brussels Convention of 1924 deals only partially with problems of burden of proof (articles 3 (4), 4 (2) (q)); outside this area the problem is left to the conflicting rules of national law. Thus, it may be relevant under this item to analyse such areas where uncertainty exists, and indicate alternative means of resolving these problems. As will be noted later, problems of burden of proof are also relevant to the allocation of risks.

14. With respect to the reference in sub-paragraph (d) to "jurisdiction" uncertainty arises from the lack of any provision on the subject in the 1924 Brussels Convention. Consequently, doubt may exist as to the validity of clauses requiring litigation or arbitration in places that are unreasonably remote from the place of shipment or from the goods that are the subject of a claim.

15. The reference in paragraph (g) to "definitions under article 1 of the Convention" may be intended to refer, inter alia, to ambiguity with respect to the definitions of the following terms: "carrier"; "contract of carriage"; "goods"; "ship";^{6/} "carriage of goods";.

16. The reference in paragraph 2 (f) to "extension of the period of limitation" may be intended to refer to uncertainty and ambiguity when "delivery" and "discharge" occur at different times.^{7/}

17. The reference in paragraph 2 (h) to the "elimination of invalid clauses in bills of lading" may be intended to refer to uncertainty and ambiguity which arise when it is unclear whether a clause inserted in the bill of lading is contrary to provisions of the 1924 Brussels Convention. It might be desirable to consider whether "liberty" clauses such as "freight" and "refrigeration" clauses present sufficiently serious problems as to warrant the drafting of a rule dealing with the subject.^{8/}

^{6/} See UNCTAD, Report on Bills of Lading, para. 94.

^{7/} Ibid., para. 99.

^{8/} Ibid., para. 119; this paragraph makes a suggestion aimed at classification and itemizes invalid clauses.

18. It is probable that the resolution did not intend to list all of the areas of "uncertainties and ambiguities" under the present rules. Thus, study of the decisions and commentary on the existing rules may indicate that comparable problems exist, inter alia, in the following areas:

(a) whether the definition of "loss or damage" (article 4 (1)) includes damages for delay;

(b) the distinction between "care of cargo" (article 3 (2)) and "management of the ship" (article 4 (2) (a)).^{9/}

B. Balanced allocation of risk

19. Other areas for consideration listed in the resolution seem primarily directed at the second stated objective: "establishing a balanced allocation of risks between the cargo owner and carrier".

20. Sub-paragraph (a) refers to "responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents". This objective would enlarge the responsibility of the carrier in article 1 (e) of the 1924 Brussels Convention which provides: "'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship".^{10/}

21. Sub-paragraph (b) lists "the scheme of responsibilities and liabilities, and rights and immunities, incorporated in articles 3 and 4 of the Brussels Convention 1924 and their interaction and including the elimination or modification of certain exceptions to carrier's liability". Investigation under this heading would relate to several important questions concerning the balanced allocation of risks between the cargo owner and the carrier. More specifically, the consideration of "the elimination or modification of certain exceptions to carrier's liability" might call for attention to several of the provisions of article 4 (2) of the Brussels Convention of 1924 such as the following:

(a) "Act, neglect, or default of the master, mariner, pilot, or servant of the carrier of the navigation or in the management of the ship" (article 4 (2) (a))." (The scope of this exception was also noted under A above in relation to uncertainties and ambiguities.)

^{9/} Ibid., para. 102.

^{10/} Ibid., para. 95.

(b) "fire, unless caused by the actual fault of privity of the carrier (article 4 (2) (b))" 11/

(c) "perils, dangers and accidents of the sea or other navigable waters" 12/

In considering which exemptions from liability should be re-examined it may be appropriate to take into account the following: (a) the technological advances that have increased the ability of shipowners to maintain close contact with the ship while at sea and the ship's capability to withstand hazards; (b) modern developments in the transport of goods, especially the widespread use of containers; (c) rules regarding carriers responsibility in other modes of transport of goods; (d) rules of law being prepared to deal specifically with combined transport, namely, the draft Convention on the Combined Transport Contract.

22. Sub-paragraph (e) lists "responsibility for deck cargoes, live animals and transshipment".

(a) This reference in part relates to the definition of "goods" in article 1 of the 1924 Brussels Convention. This definition of "goods" excludes "live animals and cargo by which the contract is stated to be carried on deck and is so carried". In the light of the underlying study,^{13/} this item would call for examination of the effect of the development of containerization with reference to the practice of shipping containers on deck, and the appropriateness of excluding such shipments from the protective provisions of the Convention.^{14/}

(b) The reference to "transshipment" may relate to clauses in bills of lading that, in some circumstances, permit the carrier to transship goods short of or beyond the port of destination specified in the bill of lading at the risk and expense of cargo owners.^{15/} On analysis, the problem seems closely related to the item of "deviation" (listed in sub-paragraph (i) together with "seaworthiness and unit limitation of liability") and to various exceptions to carrier liability referred to in sub-paragraph (b).^{16/}

11/ Ibid., para. 103.

12/ Ibid., para. 104.

13/ Ibid., para. 186.

14/ Ibid., para. 93.

15/ Ibid., para. 73 (1).

16/ Ibid., para. 112.

23. Sub-paragraph (i) refers to: "deviation, seaworthiness and unit limitation liability":

(a) This reference in part concerns article 4 (4) of the 1924 Brussels Convention which provides: "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom".^{17/}

(b) Another part of sub-paragraph (i) of the resolution refers to "seaworthiness" and may be aimed at extending the scope of responsibility of the carrier for the seaworthiness of the ship beyond that provided in article 3 (1) of the 1924 Brussels Convention: "the carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) make the ship seaworthy".^{18/}

(c) The last part of this sub-paragraph refers to "unit limitation of liability".^{19/} Article 4 (4) of the 1924 Brussels Convention, the existing rule, and the 1968 Protocol (article 2) both provide for a specific monetary limitation of the carrier's liability. The unit or package is the only measure in the 1924 Brussels Convention. The inclusion of this item in the resolution may relate to whether the present limitation is too low and should be raised, to whether the term "unit" is ambiguous and must be defined accurately, or to whether another method for measuring the limitation of liability would be more desirable.

C. Possible recommendation as to topics for work

24. As has been noted paragraph 8, supra, one of the two tasks assigned to the Working Group is to "indicate the topics ... of work on the subject ... giving full regard to the recommendations of the United Nations Conference on Trade and Development and any of its organs".

^{17/} Ibid., paras. 256-263.

^{18/} Ibid., paras. 203-206 (Emphasis added).

^{19/} Ibid., paras. 265-281.

25. Under this assignment, in the light of the unanimous recommendation by the UNCTAD working group, the Working Group of UNCITRAL may wish to consider whether it would recommend to the Commission that:

(a) Within the priority topic of international shipping legislation, consideration should be given to the subject of bills of lading.

(b) Within this subject, the topics for examination should include those set forth in paragraphs 1 and 2 of the resolution of the UNCTAD Working Group.

III. METHOD OF WORK

26. As has been noted, the second task assigned to this Working Group is to indicate the method of work on the subject. (The following discussion of possible methods of work assumes that the Working Group concludes that affirmative recommendations concerning topics of work are made under part II, supra.)

A. Recommendation concerning a working group

27. The Commission at the third session included the following in its decision regarding international shipping legislation:^{20/}

"9. That the term of the Working Group on International Shipping Legislation will expire after it has submitted its report to the fourth session of the Commission, in view of the fact that it is anticipated that a new and larger working Group will be set up at the fourth session of the Commission."

28. Consequently, as a first step, the Working Group may wish to consider recommending to the Commission that a new working group be set up at the fourth session. Such a recommendation could be supported, inter alia, by the experience that the Commission has gained in the use of working groups for the development of recommendations in technical fields requiring the evaluation of complex and voluminous documentation and the preparation of drafts of proposed legal rules.

29. The present Working Group may wish to aid the Commission by a recommendation concerning the size of the new working group. In this regard, consideration may be given to the experience of the two other working groups established by the

^{20/} UNCITRAL, Report on the third session (1970), para. 166.

Commission: the Working Group on Sales (fourteen members) and the Working Group on Prescription (seven members). On the assumption that the central task of the Working Group will be the drafting of proposed legal texts, the recommendation may take into account the size that would be most efficient for this type of work, as well as the need for the representation of the various regions and economic interests.

B. Programme of work

30. Consideration might also be given to the development of a step-by-step programme of work. Thus, if the Working Group is of the view that drafting of proposed legal texts should be undertaken promptly, it may be appropriate to consider which topics should be selected for this purpose. Relevant criteria may include the following: (1) Whether the problems are sufficiently important; (2) Whether the issues presented by a group of topics are related to each other; (3) Whether the underlying issues are susceptible of early resolution; (4) Whether the drafting work is relatively free of the danger of being nullified by later decisions on difficult issues that are not yet ready for resolution.

31. In the light of these considerations, the Working Group may wish to consider the appropriateness of the problems that fall under the following items in paragraph 2 of the UNCTAD resolution:

"(a) responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents."

...

"(d) jurisdiction"

"(e) responsibility for deck cargoes, live animals and transshipment."
(The Working Group may conclude that special attention should be given to the first of these three items, which relates to the exclusion of goods carried on deck from the provisions of the Brussels Convention of 1924, and assumes special importance with the development of containerization.)

"(g) definitions under article I of the Convention".

32. Analysis of these items may indicate that they relate to a substantial interrelated area: the sphere of application of the rules applicable to bills of lading. The difficulties presented by the present limited scope of the 1924

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Convention were given significant attention in the UNCTAD Report and at the meeting of the UNCTAD Working Group. Special reference might be made to the consideration given to the following problems: (1) the responsibility for loss or damage to cargo during the period after delivery to the carrier but before loading on ship, and during the period after discharge of cargo from the ship and prior to delivery to the consignee (item (a) above);^{21/} (2) the effect of clauses in bills of lading requiring claims to be presented to a tribunal at a location that is not related to the shipment or is inconvenient from the viewpoint of the claimant (item (d) above);^{22/} (3) the exclusion of goods carried on deck from the Brussels Convention of 1924.^{23/}

33. The remaining items in paragraph 2 of the resolution of the UNCTAD Working Group are concerned primarily with a second major and interrelated issue: the degree of responsibility of the carrier for loss of the cargo. It might be considered premature to start drafting in this area until after decisions have been reached concerning the approach to "establishing a balanced allocation of risks between the cargo owner and the carrier" within paragraph 2 of the resolution of the UNCTAD Working Group. Thus, to promote the most effective progress towards the completion of the task, the Working Group may wish to consider whether drafting should commence promptly with respect to the problems of scope (outlined in paragraph 31, supra) while basic decisions of policy are being taken concerning the approach to allocation of risks (in paragraph 33, supra).

34. If the Working Group recommends that drafting should commence promptly within a defined area, it may wish to suggest that the new Working Group should meet during the fourth session of UNCITRAL to consider allocating topics to members of the working group for reports and the preparation of recommended texts.

^{21/} See UNCTAD Report on Bills of Lading, paras. 190-202; see Report of UNCTAD Working Group on International Shipping Legislation on the work of its second session, TD/B/343, TD/B/C.4/86, TD/B/G.4/ISL/8, paras. 7, 21, 26, 35, 49, 51, 63, 64.

^{22/} See UNCTAD Report on Bills of Lading, paras. 299-304, paras. 48, 62, 74.

^{23/} Article 1 (c).

In this regard, consideration may be given to the working method adopted by the Working Group on Prescription, and the contribution of that method to the prompt preparation of draft provisions. If such a procedure is recommended, consideration might be given to whether an analysis by the Secretariat should be requested to aid in this work.

35. If the Working Group concludes that certain basic issues concerning the approach to the allocation of risk between the cargo owner and carrier call for policy decisions in advance of the drafting of texts, this Working Group may wish to recommend that the new Working Group should be requested to consider these issues at its first meeting, assisted by an analysis by the Secretary-General of alternative approaches to the questions of policy requiring decision.

36. The Commission presumably will wish to set a date for the first meeting of the new Working Group. It may, however, be appropriate for the selection of a date to be considered first by the new Working Group at a meeting held during the fourth session of the Commission. (See also the suggestion in paragraph 34, supra, for such a meeting to assign topics for drafting.) At this meeting consideration could be given to the time required by members for the preparation of reports and proposed drafts, and for the time required for the preparation of any other material requested to aid in taking the necessary decisions concerning the approach to the allocation of risks between the cargo owner and the carrier.
