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### UNCITRAL Draft Convention on Carriage of Goods by Sea, Part 5

Joseph Sweeney

*Fordham University School of Law*

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# *The Uncitral Draft Convention on Carriage of Goods By Sea (Part V)\**

JOSEPH C. SWEENEY\*\*

## INTRODUCTORY COMMENT

The General Assembly of the United Nations at its Thirty First Annual Session in New York has resolved to convene a Conference of Plenipotentiaries to consider the Draft Convention on Carriage of Goods by Sea,<sup>211</sup> following favorable action on the draft by the U.N. Commission on International Trade Law<sup>212</sup> and the U.N. Conference on Trade and Development.<sup>213</sup> Accordingly it is now expected that the diplomatic conference culminating six years of efforts in the United Nations will be held in March-April, 1978 in Geneva. The complete text of the Draft Convention may be found in the Texts and Documents section of this issue for convenience of reference.

This article will consider briefly the preparation of the following provisions of the convention:

- Q. Liability of the Shipper
- R. Dangerous Goods as Cargo
- S. Notice of Loss Provisions
- T. Derogations from the Convention

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\* This is the fifth and final part of a study of the new draft convention. The first part appeared in 7 J. Mar. L. & Comm. 69-125 (1975), the second part in 7 J. Mar. L. & Comm. 327-350 (1976), the third part in 7 J. Mar. L. & Comm. 487-503 (1976) and the fourth part in 7 J. Mar. L. & Comm. 615-670 (1976).

\*\* Professor of Law, Fordham University School of Law, Member of the Editorial Board, United States Representative to the Third, Fourth, Fifth, Sixth, Seventh and Eighth Sessions of the UNCITRAL Working Group, the UNCITRAL Commission, and the Sessions of the UNCTAD Working Group on International Shipping Legislation considering the draft convention.

<sup>211</sup> G.A.Res. \_\_\_\_\_ (XXXI) of Dec. 15, 1976. See Report of Sixth Committee, A/31/390.

<sup>212</sup> UNCITRAL Res. of May 7, 1976 Rpt. of UNCITRAL on its 9th Session, (A/31/17) at p. 16.

<sup>213</sup> UNCTAD, Working Group on International Shipping Legislation, Resolutions of Jan. 16, 1976 and July 30, 1976; UNCTAD Trade & Development Board Res. of October 6, 1976. TD/B/C.4/ISL/21; TD/B/C.4/ISL/25; and A/C.6/31/5.

The article concludes with an examination of the review process of the draft convention, as follows:

- IV. Second Reading of the Text
- V. UNCITRAL Commission Review
- VI. UNCTAD Review

### *Q. Liability of the Shipper*

The Hague Rules dealt with this topic very succinctly in a short article imposing a fault liability on the shipper,<sup>214</sup> but some of the proposals for this subject at the Eighth Session of the Working Group contained a complete codification paralleling the provisions on carrier liability in order to appear to give a balanced view to the new draft.<sup>215</sup>

<sup>214</sup> "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

<sup>215</sup> A/CN.9/WG.III(VIII)/CRP.9

#### *Proposal submitted by the delegation of Poland*

1. The shipper shall be bound to provide the goods to the carrier with suitable packing, according to the nature of their contents and of the carriage and to place upon it the marks, numbers, quantity, weight and other necessary particulars in such a manner, as they would ordinarily remain legible until delivery of the goods to their consignee or other authorized person.

2. If the shipper does not deliver the goods at the place, date and time fixed in the contract of carriage or eventually in a subsequent written agreement, in a condition suitable for immediate loading, he shall be bound to pay the agreed full freight for the goods not loaded, whether in whole or in part. The amount due to the carrier by way of dead freight is reduced by the amount of freight obtained by the carrier for another cargo received for carriage instead of the cargo not supplied.

3. The shipper shall be bound to furnish in a written declaration all the particulars regarding the goods to be carried by sea, which are to be inserted in the bill of lading.

4. The shipper shall be liable to the carrier as well as to the members of the crew, to other persons on board and to the owners of other cargoes for any loss, damages and expenses arising or resulting from inaccuracies or misrepresentation comprised in his written declaration regarding the nature and properties of the goods delivered to the carrier.

5. The shipper shall be liable for any loss or damage which the carrier may sustain by reason of the shipper's failure to provide or deliver all certificates and documents or to pay any tax on goods required by the laws and regulations of the countries linked by the carriage of these goods.

6. If any reconditioning or repacking of the goods, repairs to the goods or to the packaging or collection of goods shipped in bulk or of the contents of packages is required as a result of inadequate packing or neglect of the shipper, the shipper shall be liable for all expenses incurred by the carrier in that connection, together with any other loss or damage he may suffer.

7. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising from any other cause without the act, or omission, fault or neglect of the shipper, his servants, agents or other persons acting pursuant to the shipper's instructions.

*Cf. Proposal by India (A/CN.9/WG.III(VII)/(CRP.5)*

This was opposed by many delegations since there had not been difficulties with the Hague Rules provisions and many delegations believed it was unnecessary to put the shipper's obligations<sup>216</sup> in positive form, accordingly, the Hague Rules formulation was retained, and is now found in Article 12 of the draft convention as follows:

The shipper shall not be liable for loss sustained by the carrier or the actual carrier, or for damage sustained by the ship, unless such loss or damage was caused by the fault or neglect of the shipper, his servants or agents. Nor shall any servant or agent of the shipper be liable for such loss or damage unless the loss or damage was caused by fault or neglect on his part.

Proposals to codify provisions of bill of lading clauses dealing with the consignee's obligations to take delivery and the master's authority to sell the cargo were considered,<sup>217</sup> but rejected, essentially because

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship where such loss or damage does not arise directly from the act, default, or negligence of the shipper, his agents or servants."

<sup>216</sup> In the United States the cargo itself is liable *IN REM* for damage done to the ship. See *Westchester Fire Ins. Co. v. Buffalo House Wrecking Co.*, 129 F.2d 318 (2d Cir. 1942); *Ryan Stevedoring Co. v. U.S.*, 175 F.2d 490 (2d Cir. 1949); *Williamson v. Compania Anonima Venezolana de Navegacion*, 446 F.2d 1339 (2d Cir. 1971).

<sup>217</sup> A/CN.9/WG.III(VII)/CRP.12

*Draft proposal submitted by the delegation of Japan*

The consignee shall receive the goods from the carrier or his agent within a reasonable period after the notice of arrival was sent at the port of discharge to the person designated by the shipper for such notification. If such person has not so received them, the carrier shall inform the shipper of the situation. The shipper upon such notice by the carrier shall designate the person who shall take delivery of the goods or otherwise instruct the carrier about their disposal.

If the goods have not been received by the consignee or by the above designated person within a reasonable period, the carrier may sell or otherwise dispose of the goods on the best possible terms for account of the person entitled to the goods, if required to collect the freight or other expenses due, or to avoid disproportionate storage costs, or to avoid deterioration of the goods.

The loss, damage or expense which cannot be recovered from the proceeds of the above sale of the goods shall be payable by the consignee or the shipper.

See also A/CN.9/WG. III (VIII)/CRP.11

*Proposal by the Federal Republic of Germany Article 12 bis*

1. If the consignee does not take delivery of the goods within a reasonable period after arrival of the vessel at the port of destination (and after notification, where appropriate, by the carrier), the carrier shall be entitled to discharge the goods for the account of the consignee (and the shipper) and, where necessary, to entrust them to a third party. The charges incurred as a consequence of these measures are chargeable against the goods.

2. The carrier may, under the conditions mentioned in paragraph 1, sell the goods if they are perishable or if the storage expenses would be out of proportion to the value of the goods.

3. The rules of paragraphs 1 and 2 also apply when more than one person claims delivery and the carrier is unable to ascertain their respective rights.

of the complexity of introducing elaborate provisions on notification of the consignee or shipper so as to permit substitution of consignees. This area of the law was previously uncodified, but is determined by conflicts of law rules, trade custom and bill of lading clauses. There was also a French proposal respecting only master's sale of the cargo.<sup>218</sup> Such provisions are found in Anglo-American law in cases of extraordinary circumstances and emergency where the master is deemed to become the agent for the cargo owner.<sup>219</sup> There was no support for the attempt to codify those rules in the new convention.

### R. *Dangerous Goods as Cargo*

There had been little criticism of the Hague Rules provisions, despite the failure to specify the shipper's obligations and the absence of a mechanism to determine with precision when goods were to be considered dangerous within the meaning of Article IV (6).<sup>220</sup>

Poland, speaking for carrier interests, favored a more lengthy provision detailing the carrier's rights,<sup>221</sup> while the United States proposal restated the Hague Rules provisions, adding new language respecting

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<sup>218</sup> See A/CN.9/WG.III(VIII)/CRP.10

*Draft article proposed by the representative of France*

If the goods are not claimed or in the event of a dispute regarding delivery or payment of the freight, the captain may, on a court order:

(a) Arrange to sell the goods until agreement has been reached regarding payment of the freight and of the costs incurred, unless the consignee provides surety;

(b) Order the remainder of the goods to be held at the expense of the consignee.

If the sale of the goods does not suffice to cover the full amount of the freight and the costs incurred, the carrier shall retain the right to seek payment of the balance of the freight from the shipper.

<sup>219</sup> See E. Ivamy, Payne and Ivamy's Carriage of Goods by Sea, 156-160 (1972); 2 Carver, Carriage by Sea (11th ed. by R. Colinaux) 628-636 (1963)

In the United States, an early Supreme Court case was concerned with the on-going nature of the duty owed by the Master (and the vessel) to the cargo. *The Propeller Niagara v. Cordes*, 62 U.S. (21 How.) 7 (1858).

<sup>220</sup> "Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier has not consented with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any."

<sup>221</sup> A/CN.9/WG.III(VIII)/CRP.8

1. On easily inflammable, explosive or otherwise dangerous goods, the shipper is bound to place a suitable marking indicating such goods as dangerous, and to give the carrier the necessary information on the nature and properties of the goods.

2. When supplying for carriage the goods which should be handled in a particular manner, the

a definition of dangerous goods, the concept of special risks inherent in that type of carriage and the carrier's burden of proof.<sup>222</sup> Some developing states disapproved the unlimited discretion to the Master or the carrier to destroy the goods and proposed to modify the original language of the Hague Rules to limit the discretion of the carrier to those provisions reasonably related to and therefore limited by the nature of the damage involved. It proved to be difficult to draft such a text, therefore language was inserted into Paras. 2 and 3 of the new article limiting the master's discretion by the expression, "as circumstances may require."

Eventually it was determined to retain the Hague Rules language as the basis for a new article and to divide it into separate paragraphs along the lines of the Polish and United States proposals. It was also decided to specify the shipper's obligations directly, rather than leave them to be inferred from customary practices, even though the ship-

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shipper is bound to place a suitable marking thereon and to inform the carrier as to their nature and properties.

3. The carrier—while retaining his right to the full freight—may at his discretion discharge the cargo from the vessel, destroy or render it innocuous without any obligation to compensate for damage resulting therefrom where the cargo containing easily inflammable explosive or otherwise dangerous materials has been falsely declared or where the carrier could not, when receiving the cargo, ascertain its dangerous nature or properties on the basis of a common knowledge of such matters and has not been warned about such nature. The shipper is liable for damage resulting from such cargo having been loaded and carried.

4. Although the nature and properties of the cargo as set out in paragraph 3 have been known to the carrier and the cargo has been loaded with his consent, but subsequently the cargo has imperilled the safety of the vessel, of persons on board or of other cargoes, the carrier may—at his discretion—discharge the dangerous cargo, destroy it or render it innocuous. For damage resulting therefrom the carrier is liable only in general average. The carrier retains his right to the distance freight.

<sup>222</sup> A/CN.9/WG.III(VIII)/CRP.13

1. With respect to goods which are regarded as dangerous goods at the port of loading, or by the law of the vessel's flag or by international agreement, the carrier shall be relieved of his liability where the loss, damage or delay in delivery results from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the goods and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or negligence on the part of the carrier, his servants or agents.

2. Such dangerous goods may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation where they have been taken in charge by the carrier without knowledge of their nature and character.

3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

per's obligations might become more costly and time-consuming. The shipper must inform the carrier of the dangerous nature of the goods, the character of the danger and precautions to be taken and must mark the goods in a manner to indicate the dangerous character. There was a consensus that it was unnecessary to state a definition of dangerous goods. The text approved by the Eighth Session<sup>223</sup> was substantially reworked at the UNCITRAL Plenary in 1976 and now provides, as follows:

*Article 13. Special rules on dangerous goods*

1. The shipper shall mark or label in a suitable manner dangerous goods as dangerous.

2. Where the shipper hands over dangerous goods to the carrier or an actual carrier, as the case may be, the shipper shall inform him of the dangerous character of the goods and, if necessary, the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character,

(a) The shipper shall be liable to the carrier and any actual carrier for all loss resulting from the shipment of such goods, and

(b) The goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3. The provisions of paragraph 2 of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

4. If, in cases where the provisions of paragraph 2, subparagraph (b) of this article do not apply or may not be invoked, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require,

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<sup>223</sup> Article 13. Special rules on dangerous goods\*

1. When the shipper hands dangerous goods to the carrier, he shall inform the carrier of the nature of the goods and indicate, if necessary, the character of the danger and the precautions to be taken. The shipper shall, whenever possible, mark or label in a suitable manner such goods as dangerous.

2. Dangerous goods may at any time be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him where they have been taken in charge by him without knowledge of their nature and character. Where dangerous goods are shipped without the carrier having knowledge of their nature or character, the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

3. Nevertheless, if such dangerous goods, shipped with knowledge of their nature and character, become a danger to the ship or cargo, they may in like manner be unloaded, destroyed or rendered innocuous by the carrier, as the circumstances may require, without payment of compensation by him except with respect to general average, if any.

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\* Note: Knowing delivery by a shipper of unmarked and undeclared dangerous articles is a criminal offense in the United States, 18 U.S.C. §833 (1974). For civil liabilities, see *Hansen v. Du Pont*, 8 F.2d 552 (W.D. N.Y. 1925).

without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article 5.

### S. Notice of Loss

The United States version of the notice of loss provision<sup>224</sup> makes it very clear that it is not a time bar, and the existing Hague Rules provision makes it clear that the effect of the provision on the cargo claim is at best indirect in that it goes only to the question of the quality of the evidence.<sup>225</sup> Nevertheless, this provision has been misconstrued as a time bar, and the Eighth Session of The Working Group and the UNCITRAL Plenary spent far more time on this subject than it is really worth, in view of the limited effect which it has.

Germany favored retention of the notice of loss provision of the Hague Rules and its reformulation as a precondition to stating a claim, while the United Kingdom favored the retention of the existing provision as a "disciplinary measure" to police fraudulent claims. There was, however, no strong opposition to the retention of the provision, although some delegations felt that in view of the fact that there were to be no "teeth" in the provision it could be eliminated. The Drafting Committee then set out to reformulate the provision on its own responsibility.

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<sup>224</sup> 46 U.S.C. 1303(6), Fourth Paragraph

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not effect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered."

See *Miami Structural Iron Corp. v. Cie Nationale Belge de T.M.*, 224 F.2d 566 (5th Cir. 1955). Cf. *The Scantic*, 40 F.2d 39 (5th Cir. 1930)

<sup>225</sup> "6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

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

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

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

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."



At this session there was support for the principle that a distinction should continue between loss or damage which was apparent and loss which was non-apparent, and that the notice should be in writing.

Respecting apparent loss the formula from the Hague Rules concerning the time for giving notice ("before or at the time of the removal of the goods") was changed to "not later than at the time the goods are handed over to the consignee".<sup>226</sup> Subsequently, however, at the UNCITRAL Plenary, concern for the absolute requirement of a writing produced the further change to "*not later than the day after the day when the goods were handed over to the consignee*".

Respecting non-apparent loss, the Hague Rules had allowed three days for the notice in writing to be given. Considerable discussion took place on the custom of ports and it became readily apparent that there were a number of informal exceptions to the three day rule because of Sundays (or Fridays in Moslem states), holidays and the length of the working week, thus it became apparent that the three day period was not sufficient in practice, accordingly, it was then sought to formulate a rule to take account of the divergent patterns of behavior respecting days of rest, national holidays and local holidays. This effort had to be abandoned because of its complexity and it was decided to adopt a straight ten day period which would be consecutive days regardless of holidays, working days and the day of rest, thus affording a sufficient time for the discovery of non-apparent damage.<sup>227</sup> Subsequently, the UNCTAD Preliminary review recommended that the ten day period be extended, and the UNCITRAL Plenary Session, by a vote of 13 to 7 with 3 abstentions decided to extend the period to fifteen consecutive days.

Respecting *DELAY*, the notice of loss provision is a *PRECONDITION TO RECOVERY*, that is, failure of the consignee to give the notice of delay in writing within 21 consecutive days from delivery to the consignee will bar the claim. This provision was accepted with little discussion. The argument in favor of such a draconian provision had to do with the need for quick action by the carrier to preserve defensive evidence that delay was justified. On the other hand, the fact of the drastic consequences of failure to give notice of delay was used to justify the 21 consecutive day period.

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<sup>226</sup> Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than at the time the goods are handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery of the goods by the carrier in good condition and as described in the document of transport, if any.

<sup>227</sup> Where the loss or damage is not apparent, the notice in writing must be given within 10 days after the completion of delivery, excluding that day.

The Working Group added a provision to the effect that notice to the actual carrier was the equivalent of notice to the carrier. UNC-TAD recommended an expansion of this provision so that any notice given to the carrier shall have effect as if given to an actual carrier.

The following provision was adopted by the UNCITRAL Plenary:

*Article 19. Notice of loss, damage or delay*

1. Unless notice of loss or damage, specifying the general nature of such loss or damage, be given in writing by the consignee to the carrier not later than the day after the day when the goods were handed over to the consignee, such handing over shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the document of transport or, if no such document has been issued, in good condition.

2. Where the loss or damage is not apparent, the provisions of paragraph 1 of this article shall apply correspondingly if notice in writing has not been given within 15 consecutive days after the day when the goods were handed over to the consignee.

3. If the state of the goods has at the time they were handed over to the consignee been the subject of joint survey or inspection by the parties, notice in writing need not be given of loss or damage ascertained during such survey or inspection.

4. In the case of any actual or apprehended loss or damage the carrier and the consignee shall give all reasonable facilities to each other for inspecting and tallying the goods.

5. No compensation shall be payable for delay in delivery unless a notice has been given in writing to the carrier within 21 consecutive days after the day when the goods were handed over to the consignee.

6. If the goods have been delivered by an actual carrier, any notice given under this article to the actual carrier shall have the same effect as if it had been given to the carrier, and any notice given to the carrier shall also have effect as if it had been given to such actual carrier.

*T. Derogations from the Convention*

*1. General Average*

This subject might resemble, facetiously, Winston Churchill's 1939 description of the Soviet Union during the Stalin era as, "a riddle wrapped in a mystery inside an enigma". One of the complexities of the subject which made it very difficult to reach agreement among states not experienced with its mysteries is the multiplicity of ways in which disputes can arise involving general average.<sup>228</sup> Where a general

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<sup>228</sup> Rule A of the 1974 York-Antwerp Rules provides,

"There is a general average act where, and only when, any extraordinary sacrifice or

average disaster has damaged the vessel (and some of the cargo) the shipowner can demand contribution in general average from the cargo.<sup>229</sup> The issue of the shipowner's action to recover general average would be raised most clearly where the cargo (and possibly the vessel) have been totally lost. Where the cargo has been preserved after a general average disaster, the shipowner will not release it to the consignee without payment of the cargo's contribution. However, since the calculation of this is an intricate and time-consuming operation and there is danger of expiration of statutes of limitation before the statement of general average is completed by the adjuster, it is customary for the cargo owner to post a bond and also to pay a cash deposit, unless there is cargo insurance, for the amount of the general average contribution. Thus, it is possible that the question of the shipowner's entitlement to general average might be litigated in the context of an action by the cargo against the shipowner to recover deposits and interest paid for the general average bond.<sup>230</sup> The action can be in Admiralty, *in rem* or *in personam* or in the civil law courts.

There was no difficulty respecting preservation of the actual Hague Rules language which is now found as the first paragraph of Article 24,

"Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average."

However, in view of the fact that bill of lading provisions, national law and the York-Antwerp Rules all presupposed that the policy based

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expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure."

A descriptive summary of general average from the general maritime law may be taken from the *Star of Hope*, 76 U.S. (9 Wall.) 203, 228 (1869).

"General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise."

A general text of the American law is L. Buglass, *Marine Insurance and General Average in the United States* (1973). The leading English work is R. Lowndes & G. Rudolf, *The Law of General Average and the York-Antwerp Rules* (10th ed. by J. Donaldson, C. Staughton and D. Wilson, 1975).

The law of general average has become effectively international since the York-Antwerp Rules concerning the Adjustment of General Average (first prepared in 1877) are incorporated by reference in bills of lading of all maritime states. At the Hamburg Plenary Conference of C.M.I. in 1974 a new revision of the York-Antwerp Rules was approved, effective after July 1, 1974.

<sup>229</sup> *Transpacific S. S. Co. v. Marine Office of America*, 1957 A.M.C. 1070 (Sup. Ct. N.Y. County).

<sup>230</sup> See *United States v. Atlantic Mutual Insurance Co.*, 298 U.S. 483 (1936).

defenses of negligent navigation and management and the fire exclusion would protect shipowners from liability to cargo unless unseaworthiness could be established, and in view of the fact that the concept of seaworthiness had been eliminated together with the policy-based defenses, it was considered by a number of delegations that general average provisions, imposed as part of the contract of carriage, should reflect these changes. The United Kingdom proposed that cargo not be required to contribute in general average unless the carrier proves that, "he, his servants and agents took all measures that could reasonably be required to avoid the occurrence giving rise to the general average." There was much criticism of this proposition from both shipowner and shipper nations that this might be unfair to the shipowner under traditional concepts of general average, and it was proposed to amend the proposal so as not to effect the shipowner's right to contribution in the first instance, but rather to provide for reimbursement of the contribution by shipowner to cargo unless the shipowner proved absence of fault. A small number of states favored this concept, although difficulties respecting the short time bar were acknowledged. In view of the "JASON" Clause, the United States had proposed merely that any bill of lading provision on general average inconsistent with the Convention be null and void, however, other delegations believed this to be superfluous in view of the general rule in Article 23 against bill of lading clauses lessening carrier liability.

Eventually a text was produced, although it evoked little comment *pro* or *con*, as follows:

#### Article 24. General average

Nothing in this Convention shall prevent the application of provisions in the contract of carriage or national law regarding general average. However, the rules of this Convention relating to the liability of the carrier for loss of or damage to the goods shall govern the liability of the carrier to indemnify the consignee in respect to any contribution to general average.

Because of some negative comments on this language by UNCTAD, the provision was divided into two paragraphs and the second paragraph was reworked at the UNCITRAL Plenary so as to eliminate the statute of limitations problem, as follows:

2. With the exception of article 20, the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods shall also determine whether the consignee may refuse contribution in

general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.

## 2. *Relationship with Other Conventions*

The Hague Rules, prepared at the same time as the first international convention on limitation of shipowner liability,<sup>231</sup> provided that the Hague Rules would not be affected by the carrier's rights to limit his liability (beyond the limitation already provided in the Hague Rules) given by national statutes then in force.<sup>232</sup> This provision is slightly different in the United States version of the Hague Rules.<sup>233</sup>

There was a consensus that the Working Group on the Hague Rules could not do anything about removing the "global" limitation of liability convention, then being revised by the IMCO Legal Committee for a Diplomatic Conference in late 1976. Accordingly, it was agreed that the exception of the "global" limitation of liability provisions under statute or international convention would continue. The Drafting Committee also added exclusions for the Paris (1960) and Vienna (1963) nuclear conventions<sup>234</sup> and the UNCITRAL Plenary added an exclusion for passenger luggage under the 1974 Athens Passenger Convention.

The provisions, as approved by the UNCITRAL Plenary, are as follows:

### *Article 25. Other conventions*

1. This Convention shall not modify the rights or duties of the carrier, the actual carrier and their servants and agents, provided for in international conventions or national law relating to the limitation of liability of owners of seagoing ships.

<sup>231</sup> International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, August 25, 1924, N. Singh, *International Conventions of Merchant Shipping*, 1058 (1963).

<sup>232</sup> "The provisions of this Convention shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of seagoing vessels."

<sup>233</sup> 46 U.S.C. 1308 specifically preserves the 1851 Fire Statute and the United States Limitation of Liability Act, as amended, 46 U.S.C. 181-189 and adds that the provisions of the 1916 Shipping Act are preserved. 46 U.S.C. 1309 specifically preserves the 1916 Shipping Act provisions against certain anti-competitive agreements in the shipping industry and 46 U.S.C. 1311 specifically preserves the Harter Act (46 U.S.C. 190-196) coverage before and after the "tackle to tackle" period of the Hague Rules.

<sup>234</sup> See Cigoj, *International Regulation of Civil Liability for Nuclear Risk*, 14 *Intl. & Comp. L.Q.* 809 (1965); Konz, *The 1962 Brussels Convention on the Liability of Operators of Nuclear Ships*, 57 *Am. J. Intl. L.* 100 (1963) and Hardy, *The Liability of Operators of Nuclear Ships*, 12 *Intl & Comp. L.Q.* 778 (1963).

2. No liability shall arise under the provisions of this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under either the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy as amended by the Additional Protocol of 28 January 1964 or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, or

(b) By virtue of national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or Vienna Conventions.

3. No liability shall arise under the provisions of this Convention for any loss of, or damage to or delay in delivery of luggage for which the carrier is responsible under any international convention or national law relating to the carriage of passengers and their luggage by sea.

#### IV. Second Reading of the UNCITRAL Text (February, 1975)

The Seventh Session of the Working Group had been unable to complete all the topics assigned to it, thus the first week of the two week Eighth Session, in which a Second Reading of the entire text was to be accomplished, had to be devoted to unfinished business with the result that the Second Reading took place under great time pressures with long night sessions and shortened debates on a number of issues.<sup>235</sup> Changes to the twenty five substantive articles of the Draft Convention made by the Working Group, during its article-by-article review will be discussed briefly below, using the six Part (or Chapter) headings into which the text has been divided.

##### A. Part I. General Provisions

The first draft had prepared two separate articles on documentary scope and geographic scope of the Convention.<sup>236</sup> Despite some opposition by France which felt that the scope of application should be placed first in the Convention, it was decided to follow the usual Anglo-American practice and begin with definitions of terms, followed by a single article combining documentary and geographic scope. Following an extensive discussion, two paragraphs of the documentary scope article were deleted: former para. 2, bracketed when drafted, permitting agreement of the parties to take the shipment outside the Convention where no bill of lading or similar document of title was issued and former para. 4, also bracketed when drafted,

<sup>235</sup> The Report of the Second Reading of the text of the draft convention is found in U.N. Doc. A/CN.9/105 of 18 March 1975 at pp. 23-59.

<sup>236</sup> 7 J. Mar. L. & Comm. 494-503 (1976)

excluding "frame" or "volume" contracts over a period of time. The majority view was that these two provisions were too dangerous for shippers because they permitted the exclusion of too many shipments from the protection of the Convention. The latter provision was strongly defended by Norway which feared that courts might construe frame contracts as contracts of carriage to be covered by the convention, although the parties intended their relationship to be private carriage under charter party for each separate shipment, thus an amendment was offered which would describe the contracts to be excluded from the convention as, "contracts for successive shipments of goods as bulk cargo in full shiploads." This proposal was withdrawn in the face of limiting amendments, however, at the UNCITRAL Plenary a new version of this proposition was accepted and is now found in Art. 2, para. 4. Article 3 exhorting uniformity of interpretation was taken from UNCITRAL's 1974 Convention on the Limitation Period in the International Sale of Goods.

Respecting definitions, the proposed definition of ship was deleted and "goods" was redefined to include packaging supplied by the shipper, and the bill of lading definition was improved by clarifying that the bill could be made out to a named person, to order or to bearer. A proposal by France to omit "consignee" and replace it with "l'ayant droit" or "rightful owner" was rejected.

## *B. Part II. Liability of the Carrier*

In Article 4 concerning the period of responsibility, the formula in para. 2 for delivery at the disposal of the consignee had mentioned "usage" at the port of discharge. This was expanded to "common usage of the particular trade" by the Second Reading, although the word common was subsequently stricken by the UNCITRAL Plenary.<sup>237</sup>

Respecting Article 5, the United States, supported by Australia, proposed to alter the carrier defense of fire in para. 4 in the manner proposed by Spain at the Working Group,<sup>238</sup> the effect of which would be that the cargo claimant could attempt to prove actual fault of the carrier, failing which the carrier would have the defense of fire if he had adequate means to fight the fire and had taken all reasonable measures to fight the fire and limit it. This formula differed from the general rule of para. 1 wherein the carrier had the heavier burden of

<sup>237</sup> 7 J. Mar. L. & Comm. 77-84, esp. 84 (1975)

<sup>238</sup> 7 J. Mar. L. & Comm. 115 (1975)

proving nonfault, that is, "all measures that could reasonably be required to avoid the occurrence and its consequences". This proposal was rejected by a vote of 5 to 9 with 2 abstentions on the ground that a heavy burden of proof on cargo was justified because spontaneous combustion in the cargo was the usual source of shipboard fires, and more importantly, because the compromise, whereby negligent navigation and management were suppressed while fire was retained, should not be altered. An Indian proposal to reintroduce the concept of seaworthiness in para. 1 was also rejected.

Belgium, Japan, Poland and U.S.S.R. proposed an amendment which would reintroduce the defense of negligent navigation,<sup>239</sup> in view of the opinion of C.M.I. at the Hamburg Plenary in April, 1974 approving the suppression of negligent management but supporting the retention of the defense of negligent navigation. Economic arguments were again unconvincing because of the unreliability and speculative nature of the data and by a vote of 12 to 5 the existing compromise was retained and the amendment was rejected.<sup>240</sup>

Respecting the unit limitation in Article 6, Norway again proposed weight alone as the method for computing the unit limitation but again a majority favored the combination system of weight or shipping unit (package) approved by the Brussels Protocol in 1968.<sup>241</sup> However, since the discussions in 1973 on the choice between these two methods there had been the discussions in 1974 on damages for delay, therefore, debate on the unit limitation issue now revealed more fragmented shades of opinion than had been apparent in 1973, accordingly, the Drafting Committee prepared six alternative formulations:

Alternative A: weight alone for damage or delay

Alternative B: weight alone for damage; multiple of the freight for delay

Alternative C: weight or package for damage or delay

Alternative Dx: weight or package for damage; multiple of the freight for delay

Alternative Dy: weight or package for damage; a lesser amount than the weight/package formula for delay

Alternative E: weight or package for damage; multiple of the freight for delay.

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<sup>239</sup> "Notwithstanding the provisions of paragraph 1 of this article, the carrier shall not be responsible for loss, damage, expense or delay resulting from any neglect or default in the navigation of the ship or from fire unless it is proved that the occurrence giving rise to such loss, damage, expense or delay has been caused by the fault of the carrier."

<sup>240</sup> 7 J. Mar. L. & Comm. 116 (1975)

<sup>241</sup> 7 J. Mar. L. & Comm. 327-335 (1976)



This list of confusing alternatives was subsequently rejected by UNCTAD and the UNCITRAL Plenary selected Alternative D (or E) as the majority choice with an optional proposal of Alternative A.

A very serious disagreement broke out over the question whether the unit limitation of liability should be completely unbreakable. Norway urged the replacement of the first draft formula<sup>242</sup> with the formula taken from Article 13 of the Athens Convention on the Carriage of Passengers and their Luggage.<sup>243</sup> The U.K. delegation, seconded by Norway, had proposed that for reasons of insurability the unit limit had to be completely unbreakable except for the wilful misconduct of the individual proprietor as carrier. The counter argument by France and the United States was that this was *not* now the law and that insurance rates had been set for fifty years under the unit limitation system without unbreakable limits. The Second Reading adopted the Norwegian-U.K. proposals by a vote of 7 to 6 with 4 abstentions and 4 states not present. Respecting deck cargo in Article 9, consideration was given to an I.C.C. proposal that carriers should have an option to carry cargo on-deck in accordance with Para. 2 only when the vessel was "containerized", that is, specially fitted to carry containers only, however, there was no support for the proposal.

Articles 10 and 11 on Transshipment engendered the same heated discussions as had occurred during the 1973 Working Group.<sup>244</sup> Germany proposed to replace the existing article 10 with a new formula taken from the Athens Passenger Convention. Eventually, the Drafting Committee produced a text which welded the existing language with the German proposal, although the United States and Australia were opposed to para. 3 of the new draft because of the possibility of an over-broad exculpatory effect. The paragraph was retained by a vote of 11 to 6. The text of Article 11, para. 2 had been placed in brackets when drafted because a closely divided vote (9 to 7) had determined to suppress it but its sponsors would also have deleted the entire article, thus a compromise solution was hurriedly accepted to bracket the language permitting wide exculpatory clauses to be used by the contracting carrier during transshipment by an actual carrier. Norway, U.K., Japan and U.S.S.R. proposed to delete the brackets and accept the text as drafted. Again threats were voiced that unless the exculpatory clauses were permitted carriers would refuse to participate as agents for shippers in any arrangements for through-carriage beyond the port of discharge on the first leg of the voyage and that the

<sup>242</sup> 7 J. Mar. L. & Comm. 339 (fn. 118) (1976)

<sup>243</sup> 7 J. Mar. L. & Comm. 340 (fn. 120) (1976)

<sup>244</sup> 7 J. Mar. L. & Comm. 341-346 (1976)

necessity for a new bill of lading for each leg of the voyage would compound the problem of voluminous documentation. The response to that argument other than out-right denial was that contracting carriers were now collecting the freight for the entire transit and even advertised transit to ports at which their vessels never called and that this practice, as a matter of public policy, created the necessity for contracting carrier liability throughout the entire contracted voyage. In a vote on this issue at the Second Reading some of the states which had originally opposed the exculpatory language were not present, accordingly by a vote of 9 to 6 with two abstentions the bracketed language was retained.<sup>245</sup>

### *C. Part IV: Transport Documents*

A U.S. proposal concerning signatures<sup>246</sup> (Art. 15, para. 1(j), now Art. 14 para. 3) was added but a proposal for the addition of a new paragraph to insure that the documentary requirements would be compatible with automatic or electronic data processing methods now in use or to be used in the future was not accepted. No delegation said that the new convention would not be compatible with such electronic data processing, but the majority stated that additional language was unnecessary. The proposed language was,

“Any other means which would preserve a record of the particulars set forth in paragraph 1 may, with the consent of the shipper, serve as a bill of lading.”

Respecting Article 16<sup>247</sup> Para. 3(b), Japan proposed that the evidentiary effect of the clean bill of lading be withheld from the consignee who is also the charterer by deleting the words, “any consignee”. In the debate on this proposal it was seen that there were divergences of view in legal theory as to whether the consignee was a party to the contract of carriage or merely a third party beneficiary thereof. Because of uncertainty as to the effect such deletion would have in all legal systems, it was decided to retain the language.

The United States and Japan, supported by C.M.I. and I.C.C. observers sought to delete paras. 2, 3 and 4 of Article 17 as an unacceptable encouragement to fraudulent practices. However, the

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<sup>245</sup> The discussion of this problem in the Report of the Working Group, A/CN.9/105 of 18 March 1975 at p. 49-50 is considerably abbreviated.

<sup>246</sup> See generally, 7 J. Mar. L. & Comm. 639-645 (1976)

<sup>247</sup> 7 J. Mar. L. & Comm. 645-659 (1976)

majority believed that the subject matter should be covered in the new convention, and decided to retain the complete text.<sup>248</sup>

#### *D. Part V: Claims and Actions*

The principal issue respecting Article 20, the Statute of Limitations, was whether the period should be one year or two years.<sup>249</sup> The vote was evenly divided: 8 in favor of one year, 8 in favor of two years, accordingly the length of the period was bracketed. A new paragraph was added to the effect that the limitation period also applied to servants and agents as well as an actual carrier.

Of great significance at this Second Reading was the decision that the name of the new draft convention should be Draft Convention on the Carriage of Goods by Sea, thereby denoting that the scope of the draft is no longer restricted to bills of lading nor even to the formal contract of carriage.

#### *V. The UNCITRAL Commission Review (April-May, 1976)*

In preparation for their meeting there had been circulation of the draft text to all governments and interested international organizations and the compilations of these replies<sup>250</sup> were frequently used during the session so that the members of UNCITRAL<sup>251</sup> would have the benefit of the views of all states. The UNCITRAL Plenary divided into two committees of the whole to consider the agenda topics: the Draft Convention on Carriage by Sea and Arbitration Rules. Committee of the Whole I was under the chairmanship of Prof. Mohsen Chafik of Egypt who had presided over three sessions of the Working Group. A Summary Record of all these discussions has been kept and will be part of the Proceedings.<sup>252</sup> Because of the completeness of the availa-

<sup>248</sup> 7 J. Mar. L. & Comm. 662-670 (1976)

<sup>249</sup> 7 J. Mar. L. & Comm. 348-350 (1976)

<sup>250</sup> U.N. Doc. A/CN.9/109 contains all governmental and international organization commentaries, while U.N. Doc. A/CN.9/110 of 25 February 1976 contains an analysis of the commentaries.

<sup>251</sup> Argentina, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Chile, Czechoslovakia, Egypt, France, Federal Republic of Germany, Ghana, Greece, Hungary, India, Japan, Kenya, Mexico, Nigeria, Norway, Philippines, Poland, Sierra Leone, Singapore, Syrian Arab Republic, U.S.S.R., U. Rep. of Tanzania, U.S.A., and Zaire attended. Observers from Canada and the German Democratic Republic also attended, along with observers from C.M.I., I.C.S., I.C.C., I.U.M.I., I.M.C.O., I.M.F., UNCTAD, the East African Community and the League of Arab States.

<sup>252</sup> Summary Records of the discussions in Committee I can be found in the series A/CN.9/9/C.1/SR.1 through SR. 31. Note, however, that while many remarks of delegations were made originally in English, the Summary Records were made originally in Spanish or French and there

ble records, this article will briefly review only the major issues discussed at the Commission Sessions.

### A. Part I: General Provisions

#### Article 1

Minor drafting changes were made in paras. 1 and 2 in that the expression "contracting carrier" was changed to the simple "carrier" and *performance* by the actual carrier is now emphasized instead of *entrustment*. The definition of goods in para. 3 was reformulated to stress the inclusion of live animals within the Convention.

The U.S. recommendation concerning deletion of the word "specified" in para. 5 was accepted and the paragraph was redrafted to emphasize the carrier's *undertaking to carry* rather than the agreement with the shipper.

The U.S. Concern that the para. 6 definition appeared to exclude straight bills of lading was not shared by other delegations and there was agreement that the straight bill of lading was preserved under Art. 18 as a document other than a bill of lading, and an unopposed statement to that effect was made during the consideration of Article 18.

A new para. 7 was added to define "writing," but attempts to require that the contract of carriage itself must be in writing were unsuccessful, since such a requirement would remove too many shipments from the coverage of the Convention.

#### Article 2

This article is still controversial and remains somewhat unsatisfactory. An attempt was made to delete the *port of discharge* in the scope of applicability of the Convention (Para. 1(b)), but this was not successful.

The U.S. delegation, supported by C.M.I. and a few delegations, attempted to insert a definition of charter party, but this was unsuccessful because a combination of states which did not wish a definition together with those states which could not agree on a definition prevented it. The danger for the future, of course, is that Para. 3 (formerly Para. 4) provides a blanket exception from the Convention by the simple device of calling the document used by the parties a "charter party" or "space charter party" rather than a bill of lading.

The new revision also contains an exception for so-called "frame" or "volume" contracts in para. 4. An earlier version of this concept gave too wide scope to this exception, but has now been considerably narrowed.

In new Para. 3, the language of the Brussels Convention regulating bills of lading issued pursuant to charter parties has been amended to

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are instances where the nuances or the entire contents appear to differ from the original remarks. Summary Records of the Plenary discussions can be found in the series A/CN.9/SR. 173 through SR. 179. The entire Report of Committee I is found in A/31/17 at pp. 57-160.

protect the consignee, "*not being the charterer*". The old Para. 3 concerning application of the Convention to domestic carriage was removed and will be reinserted as part of the final clauses.

## B. Part II: Liability of the Carrier

### Article 4

Editorial changes to denote the period of carrier responsibility in the active voice of the verb rather than in the passive voice were made in Para. 1. and an addition was made to Para. 3 to clarify the situation when delivery is not made from the carrier to the consignee directly. Finally, the superfluous expression, "other persons acting pursuant to the instructions . . ." which followed the expression "servants or agents" was deleted. Attempts to eliminate the geographical limits of carrier responsibility by deleting "port" from the idea of loading and discharging were unsuccessful because no adequate replacement language which did not add multi-modal complications or infringe on clearly domestic transport could be agreed upon.

### Article 5

This article is the core of the new convention as it establishes a negligence basis of liability while requiring the carrier to prove nonliability,<sup>253</sup> further the carrier's liability for delay in delivery is also clearly spelled out.<sup>254</sup> Despite the major changes from the liability scheme of the Hague Rules opposition to Article 5 is now concentrated solely on the issue of the failure to include an exception for carrier's negligent navigation of the vessel. The arguments made previously in the Working Group (October, 1972 and February, 1975) were made again. Ship-owner states (Japan, U.K., West Germany and U.S.S.R.) proposed to reintroduce the exception of negligent navigation. This was done simultaneously with a proposal of some cargo owning states (Czechoslovakia, Hungary, Nigeria, Barbados, Philippines, Sierra Leone and India) to delete or change the special treatment of fire in Para. 4. The majority view was that Para. 4 on fire was part of a single compromise with the deletion of negligent navigation, and that no part of the compromise solution should be disturbed, accordingly, both the proposals to reintroduce the exception for negligent navigation and alter the fire exception were defeated. The Soviet Union entered a firm objection to the former decision on the record. An attempt to include the negligent navigation exception in brackets as an alternative solution was also rejected.

The necessary substitution of "or" for "and" was made in Para. 6 together with language to preserve the right to general average contribution where deviations to save life or property had occurred.

<sup>253</sup> 7 J. Mar. L. & Comm. 102-117 (1975)

<sup>254</sup> 7 J. Mar. L. & Comm. 488-494 (1976)

The cumbersome formula<sup>255</sup> in Para. 1 (and in Art. 17), that the carrier was liable for "loss, damage or expense" used to express the idea of out-of-pocket and compensatory damages for consequential losses has been replaced by the simple word "loss".

### Article 6

The number of alternative formulations of the method for determining the unit limitation of liability has been reduced from five to two, however, there is not yet complete agreement on the method of figuring a special limitation amount for delay damages. There was a decided majority of 12 to 5 for old Alternative D, however there was not yet much support for old Variation Y and at the present time there is no consensus on old Variation X which uses a multiple of the freight. The Soviet Union favored a multiple (possibly 1) of the freight payable for the goods delayed, whereas Australia preferred a multiple (2 or 3 or more) of the freight payable under the entire contract of carriage. Possibly neither choice will be made at the diplomatic conference if a realistic figure for loss or damage is chosen.

Unfortunately, the minority of states which supported old Alternative B (weight alone) argued loudly for the retention of old Alternative B to be presented as an alternative to the diplomatic conference. The unfortunate consequence of this decision was the desire to present alternative texts in the draft convention whenever there was an issue which sharply divided the Commission, as in Arts. 8, 11, 17 and 21.

It was not possible to obtain the agreement of non-members of I.M.F. to the substitution of the S.D.R. for the Poincaré Franc, although the proposal was supported by all other delegations. Accordingly, references to gold were deleted and a note was added to the effect that the unit of account would be determined at the diplomatic conference.

There was *no* discussion of the amount of the unit limitation of liability which will also be left for determination at the diplomatic conference.

### Article 8

The originally drafted article was replaced at the Second Reading by a formulation taken from the Athens Passenger Convention, unacceptable to many states, which provided that the carrier's right to unit limitation of liability could only be voided by the intentional tort of the carrier himself. The UNCTAD Group sought to provide for breaking the unit limitation where the cargo had been damaged recklessly or intentionally by the carrier or his servants and agents, a position which was unacceptable to the shipowning states. Accordingly, some compromise position had to be negotiated, and this compromise is reflected in the new draft to the effect that the carrier's right to unit limitation can be avoided by the intentional or reckless act of the carrier, a home-

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<sup>255</sup> 7 J. Mar. L. & Comm. 493 (1976)

office supervisor of the carrier actually taking charge of any operation of the vessel who performs a reckless or intentional act which damages the cargo, and lastly the reckless or intentional act of the Master or Crew during the crucial periods of loading and discharging of the cargo or performing any other vessel operation directly related to the care of the cargo. While this provision can be criticized as unduly complex, it is doubtful that it will ever be of great practical importance and it is a viable compromise. Under the case law developed under the exception for negligent navigation and management both under the Harter Act and the Hague Rules, U.S. Courts limited the effectiveness of the exception by distinguishing those vessel operations which were essential to navigation but merely incidental to the care of the cargo from those operations which were essential for the care of cargo but merely incidental to the navigation of the vessel.<sup>256</sup> Perhaps it will be necessary to add some language to that effect to Article 8 to insure that it is not used as a blanket approval of employee recklessness.

### Article 9

An extensive debate with many diverse positions was occasioned by proposals to alter or delete the language in Para. 1 concerning on-deck carriage in accordance with the custom of the trade or because of safety regulations. Some delegations favored complete elimination of the language while others favored specifying the source of the regulations to be the flag state or the flag state and the port of loading. Because of the diversity of views the language was essentially retained unchanged with the addition of "is required by" rules and regulations.

Para. 3 was extensively redrafted, but the essence of it remains carrier liability for accidental carriage on deck where no trade custom, safety regulation or bill of lading clause can be established to protect the carrier, who, additionally may be liable without unit limitation for reckless actions.

Para. 4 remains unchanged after an extensive debate concerning proposals to delete it. Para. 4 is concerned with deliberate carriage on deck of cargo which the carrier has agreed to carry under-deck at the insistence of the shipper and would replace the "deviation" remedy presently afforded in U.S. law.<sup>257</sup>

### Article 10

Changes were made in Paras. 1, 3, 4, 5 and 6 to reflect the elimination of the expression "contracting" in modification of "carrier".

Language added to Para. 1 references the almost universal habit of carriers to add extensive "Liberties" clauses to bills of lading and is

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<sup>256</sup> See fn. 89, 7 J. Mar. L. & Comm. 107 (1975)

<sup>257</sup> See fn. 130, 7 J. Mar. L. & Comm. 346-7 (1976)

probably harmless since such clauses cannot vary the convention scheme of liability, in accordance with Art. 23.

Finally, language was added to Para. 3 to emphasize the carrier's continuing liability respecting special agreements with the shipper.

An attempt by Czechoslovakia to provide for joint and several liability of carrier and actual carrier where it was not possible to ascertain the timing of the loss was defeated by 12 to 9 with 3 abstentions.

#### Article 11

Although there have been improvements in this text to lessen the impact of its wide carrier exculpatory provisions, nevertheless, the text remains substantially unsatisfactory.

The improvements were the addition of a requirement that the actual carrier be specified and that the transshipment arrangement be explicitly noted in the bill of lading. There was an extensive debate provoked by U.S. proposals for substantial changes in Article 11, but because of diffuse amendments it was not possible to get a clear decision on a total deletion of the exculpatory clause provision. A compromise solution offered by the United States was defeated which would have permitted the carrier exculpation on the condition that, "by virtue of assignment by the carrier of his rights against the actual carrier or otherwise, it is possible for the shipper to institute legal action directly against the actual carrier."

Paras. 1 and 2 of the old draft have been consolidated and a new para. 2 added which actually contributes nothing as it restates Art. 10.

#### C. Part III: Liability of the Shipper

#### Article 13

U.S. proposals to insert some definition of dangerous goods tied to the law of the flag state were debated extensively but were again defeated.

The language of Art. 13 was completely reformulated and considerably clarified the situation of the shipper's obligations to inform the carrier of the dangerous character of the goods and, if necessary, the precautions to be taken. It is believed that no substantive changes, other than that concerning precautions, have been made in the reformulation.

#### D. Part IV: Transport Documents

#### Article 14

Editorial changes were accomplished in Paras. 1 and 2. A new para. 3 was added, taken from old para. 1(j) of Art. 15.



## Article 15

There was no objection to the U.S. Statement that the draft convention did *not* preclude the preservation of the contents of the bill of lading by electronic data processing equipment.

A new provision, 1(m) concerning on-deck carriage was added to Art. 15 at the insistence of the Soviet Union, however, the UNCTAD proposal that a statement concerning demurrage be added to the list of mandatory contents in Art. 15 was not approved, although a provision respecting demurrage and the evidentiary effect of its non-inclusion was added to Art. 16 Para. 3.

The attempt to limit the number of originals of a bill of lading to one was not approved, although Para. 1(h) was amended to reflect the custom of multiple originals.

Respecting Para. 3, the Philippines proposed to put teeth (or even fangs) into the paragraph by depriving the carrier of the unit limitation of liability if any of the thirteen mandatory requirements of the bill of lading were omitted. This extreme position was not adopted, although it did set off a lengthy attempt to distinguish the essential from the non-essential in the list of mandatory contents. Since the language of old Para. 3 was susceptible to the interpretation that while the non-complying bill of lading remained valid for commercial purposes, states would be free to deny effect to non-complying bills in legal proceedings, this possibility has been eliminated by the rephrasing of Para. 3 using "legal character" instead of "validity" and laying down the bare minimum of contents of a bill of lading to be those noted in the definition of bill of lading in Para. 6 of Art. 1.

## Article 16

The principal change in this article was the deletion of the term "special note" which was used in old Para. 1, to indicate a duty, beyond the normal carrier reservations on the bill of lading, to state the grounds for the reservations.<sup>258</sup>

The United States attempted to add explanatory language to Para. 1 to the effect that "reasonable means of checking" did not include the opening of sealed containers. Although no delegation supported the idea of opening sealed containers, nevertheless, most speakers objected to the addition of such special circumstances language to the draft.

UNCTAD Proposal to add demurrage to the Para. 4 provision respecting the presumption of payment was accepted.

## Article 17

The United States, United Kingdom, Japan and U.S.S.R. attempted to eliminate Paras. 2, 3 and 4 of Art. 17 concerning letters of guarantee (or indemnification) given by shippers to carriers, as conducive to

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<sup>258</sup> 7 J. Mar. L. & Comm. 647-653 (1976)

fraudulent practices, however, this was defeated by a vote of 12 to 8. Nevertheless, a statement indicating the proposal to delete Paras. 2, 3 and 4 was added to the draft text in a footnote.

#### *D. Part V: Claims and Actions*

##### Article 19

Major changes were effected in this article, although, excepting Para. 5 which barred delay claims, the effect of notice of loss provisions is merely evidentiary and not of great practical importance.

In Para. 1, the written notice of loss must now be given not later than the day after the day when the goods were handed over, rather than "at the time" of handing over, since the majority would not accept both instantaneous notice and the requirement of a writing.

Para. 2 was reformulated and the time limit on written notice for non-apparent damage was extended from 10 days (3 days in the Hague Rules) to 15 days.

Para. 3 was reformulated to replace "delivery" with "handed over" and, Para. 5 was amended in conformity thereto. Para. 6 was amended to specify explicitly that notices to the carrier shall also be effective as to the actual carrier.

##### Article 20

At the outset a decision was taken to extend the time period from one to two years.

In Para. 1, there was a debate over the U.S. concern that the time bar of the Hague Rules, applicable only to claims by the cargo interest against the carrier for cargo damage, would be extended to other "non-carriage" disputes such as concerning freight, dead-freight, and failure to carry and also to carrier actions against the shipper. It was first decided to apply the two year time bar to carrier actions against the shipper (as for dangerous cargo). Concerning shipper's non-carriage actions against the carrier, the expression "of goods under this convention" modifying the very broad expression, "Any action relating to carriage" is expected to limit the scope of the time-bar. Furthermore, the Norwegian proposal for a new terminology to substitute "is time-barred" for "shall be discharged from all liability" was accepted after a lengthy debate. The complex provision of the old draft concerning total loss of the goods was deleted and were replaced in Para. 2 by the formula from the Hague Rules, Art. 3(b).

Para. 3 was revised to reflect the view that either the carrier or shipper, as defendant, could agree to extend the limitation period, however, there was no agreement on provisions for further provisions to suspend or interrupt (toll) the statute of limitations, which presumably will continue to be made under national law.

Para. 5 on Indemnification actions was clarified and retained.

## Article 21

Here the Soviet Union unsuccessfully sought the deletion of the entire article on the ground that only the forum selected by the parties should be valid. Some delegations, however, felt that this selected forum would be that printed by the carrier in his bill of lading.

Japan proposed amendments to Para. 1 which were accepted to refer the judicial selection machinery to the proper venue rules of the state in question so as to prevent abuses in very large countries such as the United States or the Soviet Union.

The Norwegian proposal to delete the word "contracting" in Para. 1 was also accepted after a furious debate, however, an explanatory note was added to the convention text about this point.

Para. 2, the compromise "In-Rem" provision was preserved and even enlarged, after an extensive debate, in that a provision regarding quasi-in-rem jurisdiction over sister ships which had been rejected in 1972 was accepted.<sup>259</sup> This question of "in-rem" jurisdiction was complicated by a Soviet proposal to except state-owned vessels from such jurisdiction, but eventually it was decided to retain the compromise without special provision for state owned vessels, relying on the provision that the vessel must have been, "legally arrested in accordance with the applicable law of that State."

## Article 22

The Soviet Union, Poland, Hungary and Brazil made a strong effort to delete this article since it interfered with party autonomy to determine the place of arbitration. Other states, however felt that the danger was too great of lessening carrier liability by reason of an arbitration clause selecting a forum inconvenient or inordinately expensive for shippers, accordingly the article was retained.

The UNCTAD Proposal requiring that when a bill of lading is issued under a Charter party incorporating arbitration provisions by reference, the bill of lading must contain a special annotation to that effect in order to bind the third-party consignee, was contained in a new Para. 2 and an amendment to Para. 1 that the arbitration agreement must be in writing.

VI. *UNCTAD Review*

UNCTAD had begun the consideration of international shipping legislation in its landmark study of bills of lading in 1970,<sup>260</sup> thereafter, the task of formulating the new convention was entrusted to UNCITRAL, with an opportunity for comment thereon to be afforded to UNCTAD.<sup>261</sup>

<sup>259</sup> 7 J. Mar. L. & Comm. 96-100 (1975)

<sup>260</sup> Report by UNCTAD Secretariat, TD/B/ C.4/ ISL/ 6 of 14 Dec. 1970.

<sup>261</sup> 7 J. Mar. L. & Comm. 76-7 (1975)

UNCTAD review of the UNCITRAL draft convention took place at a bifurcated meeting of the UNCTAD Working Group on International Shipping Legislation, one session in January, 1976 before the UNCITRAL Plenary in April-May and a second session in July, 1976. The UNCTAD Secretariat prepared commentaries on the draft convention for both meetings.<sup>262</sup>

At the January, 1976 Session there was an extensive discussion of the economic implications of the new convention, but no new arguments or data were presented which had not been previously presented in UNCITRAL, although consideration was given to the Report of the Committee on Invisibles and Financing related to Trade of UNCTAD on Marine Cargo Insurance.<sup>263</sup> It was the view of most delegations that the recommendation of that report against any radical shift in risk allocation did not apply to the UNCITRAL draft convention. There was an article-by-article review of the provisions of the draft text followed by a list of changes to the UNCITRAL draft convention which had the concurrence of Group B (Western Europe and Others), Group D (Eastern Europe) and the Group of 77.<sup>264</sup>

The UNCITRAL Plenary gave full consideration to the UNCTAD proposals, which were generally adopted, accordingly, the July, 1976 UNCTAD Session reviewed the amended UNCITRAL draft convention and again endorsed the views that, "the draft convention taken as a whole reflects a new balance between all interests concerned, which is intended to be of benefit to international trade and especially to developing countries,"<sup>265</sup> and that the draft convention, "taken as a whole is generally acceptable and meets with the wishes for the revision and amplification of the rules on international carriage of goods by sea."<sup>266</sup>

## VII. Conclusion

At the beginning of this series of articles, the author stated his purpose to describe the issues debated in the preparation of the draft convention so that the entire transportation industry could easily un-

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<sup>262</sup> For the January, 1976 Session, see TD/B/C.4/ISL/ 19 of 30 October 1975. For the July, 1976 Session, see TD/B/C.4/ISL/23 of 18 June 1976. The latter report contains a valuable composite text of the UNCITRAL draft text before and after the 1976 UNCITRAL Commission Review thereof.

<sup>263</sup> TD/B/C.3/120

<sup>264</sup> TD/B/C.4/148 of 11 February 1976.

<sup>265</sup> Resolution of the UNCTAD Working Group on International Shipping Legislation of 16 January 1976, TD/B/C.4/148. Annex I. or TD/B/C.4/ISL/21.

<sup>266</sup> Resolution of the UNCTAD Working Group on International Shipping Legislation of 30 July 1976, TD/B/C.4/ISL/25 or TD/B/C.4/153.

derstand the strength of the positions taken and the wisdom of the compromises achieved. The text now contains many delicate compromises and there may be trade-offs and further compromises which can change the form of the convention at the Diplomatic Conference to be held in 1978. It is likely that proposed texts at that Conference will require the support of two-thirds of the participating delegations.

The author believes that the present text is the product of much careful research and contains compromises reached in a scientific spirit of cooperation in the search for a proper harmonization of conflicting positions. Furthermore, he believes that it is unlikely that another effort at the present time or in the reasonably foreseeable future could produce a text which would successfully balance the interests of developing states, the developed world and the centrally planned economies while being mindful of the commercial interests of carriers, shippers and insurers. If this draft convention fails, the prospect for the harmonious conduct of world trade will be diminished as a multiplicity of local rules will surely take the place of the Hague Rules. Of course the Provisions of Article 5 remain controversial, but it is submitted that the article merely effects a slight alteration in legal theory without making any change in what is expected of the prudent seaman.<sup>267</sup> Accordingly, it is hoped that full discussion of the draft convention in the United States will lead to a favorable judgment on the new text, culminating in ratification of the new convention by the United States.

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<sup>267</sup> See Fleet Admiral C. W. Nimitz Fleet Letter of February 13, 1945.

"... The time for taking all measures for a ship's safety is while still able to do so. Nothing is more dangerous than for a seaman to be grudging in taking precautions lest they turn out to have been unnecessary. Safety at sea for a thousand years has depended on exactly the opposite philosophy." quoted in S. Morison, 13 *History of United States Naval Operations in World War II*, 85-86 (1959).