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*The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part III)**

JOSEPH C. SWEENEY**

“Laws should humor habits so long as they are not vices” ***

Following the three substantive meetings of the UNCITRAL Working Group in 1972–1973 which reformulated and up-dated the 1924 Hague Rules there was a one year hiatus before the work resumed. In February, 1974, a special three weeks meeting was held, and in October, 1974 and February, 1975 two weeks sessions were held to complete preliminary consideration of all issues suggested by the Working Group.

Preparation for the February, 1974 meeting was extensive, with a new questionnaire and further studies prepared by the UNCITRAL Secretariat.¹³⁷ In the meanwhile the UNCITRAL Commission had decided that the activities of the Working Group on Merchant Shipping were to have the highest priority.¹³⁸

Perhaps an explanation for the difficulties, apparent later in this article, which the Working Group had in the Sixth, Seventh and Eighth Sessions, can be sought in the fact that in large part the work was now directed at subjects *not* contained in the 1924 Hague Rules on Ocean Bills of Lading. This meant that the Working Group had to confront

* This is the third of four parts of the study of the new draft convention. The first part appeared in 7 J. Mar. L. & Comm. 69–125 (1975) and the second part in 7 J. Mar. L. & Comm. 327–350 (1976).

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*** Quotation ascribed to the codifiers of the French Civil Code (1804) in Amos & Walton, Introduction to French Law 32 (1973), quoted from P. Fenet I Recueil Complet des Travaux Préparatoires du Code Civil, 481 (1830).

¹³⁷ Replies to the Third Questionnaire on Bills of Lading Submitted by Governments and International Organizations, A/CN.9/WG. III/L.2 Add. 1 and 2 of 11 January 1974; Third Report of the Secretary General on Responsibility of Ocean Carriers for Cargo: Bills of Lading A/CN.9/88 Add. 1; Report of the Working Group on the Work of its Sixth Session, A/CN.9/88 of 29 March 1974.

¹³⁸ Commission Decision of May 17, 1974. UNCITRAL Y.B.23 (1974).

practical issues which were handled in a variety of different ways in business practice. The different legal systems also had not produced coherent solutions which reflected a common law or socialist or civil law point of view. The absence of an historical body of law and practice, against which the issues could be framed, magnified the divergent treatments so that it proved to be very difficult for the science of comparative law to produce a rational harmonization which could gain the support of a majority of the member states, let alone a consensus.

In many areas the opposing views were stated, on the one side by those who desired to see the draft convention become a complete maritime law code governing all the relationships between shippers, carriers and consignees and on the other side by those who wished to restrict the new convention to the problems closely associated with the traditional problems of the Hague Rules.

J. Delay

At the outset it was obvious that there were no specific provisions on the problems of damages incurred by the cargo owning interest by reason of delay in delivery of the cargo. There was a considerable body of belief that when delay caused physical deterioration of the cargo the carrier would be liable for this damage in the same manner as if the damage were due to negligent stowage or an unseaworthy condition,¹³⁹ but the rationale supporting such liability varied.

Prior to the partial codification of the law on carriage of goods by sea in the Harter Act of 1893 the carrier was held liable for physical damage to cargo caused by delay. The legal doctrine frequently used to justify this liability was the doctrine of deviation, so that the carrier became liable for loss caused by delays in the beginning of the voyage and during the continuation thereof. This liability for deviation could not be excused by exculpatory clauses in the bill of lading since the bill of lading itself was ousted by the deviation.¹⁴⁰

In many legal systems, however, the issue in delay cases concerned

¹³⁹ *S.S. Willdomino v. Citro Chemical Co.*, 272 U.S. 718 (1927). See also *The Caledonia*, 157 U.S. 124 (1895) where the Supreme Court held the carrier liable for physical deterioration of live animals (cattle) caused by a short supply of food for them due to delay of the voyage by the unseaworthiness of the ship.

¹⁴⁰ When the goods have been damaged physically by decay, rot or other types of deterioration by reason of delays in the voyage or the commencement of the voyage, the shipper can state a prima facie case for carrier liability and the carrier must then attempt to prove one of the defenses in COGSA 1304. Recovery for physical damage has long been upheld. *SS Willdomino v. Citro Chemical Co.*, 272 U.S. 718 (1927). See also *The Citta di Messina*, 169 F. 472 (S.D.N.Y. 1909); *The Ile de Sumatra*, 286 F. 437 (S.D.N.Y. 1922); *U.S.S.B. v. Texas Star Flour Mills*, 12 F.2d 9 (5th Cir. 1926); *The Hermosa*, 57 F.2d 20 (9th Cir. 1932); *Romano v. West Indies Fruit & SS Co.*, 151

the validity of a broadly drawn "LIBERTIES" clause exculpating the carrier from liability due to carrier delays in loading, moving or unloading the cargo.¹⁴¹ The United States approach to delay damages through a form of deviation could not continue after adoption of the Hague Rules, since those rules did regulate *reasonable* deviations, although the subject of delay remained unregulated.¹⁴²

Many delegations expected from the outset that the Working Group would quickly develop principles to deal with *physical* damages caused by delay but it was anticipated that there would be difficulty in applying the same principles to *economic* losses caused by delay.

In tort law the public policy which permits the recovery of loss of money alone or loss of profits alone or of market value alone in cases of intentional tort (those actions arising out of the Writ of Trespass), deceit, defamation and interference with contract or prospective advantage, is not present in cases of negligent damage.¹⁴³

In contract law the courts have been guided by the principle from English common law that pecuniary loss from breach of contract may not be recovered unless such consequences are foreseen by the defendant before or at the time of contracting.¹⁴⁴ Recovery of pecuniary loss

F.2d 727 (5th Cir. 1945); *Wayne v. Inland Water Ways Corp.*, 92 F. Supp. 276 (S.D. Ill. 1950); *General Foods Corp. v. U.S.*, 104 F. Supp. 629 (S.D.N.Y. 1952); *Norjac Trading Corp. v. The Mathilda Thorden*, 173 F.Supp. 23 (E.D. Pa. 1959); *Karobi Lumber Co. v. SS Norco*, 249 F. Supp. 324 (S.D. Ala. 1966).

¹⁴¹The point at issue in delay cases before and after the Harter Act was the validity of "liberties" clauses exculpating the carrier from liability to the shipper owing to delays from various types of incidents. Two grounds of attack have been employed successfully against clauses exculpating the carrier from delay damage: (1) Construing the clause so as not to apply to the case at all as in *Florida Grain & Elevator Co. v. U.S.S.B.*, 3 F.2d 314 (S.D. Fla. 1924); *The Hermosa*, 57 F.2d 20 (9th Cir. 1932); (2) avoiding the clause because ousted by deviation. *General Hide & Skin v. U.S.*, 24 F.2d 736 (E.D.N.Y. 1928); *Kemsley Milbourn & Co. Ltd. v. U.S.*, 19 F.2d 411 (2d Cir. 1927).

¹⁴²Since enactment of COGSA in 1936, the problem has become whether delay was simply deviation which thereafter had to be an unreasonable deviation in order to justify any liability, the liability itself being limited to the \$500 Per Package amount of COGSA 1304 (5). At the present time there is a difference of opinion between the circuits on the inapplicability of COGSA. In *Atlantic Mutual Ins. Co. v. Poseidon Schiffahrt*, 313 F.2d 872 (7th Cir. 1963) the court found an unreasonable deviation but limited the amount of recovery to the Package Doctrine limit. The Court of Appeals for the Second Circuit, however, has indicated that the type deviation caused by on-deck stowage of cargo not designated as such will oust the bill of lading so as to deny the carrier the protection of the \$500 limit. *Encyclopedia Britannica, Inc. v. SS Hong Kong Producer*. 422 F.2d (2d Cir. 1969).

¹⁴³*Petition of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968); *Trans World Airlines Inc. v. Curtiss-Wright Corp.*, 1 Misc. 2d 477, 148 N.Y.S. 2d 284 (1955). At best this is a doctrine not based on the inherent requirements of the risk theory of negligence, but rather it is a policy choice to limit the liability of defendants in cases where the proof is likely to be inconclusive or perjured.

¹⁴⁴*Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1845). This leading case on damages for breach of contract states that the aggrieved party may recover such damages as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. For a full discussion of the problems of foreseeable damages

damage therefore involves questions of fact whether the carrier has knowledge or is put on notice of special needs of the shipper so that loss to the shipper would be foreseeable if the cargo is delayed.

Accordingly, some maritime courts have denied recovery for pecuniary loss caused by delay.¹⁴⁵

The approach taken by the Secretary General's Preliminary Report¹⁴⁶ was that the language of Article III (2) of the Hague Rules authorized recovery for physical damages caused by delay because of the carrier's obligation to, ". . . properly and carefully load . . . , carry . . . , and discharge the goods carried."¹⁴⁷ Thereafter, the Report pointed out the numerous difficulties associated with economic or pecuniary loss as a result of delay, but concludes that recovery of economic loss is also authorized under the Hague Rules because it is a loss "in relation to the . . . carriage . . . and discharge of such goods . . . "¹⁴⁸ Accordingly, the Report contained a Draft Proposal (A) specifically reframing the carrier liability general provision to include "loss or damage resulting from delay in the delivery of goods," a Draft Proposal (B) defining delay and then offered two solutions respecting the problem of unit limitation of liability: Draft Proposal (C) which would apply the *same* amount of limited liability to all types of delay damages and physical damages to

in contract see J. Calamari and J. Perillo, *The Law of Contracts*, 329-334 (1970).

¹⁴⁵ *U.S.S.B. v. Pensacola Lumber & Timber Co.*, 290 Fed. 358 (5th Cir. 1923); *A/S Stavangeren v. Hubbard Zemurray SS Co.*, 250 Fed. 67 (5th Cir. 1918). In the latter case the court said:

"The damages resulting by reason of the existence of such special circumstances, of which the party sought to be charged was not made aware, are disallowed, not because they are merely consequential or remote, but because they cannot fairly be considered as having been within the contemplation of the parties at the time of entering into the contract." (250 F.2d 70)

However, see *General Hide & Skin Corp. v. U.S.* 24 F.2d 736 (E.D.N.Y. 1928) for a recovery of decline in market value accompanying physical damage occurring through other causes. Further, there is language in *Commercio Transito Internazionale Ltd. v. Lykes Bros. SS. Co.*, 243 F.2d 683 (2d Cir. 1957) from which it can be argued that there is a cause of action for loss of market due to delay. This case turned on the question of the application of the one-year statute of limitations of COGSA 1303 (4). In computing damages in action for delay by the shipper against the carrier, loss of use and mental anguish have been excluded. See *Santiago v. Sealand Co.* 366 F. Supp. 1309 (D.P.R. 1974). See also *Mahmood Aljassin v. SS South Star*, 1971 A.M.C. 1703.

It should be noted that in land carriage in the United States the carrier is liable for both physical damage and economic loss due to delay, under both the common law and the Carmack Amendment. See *Great Atlantic & Pacific Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 333 F.2d (5th Cir. 1961) Cert. Denied 379 U.S. 967. An extensive annotation on this subject is contained in 13 Am. Jur. 2d 850. See also *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.* (1959) A.C. 133.

¹⁴⁶ A/CN.9/WG. III/WP.12 (Vol. I) of 30 November 1973.

¹⁴⁷ *Id.* paras 4-5.

¹⁴⁸ *Id.* See also Report of the Working Group A/CN.9/88 of 29 March 1974 at paras. 13-17. Support was also provided by specific provisions of the Warsaw Convention, Art. 19; the C.M.R. Convention, Art. 17 (1) and the C.I.M. Convention, Art. 27 (1), all of which make specific provision for carrier liability for damage occasioned by delay.

cargo and Draft Proposal (D) which would apply a lesser amount of limited liability for economic loss, based on a multiple of the freight charged by the carrier. Lastly there was a complex Draft Proposal (E) respecting presumption of total loss and intricate procedures occasioned by a discovery of the missing cargo after expiration of the presumptive loss period.

The initial discussion of the subject produced unanimous approval for a clear statement of carrier liability for delay damages, nevertheless there were sufficient differences of approach, especially concerning the concept of economic loss, so that the subject was referred to the Drafting Party to arrive at a single text. At this early stage it was also decided that the draft convention should not cover the carrier's failure to take the goods in charge at all.¹⁴⁹ Thus, the delay provision would begin with the act of the carrier in taking the goods in charge.

Another matter which was raised early in the discussion was the question of the differing concepts of the measure of damages in national legal systems. All legal systems recognize that some losses which are clearly traceable to the defendant's fault can not be recoverable because too remote. However, when it comes to drawing lines to include or exclude items of damage, the results differed greatly. For example, in common law countries there was a split between English and American courts as to whether the successful party to a law suit could include the fees charged by his lawyers in the amount of recoverable costs.¹⁵⁰ Professor Honnold quickly pointed out the difficulties which the codifiers of international sales law experienced in U.L.I.S.¹⁵¹ when an attempt was made to draft rules on measure of damages and foreseeability.

France believed that the best solution would be to state the rule creating liability in the most general terms since national law would certainly exclude indirect or remote or unforeseeable damages.

The United States proposed to amend Draft Proposal A,¹⁵² as follows,

¹⁴⁹ In United States law there is no maritime lien for shippers because of the carrier's failure to load goods. See generally *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490 (1923). Thus the action for breach of contract is a civil action under state law, although there has been an expansion of quasi contract relief in Admiralty. See *Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933)

¹⁵⁰ United States Admiralty law, similar to general common law principles, does not permit the winning party to add his lawyers' fees to the taxable costs to be recovered from the losing party. *The Baltimore* 75 U.S. 377 (1869), see also *Vaughn v. Atkinson*, 369 U.S. 527 (1962).

¹⁵¹ The Uniform Law on International Sale of Goods, THE Hague, July 1, 1964. 1 Register of Texts of Conventions and Other Instruments Concerning International Trade Law, 39 (1971).

¹⁵² Draft Proposal A

"The carrier shall be liable for all loss of or damage in relation to the goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as

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

It was the intent of the United States proposal to indicate in the substantive law creating carrier liability that mere economic losses would be treated differently from physical damage to goods, and that there should be a different and lower level of unit limitation of liability for such losses.

France, however, disapproved of the "economic loss" language, and pointed out that it would be impossible to achieve agreement on a definition of economic loss. The United States, however, indicated that it might be better not to attempt to define economic loss at all. The Chairman (Egypt) indicated that if the term "economic loss" were to be used it would have to be defined.

India agreed that there was a clear distinction between physical damage and economic loss and that the two should be dealt with separately.

Ghana introduced the problem of whether "economic loss" would be of a financial nature only or whether claims for moral damages¹⁵³ would also be included. The United Kingdom agreed and felt that there should be no reference to economic loss since all loss was financial in nature, whether arising from physical damage or some consequential losses.

Norway preferred Draft Proposal A because it distinguished only between physical loss and all other types of losses, and that it would be appropriate at a later stage to make some different arrangement for unit limitation of types of losses other than physical damage.

With these expressed differences unresolved, the entire question was handed over to the Drafting Party along with two versions of a definition of delay. While Australia, Ghana, United Kingdom, Singapore and France preferred Draft Proposal B, defining delay¹⁵⁴, Norway, Brazil

defined in Article (), and for loss or damage resulting from delay in the delivery of goods subject to a contract of carriage, as defined in Article (), unless the carrier proves that he, his servants, and agents took all measures that could reasonably be required to avoid the occurrence or delay and its consequences."

¹⁵³ "Moral damages" are known to civil law-trained lawyers as the concept justifying non-material damages such as pain and suffering and survivors' grief together with other non-material losses such as shame and humiliation and loss of reputation. See Amos & Walton, *Introduction to French Law*, 209-10 (1973).

¹⁵⁴ Draft Proposal B

and Poland had preferred the language of article 19 of C.M.R.,¹⁵⁵ accordingly, the two texts were referred to the Drafting Party to consolidate a definition which restated the rule in *Hadley v. Baxendale*.¹⁵⁶

The Drafting Party text accepted Draft Proposals A and B in simplified form, and these texts are now incorporated in Article 5 (1) and (2) of the draft convention.

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

Delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon in writing or, in the absence of such agreement, within the time which, having regard to the circumstances of the case, would be reasonable to require of a diligent carrier.”

At the Second Reading Art 5(1) was modified to express three types of damages resulting from breach of the carrier's duty: loss, damage or expense. It was the intention that the word expense include the consequential losses to the carrier, whether from destruction, damage or delay. Also, the Second Reading inserted the requirement of a port of discharge named in the contract of carriage as a prerequisite for delay damages.

There was a difference of opinion as to whether the same monetary limit should apply to both physical damage and non-physical damage resulting from delay, many delegates, including the U.S., favoring a dual method of unit limitation with a different and lower limit for economic loss.¹⁵⁷

Alternative texts were included because of the argument that Governments would not be in a position to choose between the two approaches

“Delay in delivery occurs when the carrier does not deliver the goods in accordance with Article () by the date for delivery expressly agreed upon by the parties or, in the absence of such agreement, by the latest date that may normally be required for delivery by a diligent carrier having regard for the circumstances of the case.”

¹⁵⁵ Art. 19 C.M.R.

“Delay in delivery shall be said to occur when the goods have not been delivered within the agreed time limit or when, failing an agreed time limit, the actual duration of the carriage having regard to the circumstances of the case and in particular, in the case of partial loads, the time required for making up a complete load in the normal way, exceeds the time it would be reasonable to allow a diligent carrier.”

¹⁵⁶ See fn. 144 supra.

¹⁵⁷ Report of the Seventh Session (A/CN.9/88) at para. 21

until the amount of unit limitation were chosen. The United States suggested that the special limitation of liability for delays should also have alternative texts: one incorporating the freight limitation (strongly favored by France) and the other based on per package or per weight limitation.¹⁵⁸ These alternatives are now found in Article 6 of the new draft convention.

The concept of presumed non-delivery in Draft Proposal E was approved. After a specified period of delay in delivery the consignee would be entitled to treat the goods as lost and make a claim against the carrier on that basis,¹⁵⁹ but, there were differing views as to whether the carrier should have the right to prove that the goods were not in fact lost. Some favored retention of the language "unless the carrier proves the contrary" following the expression "may treat the goods as lost," in order to permit the carrier to prove that the goods were not lost, and thereby overcome the presumption of their loss.¹⁶⁰

A majority considered it unnecessary to include provisions regulating in detail the rights of the claimant and the carrier if the goods should be recovered, trusting that the problems would be solved in commercial practice.¹⁶¹ Other representatives urged a complete treatment and considered that such provisions would be needed in cases where the consignee wanted to have the goods in spite of the delay because of their special usefulness to him. The same delegations also thought it was necessary to protect the consignees' interest in cases when the value of the goods recovered was in excess of the maximum carrier liability since in such a case the carrier would receive a windfall profit. Because of insufficient interest in the details of this complex problem, not much of the draft language was adopted. Three states had favored the detailed provisions, while eight were opposed.

K. Documentary and Geographic Scope of the Convention

Although the Second Reading combined these two subjects into a single article, 2, of the draft convention, nevertheless the problems of geographic scope and documentary scope had been considered separately and were separately drafted.

¹⁵⁸ Id. at para. 23. There was some objection to the use of a multiple of the freight rate because there is usually no relation between value of the goods and the freight rate.

¹⁵⁹ Id. at para. 24.

¹⁶⁰ Id. at para 28 (a).

¹⁶¹ Id. at para 25. There was criticism of the Draft Proposal E as too bureaucratic and inefficient. A similar provision in CMR had produced no case law.

1. *Documentary Scope*

This proved to be an extremely controversial subject, not so much because of what was to be included in the Convention, but rather because of what was to be excluded.

The Hague Rules had been prepared at a time when international trade involving ocean transport was financed solely through documentary credits, a method of procedure which began in the nineteenth century and reached its greatest development in the middle years of the twentieth.¹⁶² The relevant documentary scope of the Hague Rules is found in Article 1 (b) limiting the applicability to the contract of carriage covered by a bill of lading or to bills of lading issued under a charter party but negotiated to a third party. The Working Group had already agreed that the coverage of the Convention must be expanded beyond the "tackle to tackle" period and a further expansion of the coverage of the Convention to the various types of informal documents now found in maritime transport seemed to be necessary. Further, with respect to those shipments for which no actual documentation was issued because the shipment was recorded and tracked through computers, the present documentation requirement is an unnecessary complication.¹⁶³ The revelation of the possibility of an eventual elimination of documentation brought strong disapproval from Latin American delegates, especially Argentina. These delegates were suspicious of anything which would weaken the traditional bill of lading as the principle documentation in ocean transport.

The United States was concerned about a problem which was not raised by the Secretariat, the problem of common carriage documented as private carriage. Such common carriage under charter parties involved an abuse of the charter party exceptions in Article V and I (b) of the Hague Rules.¹⁶⁴ In *Jefferson Chemical Co. v. M/T Grena*,¹⁶⁵ the

¹⁶² The subject of documentary credits is well covered in a number of the articles: McCurdy, *Commercial Letters of Credit*, 35 Harv. L. Rev. 539 (1922); Harfield, *Secondary Uses of Commercial Credit*, 44 Colum. L. Rev. 899 (1944); Harfield, *The Increasing Domestic Use of the Letter of Credit*, 4 U.C.C.L.J. 251 (1972); Mentschikoff, *How to Handle Letters of Credit*, 19 Bus. Law 107 (1963); see also W. Ward and H. Harfield, *Bank Credits and Acceptances* (4th ed. 1958). The principal source of law and practice in this area is "The Uniform Customs and Practice for Documentary Credits" revised 1974, published by the International Chamber of Commerce. ICC Pub. No. 290.

¹⁶³ Report of the Seventh Session (A/CN.9/88) at paras. 37-38.

¹⁶⁴ See generally Chiang, *The Characterization of a Vessel as a Common or Private Carrier*, 48 Tul. L.R. 299 (1974).

¹⁶⁵ 413 F.2d 864 (5th Cir. 1969).

court, after examining the nature of the carrier operations and extent of vessel use by the shipper under a charter party, found that the carrier was actually providing common carriage and subjected the transaction to the terms of COGSA, thereby invalidating exculpatory clauses which would have been valid in private carriage under charter party.

The United States believed that the scope of the revised convention should be "carriage of goods" rather than carriage of goods by sea or bills of lading or contracts of carriage, so as to permit maximum utilization of the rules. Nevertheless, a carefully phrased exception for true private carriage under charter parties should be retained. Language to accomplish these changes was proposed by the United States, as follows:

"1. The provisions of this Convention shall apply to the carriage of goods (between ports in two different states).

2. Carriage of goods within the meaning of this Convention does not include carriage under charter whereby the entire carrying capacity ("the whole reach of the vessel") or a very substantial portion of such capacity is employed for a stated period of time (time charter) or for a particular voyage or voyages (voyage charter). Nevertheless, this Convention shall apply to the carriage of goods when the vessel is under charter from the moment at which a bill of lading or document is issued under or pursuant to a charter regulates the relations between a carrier and a holder of the same.

3. Contracting states may decline to apply the rules of this Convention where the transit is domestic or does not involve traversing oceans or seas.

4. Contracting states may decline to apply the rules of this Convention if both the port of loading and the port of discharge are in non-contracting states."

The Draft Proposals of the Secretariat were in the context of a definition of the contract of carriage, as follows:

1. "Contract of carriage" applies to all contracts for the carriage of goods by sea.

Alternative (a)

2. The provisions of this Convention shall not be applicable to charter-parties, but if bills of lading, consignment notes or other documents evidencing contracts of carriage of goods are issued in the case of a ship under a charter-party they shall comply with the terms of this Convention.

Alternative (b)

2. The provisions of this Convention shall not be applicable to carriage under a charter-party whereby a ship or all or the major (a substantial) portion of the carrying capacity of a ship is engaged for a stated period of time or for a particular voyage. However, if bills of lading, consignment notes or other documents evidencing contracts of carriage of goods are issued in the case of a ship under a charter-party they shall comply with the terms of this Convention.

In the view of the United States, the proposals of the Secretariat were not broad enough as to scope, yet too broad as to exceptions. Furthermore, Article 6 of the Hague Rules represented a potential method of avoiding the new rules altogether by the device of giving a receipt only which could never be turned into a bill of lading.

Professor Honnold noted that the Scope of the new Convention should not be permitted to shrink as less formal means of documenting international trade were developed. He also recommended retention of Article 6.

Brazil, Hungary, and India supported the idea that the new convention should be given the broadest possible scope.

Norway supported the deletion of Article 6, but favored the retention of the existing structure of Article 1 (b) excluding charter parties and eventually introduced another exception for long range space requirement contracts or quantum contracts which were not charter parties because no specific ship was in contemplation at the time of contracting.¹⁶⁶

The I.C.S. representative called for the deletion of Article 6 as inadequate, but this was immediately rebutted by the United Kingdom asserting the view that the structure of the rules provide and should continue to provide mandatory rules for certain types of contracts with special exceptions for those contracts, such as charters, not within the reach of the mandatory rules. At least the existing exceptions should be preserved. These views were supported by Japan.

The United Kingdom presented a Draft Proposal. In response to the Secretariat Questionnaire, the United Kingdom had suggested the inapplicability of the Hague Rules to goods of no commercial value or where experimental forms of packing are used or for very unusual cargoes. The United Kingdom's proposal together with commentary thereon was as follows:

¹⁶⁶ Report of the Seventh Session (A/CN/9/88) at para. 46.

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

2. These Rules shall apply to all other contracts for the carriage of goods by sea unless the parties have expressly agreed otherwise and a statement to that effect is endorsed on the document evidencing the contract of carriage and signed by the shipper.

3. These Rules shall not apply to charter parties."

"It will be seen that this proposal is identical in substance, with one difference, to that in alternative (a) in the Secretariat proposal. The new Rules would apply to all contracts of carriage by sea, except charter parties, whether or not a bill of lading was issued. The only difference lies in the very special case where both parties agree expressly that the Rules should not apply, and this agreement is endorsed on the document evidencing the contract of carriage (which cannot for these cases be a bill of lading or document of title), *and signed by the shipper*. Thus there is no question of these exceptional agreements being contracts of adhesion."

Strong opposition to paragraph 2 of the U. K. proposal came from Australia and Argentina.

The Norwegian proposal was generated by concern that very broad language in the Convention would be interpreted by courts to the effect that all contracts having to do with sea transport must either come under the Convention or be specifically excluded from it. There could thus, be no way to avoid the problem with requirements contracts by not mentioning them in the Convention. Accordingly, Norway introduced a modification of the Secretariat Proposal,

"For the purpose of this article, contracts for the carriage of a certain quantity of goods to be shipped consecutively for a specified period of time shall be deemed to be a charter party."

Norway urged that the Convention provisions defining contract of carriage should accommodate the most pressing needs: firstly, the bill of lading, where demanded by the shipper, because of its diverse functions; Secondly, other types of documents with less functions; Thirdly, the situations where documentation was minimal: the consignment note or the use of automatic data processing equipment.

Singapore felt that the scope of the documents within the Convention should include delivery orders and was concerned with the lacuna in the law being perpetuated by the charter party exception, such exception being removed by the negotiation of the bill of lading issued under charter to a third party.

Germany noted that the real problem would come with the attempt to define the contract of carriage itself. Although the Hague Rules only set out to govern bills of lading and not carriage by sea, nevertheless it was

appropriate now for an extension of the scope of documents beyond bills of lading.

France explained the provisions of the French Law on Contracts of Affreightment of June 18, 1966,¹⁶⁷ that the entrustment of goods to the carrier gave rise to the contract. The Convention, in similar fashion, should apply from the entrustment to the carrier.

Furthermore, France believed that the new Convention should be totally dissociated from questions of negotiability and title to the bill of lading, regulating only relations between the shipper interest and the carrier interest.

The C.M.I observer reformulated proposals for excepting contracts of carriage with the consent of the parties, as follows:

“The provisions of this Convention shall not apply to contracts giving the shipper the right to:

1. engage the vessel for a specified period of time.
2. call upon the ship owner to carry a volume of goods over a certain period of time.
3. engage the full or a substantial part of the vessel's carrying capacity.
4. give directions with respect to the route, navigation, operation or management of the ship.

However, the above provisions notwithstanding, the rules of this Convention shall apply when bills of lading have been issued to evidence the contract of carriage.”

The C.M.I observer noted that the tendency to complicate the issuance of the bill of lading would confirm the trend to ship with informal documents only rather than bills of lading, and that eventually the carrier might charge an extra fee for the issuance of a bill of lading.

There followed an extensive debate about the definition of a charter party, however there was little agreement about the requirements for such a definition and the attempt was abandoned.

Summarizing the discussion the chairman believed there was consensus that the scope of application of the Convention should be broadened to be made more widely applicable and that it should apply to “all contracts of carriage of goods by sea,” except charter parties, including all types of maritime transport, all forms of obligation (contract, tort, bailment), all documents, and situations when shipments are handled by

¹⁶⁷ There was considerable difficulty about the change in French terminology since the expression “*charte-partie*” used in the 1924 Hague Rules and earlier treatises has been suppressed in favor of “*contrat d'affrètement*” which has a French meaning restricted to private carriage and not as broad as the English expression “contract of affreightment” which is more nearly synonymous to the broad expression contract of carriage.

computers. Under special circumstances, the parties to a contract of carriage should be permitted specifically to agree to the non-applicability of the Convention, nevertheless Article 6 of the present Hague Rules would be dropped. As to charter parties, there was agreement that the Convention not be applicable, however, the convention will apply to the contractual relation between the carrier and the cargo owner under a bill of lading who was not himself the charterer. The exclusion of quantum contracts from the convention was controversial, but a slight majority favored it.

The draft provisions on the documentary scope of application of the convention to replace Article 1 (b) of the Brussels Convention of 1924 were as follows, and are now found in Article 2, modified to include provisions on geographic scope, and excluding paragraph 4, suppressed at the Second Reading:

“1. The provisions of the Convention shall be applicable to all contracts for the carriage of goods by sea.

2. Where a bill of lading or similar document of title is not issued, the parties may expressly agree that the Convention shall not apply, provided that document evidencing the contract is issued and a statement of the stipulation is endorsed on such a document and signed by the shipper.

3. The provisions of this Convention shall not be applicable to charter parties. However, where a bill of lading is issued under or pursuant to a charter party, the provisions of the Convention shall apply to such a bill of lading where it governs the relation between the carrier and the holder of the bill of lading.

4. For the purpose of this Article, contracts for the carriage of a quantity goods over a certain period of time shall be deemed to be charter parties.”

2. *Geographic Scope:*

Article 10 of the Hague Rules simply states: “The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States.” By the terms of the U.S. Carriage of Goods by Sea Act the provisions of the law are not to apply to domestic carriage.¹⁶⁸

The reservation entered by the United States upon ratification of the Hague Rules requires that the contracting state limitation therein be ineffective in United States courts.

Despite the greater number of ratifications and adhesions to the

¹⁶⁸ 46 U.S.C. 1300, “...every bill of lading or similar document of title which is evidence of contract for the carriage of goods by sea *to or from ports of the United States in foreign trade* shall have effect subject to the provisions of this Act.” (Emphasis added).

Hague Rules there has never been universal acceptance. Many nations have adopted the liability scheme and much of the actual language of the Hague Rules without becoming contracting states. Furthermore, the process of ratification may be quite lengthy; accordingly, Article 10 should be deleted from the Revised Rules because of the potential uncertainty it would introduce.

Article 5 of the Brussels Protocol of 1968 was proposed to meet this difficulty. However, most delegations in 1974 did not consider it to be satisfactory since it did not apply the terms of the Convention when the port of discharge is located in a contracting state.

Article 5 of the unratified Brussels Protocol of 1968 provides for replacement of Article 10 with the following:

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

- a—The Bill of Lading is issued in a contracting state or
- b—The carriage is from a port in a contracting state or
- c—The contract contained in or evidenced by the Bill of Lading provides that the rules of this Convention or legislation of any state giving effect to them are to govern the contract.

Whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person.”

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

Because the place of issuance of the bill of lading does not bear an adequate relationship to the performance of the contract of carriage, and because of constitutional problems in some federal states it seemed to be unwise for the international convention to mandate its applicability to domestic waterborne transportation, nevertheless the problem kept recurring¹⁶⁹

The many examples of conflicting provisions concerning applicability seemed to require a complete change of approach from the Hague Rules, thus the Secretariat prepared two draft proposals:

Draft Proposal A rephrased the awkward formula of Article 5 of the Brussels Protocol and provided that contracting states were free to apply the rules of the Convention to bills of lading not included within the Convention scope.

Draft Proposal B would apply the Convention to every bill of lading (or contract of carriage) between ports in two different states if:

¹⁶⁹ Sec. Gen. Rpt. (A/CN.9/WG III/W.P.12) at para. 5.

- (a) the bill of lading document evidencing the contract of carriage is issued in a contracting state, or,
 - (b) the port of loading *or the port of discharge or one of the optional ports of discharge provided for in the documents evidencing the contract of carriage* is located in a Contracting State, or
 - (c) the document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.
2. The provisions of paragraph 1 are applicable without regard to the nationality of the ship, the carrier, the shipper, the consignee or any other interested person.

Draft Proposal A was supported by Japan and the United Kingdom. The United Kingdom feared that specific reference to the port of discharge would give support to those states (like the United States and specifically the Federal Maritime Commission) which would attempt a unilateral regulation of international trade, accordingly, references to the loading state were permissible but the port of discharge should not be included.

Draft Proposal B was supported by Egypt, Hungary, Singapore, India, Tanzania, Nigeria, Ghana, Argentina, Chile, and Australia. Belgium and the Soviet Union indicated they could support it, however, the Soviet Union wanted to explore the possibility of special provisions for regional groupings such as the C.M.E.A.

Australia proposed permissive language to authorize Contracting States to apply the Convention to domestic transport. Although there was some initial opposition to this language from France, most delegations found it to be acceptable. During the Second Hearing there was more difficulty with this language, however, because of a Norwegian proposal, supported by the Soviet Union, to state directly that the Convention shall apply to domestic transport but that contracting states would be able to exempt themselves explicitly from such provisions. The United States indicated that this might raise grave constitutional questions and the Norwegian proposal was dropped.

The Drafting Party proposed the following:

“1. The provisions of this Convention shall, subject to Article (), be applicable to every contract of carriage of goods by sea between ports in two different States, if:

- (a) the port of loading as provided for in the contract of carriage is located in a Contracting State, or
- (b) the port of discharge as provided for in the contract of carriage is located in a Contracting State, or
- (c) one of the optional ports of discharge provided for in the contract of

carriage is the actual port of discharge and such port is located in a Contracting State, or

(d) the bill of lading or other document evidencing the contract of carriage is issued in a Contracting State, or

(e) the bill of lading or other document evidencing the contract of carriage provides that the provisions of this Convention or the legislation of any State giving effect to them are to govern the contract.

“2. The provisions of paragraph 1 are applicable without regard to nationality of the ship, the carrier, the shipper, the consignee or any other interested person.”

The language of these paragraphs is now incorporated in Article 2 of the draft convention.

