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*The Uncitral Draft Convention on Carriage of Goods by Sea**

by JOSEPH C. SWEENEY**

PART TWO

The two substantive meetings of the UNCITRAL Working Group on Merchant Shipping Legislation in 1972 had gone very far towards a restructuring rather than a mere amendment of the existing Hague Rules of 1924. Thereafter there would be four more meetings of the Working Group to complete the draft convention. It seemed to this observer that the meetings became increasingly more difficult as the obvious economic impact of the issues diminished.

F. The Concept of Unit Limitation of Liability and subsidiary doctrines

A large part of the work of the fifth session concerned the structuring of the unit limitation principle and an accommodation to the container revolution which was complete in North Atlantic trades and was rapidly displacing general cargo carriage by boxes, bales and bags in other important trades. Subsidiary to the unit limitation principle were the issues of its extension to other participants in the maritime industry than carriers⁹⁶ and the issue of the effect which serious fault or intentional conduct would have on the carriers' right to unit limitation of liability.⁹⁷

* This is the second of four parts of the study of the new draft convention. The first part appeared in the October issue of the Journal, 7 J. Mar. L. & Comm. 69-125 (1975).

** 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 Working Group. The author is grateful for the assistance of his students, Michael J. Egelhof and Thomas J. Hawley of the Class of 1975, Fordham Law School.

⁹⁶ E.g. *Stevedores*: See *Scruttons v. Midland Silicones Ltd.* (1962) A.C. 446; *Herd & Co. v. Krawill Corp.*, 359 U.S. 297 (1959). Cf. *Bernard Screen Printing Corp. v. Meyer Line*, 328 F. Supp. 288 (S.D.N.Y. 1971), affirmed 464 F. 2d 934 (2d Cir 1972).

⁹⁷ *The Himalaya* (*Adler v. Dickinson*) [1955] 1 Q.B. 158.

1. Unit Limitation of Liability (exclusive of amount)

At the outset there was agreement that the subject of the monetary amount of any proposed unit limitation of liability would not be discussed at this session, as noted in the Secretariat Report.⁹⁸

Nigeria began the Plenary Discussion with the statement that developing countries would favor a system of unit limitation based on *weight alone*, as found in the C.I.M., C.M.R., and Warsaw Conventions, with no reference to the package limitation system as found in Hague Rules IV (5) or the Brussels Protocol of 1968.⁹⁹

The Norwegian delegate endorsed the view that unit limitation should be based on the principle of weight alone. He based his argument on the simplicity of administration, the ambiguities and resulting friction in any "package" system of limitation and the necessity to accommodate intermodal carriage systems in the future.¹⁰⁰

The United Kingdom noted that the weight only system of unit limitation might be acceptable but that on balance he preferred the retention of the dual method contained in the Brussels Protocol of 1968. He noted the disadvantages of the weight system respecting low value-heavy weight cargoes, as well as the difficulty of establishing weight in partial loss or broken package cases.¹⁰¹

The Australian delegate indicated a preference for the weight only system because of intermodalism, but said he could accept the dual system.

⁹⁸ Secretary-General, Second Report on Responsibility of Ocean Carriers for Cargo: Bills of Lading, U.N. Doc. A/CN.9/WG.III/WP.10 (1973), Vol. I, Part One, Para. 60. (Hereinafter cited as Second Report.) While deferring the question of specific amounts, the Report suggests the possibility of restoration of the value of the original limitation amount in 1924 (para. 61) and comparison of the limitation amounts in other major transport conventions (para. 62) as possible starting points in establishing an appropriate limitation amount.

The 1968 Brussels Protocol to The Hague Rules, signed by the United States but not ratified, modified the limitation figure to \$662 per package or unit, or 90 cents per pound, whichever is higher. That Protocol is not yet in effect, although Norway and Sweden have ratified and Singapore and Syria have adhered.

⁹⁹ Report of the Working Group (Fifth Sess.), U.N. Doc. A/CN.9/76 (1973), para. 16. (Hereinafter cited as Report (Fifth Sess.).)

¹⁰⁰ See Replies to the Second Questionnaire on Bills of Lading Submitted by Governments and International Organizations for Consideration by the Working Group, U.N. Doc. A/CN.9/WG.III/WP.10/Add.1 (1972) 105-107. (Hereinafter cited as Second Questionnaire.)

¹⁰¹ Report (Fifth Sess.), para. 18:

"18. However, most representatives favoured maintaining the dual system embodied in article 2 (a) of the 1968 Brussels Protocol. These representatives pointed out that such a system had the advantage of flexibility in that it took account of packages that were relatively light but were of substantial value: a single system based on weight alone might operate to the shipper's detriment in the case of high-value, low-weight cargo. In addition, such a system would make it necessary to state the weight of every package shipped."

The French Delegate favored the retention of the dual method contained in the Brussels Protocol of 1968. His view was endorsed by Belgium, Japan, Poland, Singapore, India, Argentina, and Brazil. However, Japan approved the Dual System only on condition that containerized goods would be governed by weight alone.

The United States indicated that it would support the Dual System, by weight and package, of unit limitation found in Alternative I (Para 23 of the Secretariat's Second Report) which had been reached at Brussels in 1968.¹⁰² The United States delegate noted that the weight only system might provide adequate protection for shippers of low value-high weight bulk cargoes but felt that this system would not adequately protect the high value-low weight break bulk cargoes that were still important to world trade. Accordingly, the Dual System might be preferable at the present time although he conceded that weight alone provided a rational and simple solution to the problem. He also noted that a satisfactory solution to the problem of unit limitation might encourage those nations which had reserved their positions in October with respect to the policy based defenses to withdraw their reservations. He noted the danger that a single system of limitation with a high amount per kilo might not obtain international consensus, especially among carrier nations.

The USSR Delegate indicated his preference for the Dual System of the 1968 Brussels Protocol because of the flexible approach to the problem. He felt the argument that intermodalism will require the weight only system to be unconvincing and that we should not be driven by the solutions obtaining in European road and rail transport.¹⁰³

The Chairman noted that only two states had supported the weight only unit limitation whereas eleven states had supported the dual system of unit limitation while another state indicated it could accept the dual system. However, there had been no clear division of the states supporting the dual system as to the preferred choice among Alternative One ("per package or in the case of goods not shipped in packages, per

¹⁰² Second Report, Vol. I, Part One, para. 23:

23. Under the first of these clarifying amendments, the words "per package" might be made the primary basis of limitation, with a subsidiary limitation "per freight unit" for goods not shipped in "packages". Such a clarification might be achieved by amending article 2 (a) of the Protocol to read as follows:

Alternative I

"... neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (a) Frcs. ____ per package or in the case of goods not shipped in packages, per freight unit or (b) Frcs. ____ per kilo of gross weight of the goods lost or damaged, whichever is the higher". (emphasis added)

¹⁰³ Second Questionnaire 137-139.

freight unit"); Alternative Two A ("per package or other shipping unit") or Alternative Two B ("per shipping unit"). Accordingly, the entire subject was referred to the Drafting Committee.

Discussions in the Drafting Group were in large part a replay of the previous arguments. The United States Delegate reviewed the experience of U.S. courts with the Package Doctrine, but the Norwegian Delegate stressed the amount of litigation on the question in the United States. Nevertheless the U.S. Delegate repeated that the court interpretations were not contradictory and that complicated problems had been resolved in a consistent manner once it had been determined that a shipping container was not per se a package.¹⁰⁴ Thus, obviously boxes, bales and bags were treated as "packages," whereas the customary freight unit concept was applied to cases of linear measurement or cubic volume¹⁰⁵ while there were also some rare instances of the customary freight unit

¹⁰⁴ Recent court decisions have confronted the problem of the container following a series of cases dealing with the nature of the customary freight unit in the American version of COGSA. Thus, shipowner contentions respecting the number of freight units have been approved in the following cases:

A yacht carried on deck under a bill of lading incorporating COGSA held to be one freight unit, *Pannell v. The American Flyer*, 157 F. Supp. 422 (S.D.N.Y. 1957), modified 263 F.2d 497, (2d Cir. 1959) cert. denied 359 U.S. 1013 (1959); an enormous roll of steel fully boxed but weighing more than 32 tons held to be one freight unit, *Mitsubishi Int'l Co. v. SS Palmetto State*, 311 F.2d 382 (2d Cir. 1962) cert. denied 373 U.S. 922 (1963); a pallet containing six cartons with 40 packages apiece held to be one freight unit, *Standard Electrica v. Hamburg Sudamerikanische Dampfschiffahrt Gesellschaft*, 375 F.2d 943 (2d Cir. 1967) cert. denied 389 U.S. 831 (1967); a 6,200 pound steel press bolted to a skid held to be one freight unit, *Aluminios Pozuelo, Ltd. v. SS. Navigator*, 277 F. Supp. 1008 (S.D.N.Y. 1967) aff'd 407 F.2d 152 (2d Cir. 1968); a 68,000 pound tractor held to be one freight unit, *Caterpillar American Co. v. S.S. Sea Roads*, 231 F. Supp. 647 (S.D. Fla. 1964), aff'd 364 F.2d 829 (5th Cir. 1966).

Cargo owner contentions respecting the number of freight units have been approved in the following cases: a partially encased tractor not attached to a skid held not to be a package, thereby requiring reference to the weight unit of measure, *Gulf Italia Co. v. American Export Lines, Inc.*, 263 F.2d 135 (2d Cir. 1959) cert. denied 360 U.S. 902 (1960); each cardboard carton of frozen shrimp held to be one freight unit although shipped in sealed container packed at the factory, *Inter-American Foods, Inc. v. Coordinated Caribbean Transport Co.*, 313 F. Supp. 1334 (S.D. Fla. 1970); and each of 99 cartons of baled leather held to be one freight unit although shipped in a sealed container packed at the factory, *Leather's Best, Inc. v. S.S. Mormaclynx*, 313 F. Supp. 1373 (E.D.N.Y. 1970), modified but affirmed as to the above issue 451 F.2d 800 (2d Cir., 1971). See also *Cameco, Inc. v. S.S. American Legion*, 1974 A.M.C. 2568 (2d Cir. 1974); *Shinko Boeki Co. Ltd. v. S.S. Pioneer Moon*, 507 F.2d 342 (2d Cir. 1974); and *Royal Typewriter Co. v. Hamburg-Amerika Linie*, 483 F.2d 645 (2d Cir., 1973); *Nichimen v. M/V Farland*, 462 F.2d 319 (2d Cir. 1972); and *I.N.A. v. S.S. Brooklyn Maru*, 1974 A.M.C. 2443 (S.D.N.Y., 1974); *Eastman Kodak v. Transmariner, Inc.*, 1975 A.M.C. 123. In the *Royal Typewriter Case (M/V Kulmerland)* supra, the court establishes the rule that the determination of what unit was the package unit for the purposes of COGSA 1304(5) would depend on a FUNCTIONAL PACKAGE unit or FUNCTIONAL ECONOMICS test.—i.e.: whether the contents of the container could have feasibly been shipped overseas in the individual packages or cartons in which they were packed by the shipper. It is the shipper's burden of proof where he has prepared the shipping units himself.

¹⁰⁵ *The Exiria*, 263 F.2d 135 (2d Cir. 1959)

being determined by the single formula of freight charged, as in the case of a yacht shipped on deck or a locomotive shipped on a lump sum freight.¹⁰⁶

In rebuttal the Norwegian Delegate stressed the inherent injustice of the package concept depending on size and form of goods instead of value, while the United States Delegate drew the same conclusion with respect to the system of weight alone. The Norwegian Delegate also stressed that the dual system had not come into force yet in any state since the 1968 Brussels Protocol had not been ratified while the weight only system was working well in rail and road transport. Finally, the Norwegian Delegate noted that the shipper could always enumerate the contents or number of packages specially for a higher limitation amount although the carrier would thereby be entitled to charge an extra freight rate for such enumeration.¹⁰⁷

In view of the lengthy discussions and differences of opinion that followed the 1968 Brussels Protocol on the question of a higher freight rate for enumerated cargoes¹⁰⁸ the United States Delegate briefly reviewed the situation since February, 1968 and noted that he did not share the Norwegian interpretation. Further, the United States proposed the addition of clarifying language, as follows:

“Where under Article —, numbers of packages or shipping units are enumerated in the bill of lading, the carrier shall not be permitted to impose additional ad valorem freight charges.”

This proposal received no support and was not further discussed, except that the U.S.S.R. observed that freight rates were a matter of trade practices and competition and not within the scope of the Hague Rules. However, Language proposed by Norway concerning enumerated values (See Para 19 *supra*) was considered, as follows:

“By agreement between the carrier and the shipper a limit of liability exceeding that provided for in paragraph 1 of Article () may be fixed. A declaration of the (nature and) value of the goods made by the shipper

¹⁰⁶ *Island Yachts Inc. v. Federal Pacific Lakes Line*, 1971 A.M.C. 1633 (N.D. Ill. 1971); *The Edmund Fanning*, 201 F.2d 281 (2d Cir. 1953).

¹⁰⁷ Norway also noted an apparent ambiguity from differences in the languages used in the 1968 Brussels Protocol. Thus, the French text might mean that if the contents of the container were enumerated the container itself would be a package whereas the English text provided that if the container and packages therein were enumerated in the bill of lading, the container would not be a package or unit.

¹⁰⁸ See Diplock, *Conventions and Morals—Limitation Clauses in International Maritime Conventions*, 1 J. Mar. L. & Comm. 525 (1970); Schmeltzer and Peavy, *Prospects and Problems of the Container Revolution*, 1 J. Mar. L. & Comm. 203 (1970).

before the shipment and inserted in the bill of lading for the purpose of fixing a higher limit of liability shall be deemed to be an agreement within the meaning of the preceding paragraph and be *prima facie* evidence of the value of the goods. Provided, however, that no effect shall be given to such declaration if the nature or value of the goods has been knowingly misstated by the shipper."

This language was agreeable to the U.K. delegate but was disapproved by the Soviet delegate, at which point Japan proposed the following amendments:

"Where the value of the goods has been declared by the shipper before their receipt by the carrier and inserted in the bill of lading, the limits of liability, provided for in paragraph 1, shall not be applied and such declaration embodied in the bill of lading shall be *prima facie* evidence of the value of such goods.

If a value, which is remarkably higher than the actual value of the goods, has been knowingly misstated by the shipper in the bill of lading, the carrier shall not be responsible for any loss or damage to the goods.

Unless the exact nature (or description) of the valuable goods has been furnished in writing by the shipper before they are received by the carrier, the carrier shall not be responsible for any loss or damage to the valuable goods."¹⁰⁹

This Japanese proposal did not receive additional support. The last paragraph thereof was criticized by France, Singapore and Nigeria as being overly severe and unfair to shippers. The United States noted that Article III (3) of the Hague Rules might properly be amended to improve the description of the goods, and that the purpose for which the statement of value was being made would have to be indicated with particular care, also noting that deliberate misstatements in the bill of lading were criminal offenses. (49 U.S.C. 121).

Accordingly, there was a consensus to eliminate the language concerning the consequences of enumeration and the apparently superfluous sentence of Draft Article A (5) was put in square brackets.¹¹⁰ That sentence reads,

[By agreement between the carrier and the shipper a limit of liability exceeding that provided for in paragraph 1 may be fixed.]

Japan also proposed that in any formulation of the dual system of unit limitation the following language be added: Subparagraph (c), which

¹⁰⁹ Report (Fifth Sess.), para. 29

¹¹⁰ Report (Fifth Sess.), para. 26(9).

appears in paragraph 59 of A/CN.9/WG.III/WP.10 (Vol. I), to be modified as follows:

“(c) Notwithstanding subparagraph (a), where a container, pallet or similar article of transport is used to consolidate goods, the amount based upon the (package or other) shipping unit in subparagraph (2) shall not be used as the basis for the limit of liability of the carrier or his servants and agents, or the ship.”¹¹¹

This Japanese proposal was rejected by France and Australia as being ambiguous in that there was no direct reference to Shipper-packed containers which was the thrust of the Japanese proposal and that on the whole the proposal was grossly unfair to shippers. The Japanese proposal did not find any support.

In view of some hostility to the concept of “customary freight unit” a general consensus developed that the formulation in Alternative II A (Para 26 of the Secretariat’s Second Report) would be the basis for the unit limitation.

The proposal of Norway and Nigeria to report two alternative texts: weight alone and dual system was rejected.

The report of the drafting group recommended the following language which was accepted without change by the Plenary:

“The liability of the carrier for loss of or damage to the goods shall be limited to an amount equivalent to () francs per package or other shipping unit or () francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.”¹¹²

The Drafting Committee also recommended language to adopt the Poincaré franc and to determine its official value, as follows¹¹³:

“A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.”

“The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in paragraph 3 of this article on the date of the judgment or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this convention.”

¹¹¹ Report (Fifth Sess.), para. 28(a).

¹¹² Report (Fifth Sess.), para. 26(2)(1).

¹¹³ Report (Fifth Sess.), para. 26(2)(3) and (4).

The language in Para 25 was worked out after a lengthy debate between the delegates of U.S.S.R., Norway, France and Nigeria as to the nature of the "official value" of national currency. Norway had proposed that for judicial or arbitral proceedings the date of judgment should be used, otherwise, the date of payment or the date when security was given. The United States delegate indicated a preference for the date of judgment as a definite date which would be easily determined. The USSR reserved its position on official values. The United States and Tanzania suggested that where there was no litigation the decision on the date of conversion be left to the parties. Australia suggested that since most currencies fluctuated within ranges without fixed official values the conversion might be based on the mid-point of the official range of the national currency.

At the Second Reading an attempt was again made to select a single method of unit limitation based on weight alone, however, support for this single method was still slight, although none of the other proposals could command majority support, let alone consensus. Accordingly it was decided to present the fullest range of alternatives to the UNICTRAL Plenary, and five alternative proposals were formulated for Article 6 of the new draft.¹¹⁴

¹¹⁴ *Alternative A*

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (—) francs per kilo of gross weight of the goods lost, damaged or delayed.

Alternative B

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (. . .) francs per kilo of gross weight of the goods lost or damaged.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

Alternative C

1. The liability of the carrier according to the provisions of article 5 shall be limited to an amount equivalent to (. . .) francs per package or other shipping unit or (. . .) francs per kilo of gross weight of the goods lost, damaged or delayed, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules shall apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article

It is possible that agreement cannot be achieved on this Article for formulating the application of the unit limitation until the exact amount of the unit limitation is known. This would probably not be until the Diplomatic Conference.

of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

Alternative D

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (. . .) francs per package or other shipping unit or (—) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed:

variation X: [double] the freight;

variation Y: an amount equivalent to $(x-y)^1$ francs per package or other shipping unit or $(x-y)$ francs per kilo of gross weight of the goods delayed, whichever is the higher.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1 of this article, the following rules shall apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

Alternative E

1. (a) The liability of the carrier for loss of or damage to goods according to the provisions of article 5 shall be limited to an amount equivalent to (. . .) francs per package or other shipping unit or (. . .) francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The liability of the carrier for delay in delivery according to the provisions of article 5 shall not exceed [double] the freight.

(c) In no case shall the aggregate liability of the carrier, under both subparagraphs (a) and (b) of this paragraph, exceed the limitation which would be established under subparagraph (a) of this paragraph for total loss of the goods with respect to which such liability was incurred.

2. Where a container, pallet or similar article of transport is used to consolidate goods, limitation based on the package or other shipping unit shall not be applicable.

The following paragraphs apply to all alternatives:

A franc means a unit consisting of 65.5 milligrams of gold of millesimal fineness 900.

The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in the preceding paragraph of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this Convention.

2. *The Container Clause*

In view of the decision to retain the dual system of unit limitation, it would be necessary to make special provision therein respecting containerized cargoes. The Japanese proposal (fn. 111 *supra*) would have differentiated between containers packed by the carrier and containers packed by the shipper, but it attracted no support, and it seemed to the U.S. delegation that the type of distinction sought to be made by the Japanese proposal would not hold up in actual practice. Subsequently the Japanese proposal was withdrawn.

There was general agreement that the container clause of the Brussels Protocol of 1968 should be used as the basis of the new clause.

Brazil proposed clarifying language and reframed the proposal.

The United States proposed to add the language "when not owned or otherwise supplied by the carrier" to subpara b which was adopted after considerable discussion. The United States had insisted on this clarifying language so that there would be no danger of an interpretation of the provision so as to exclude the weight formula of unit limitation. Brazil suggested that the U.S. formula be phrased positively rather than negatively, "where supplied by the shipper," but this was not adopted.

The language adopted by the Drafting Committee and modified finally by the Plenary is as follows:

"For the purpose of calculating which amount is the higher in accordance with paragraph 1, the following rules shall apply:

a. Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

b. In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit."¹¹⁵

The language of this container clause is found now in Alternatives C and D of draft Article 6 of the new convention.

3. *Effect of Serious Fault or Intentional Conduct*

The Secretariat's Second Report had proposed to bring the Hague Rules into conformity with other transport conventions by redrafting

¹¹⁵ Report (Fifth Sess.), para. 26(2)(2).

language in the Brussels Protocol. There are really three parts to this problem:

- (1) Carrier liability for intentional damage (Brussels Protocol 2 (e)).
- (2) Agent liability for intentional damage (Brussels Protocol 3 (4)).
- (3) Carrier liability for intentional damage caused by his servants or agents (Para 54 of Second Secretariat Report)¹¹⁶.

In the discussions of the problem there was an intermingling with the general problem whether agents of the carrier are entitled to the benefit of unit limitation under any circumstances.

The U.S.S.R. delegate said that he could accept the special liability of carriers, their servants and agents for intentionally caused damage but that the concept of damage caused recklessly was unacceptable.

The Norwegian delegate offered two alternative drafts, as follows:

Alternative I: "The carrier shall not be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage was caused by an act or omission of the carrier or of the master or any member of the crew acting within the scope of their employment, done with the intent to cause damage, or recklessly and with knowledge that damage would probably result.

Alternative II: "The carrier shall not be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage was caused by wilful misconduct of the carrier, or of any of his servants or agents acting within the scope of their employment."

Both alternative proposals concluded with the following language:

"Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by such an act or omission of his part."

The Norwegian delegate indicated his personal preference for Alternative I, noting that there had been considerable litigation in Air Law on

¹¹⁶Second Report, Vol. I, Part One, para. 54:

54. The convention governing the liability of ocean carriers would be brought into conformity with the approach of other transport conventions by the following draft, which combines Articles 2 (e) and 3 (4) of the Brussels Protocol. (New language is underscored):

Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier, *or of any of his servants or agents (within the course of his employment)*, done with intent to cause damage, or recklessly and with knowledge that damage would probably result. *Nor shall the servant or agent be entitled to the benefit of such provisions with respect to such an act or omission on his part.*

the meaning of wilful misconduct. Nigeria, however, said that reckless conduct was more important and should be covered.

The French delegate wanted a clearer distinction between the intent to cause damage and the degree of misconduct by servants to impose carrier liability. France also agreed with Nigeria about recklessness and distinguished wilful misconduct from "inexcusable negligence" which should be the standard to break unit limitation for carriers.

The United States delegate noted his fundamental disagreement with the entire proposal to make special provision for serious fault. He noted that the Hague Rules dealt with the consequences of carrier negligence (or culpa) or simple breach of the contract of carriage and that there did not appear to be a need to make special provision in international law for the consequences of intentional acts (or dolus). The number of acts of deliberate damage to cargo must be few and the proof thereof extremely difficult. Further, the principal area in which intentional torts would be relevant would be with respect to theft, the proof of which was often so difficult that shippers were forced to rely on the presumption of carrier negligence to seek compensation. He noted that with respect to deliberate damage of cargo, shippers would use the traditional common law remedies (Trespass De Bonis Asportatis) which would permit punitive damages and relaxed rules of consequential damages rather than to place any reliance on the Hague Rules. He opposed the inclusion of any provision on wilful misconduct in view of the likelihood that there would be temptation to litigate every damage claim as wilful misconduct and he reviewed the history of the wilful misconduct provision in the Warsaw Convention and the Hague and Guatemala Protocols.¹¹⁷ In summary, he thought the subject should be left to national law and not codified in an international convention.

¹¹⁷ It should be noted immediately that the interpretation of the wilful misconduct formula of Article 25 of Warsaw, is at variance with the interpretations given in Great Britain and in most other countries which have considered the issue. Essentially, the extremely relaxed view of wilful misconduct came up prior to the Montreal Agreement of 1966 as the result of judicial dissatisfaction with the unconscionably low level of recoveries under Warsaw in death cases (\$8300). A leading example of this is found in *Tuller v. K.L.M.*, 292 F.2d 775 (D.C. Cir., 1961) in which the Court of Appeals found that the jury could find that the crew's failure to send distress calls, failure to inform passengers of the proper use of life vests, and improper maneuvering of life rafts, all constituted wilful misconduct so that the decedent's death by drowning after the plane ditched on takeoff from Shannon would not be subject to the \$8300 death limit. See also *Pekelis v. TWA*, 187 F.2d 122 (2d Cir. 1951); *Berner v. United Airlines*, 346 F.2d 532 (2d Cir., 1965) reversed because the trial judge found wilful misconduct as a matter of law; *Grey v. American Airlines, Inc.*, 227 F.2d 282 (2d Cir. 1955). French case law now relaxes the requirements of wilful misconduct. *Cie. Air France v. Dame Diop*, [1968] 1 Bull. Civ. I 134; [1968] *Dalloz* (Jur) 569. (Cour de Cassation, 1968)

After considerable debate a consensus emerged for the following language,

“The carrier shall not be entitled to the benefit of the limitation of liability provided for in paragraph 1 of this article if it is proved that the damage was caused by wilful misconduct of the carrier, or of any of his servants or agents acting within the scope of their employment. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by wilful misconduct on his part.”¹¹⁸

The United States delegate reserved his position as to this provision and pointed out the difficulties that would arise because national interpretations of “scope of employment” differed. He noted the trend in Agency law in the United States, where public policy in favor of compensation of the injured, made the principal liable for the intentional torts of the agent respecting personal injuries and that even where property damage was concerned the trend was toward the liability of the principal where the agent had unrestricted access to the damaged property.¹¹⁹ The U.S.S.R. agreed that wilful misconduct of the carrier was such an exceptional case it need not be covered in the convention.

During the Plenary Review of the Drafting Committee Report there were additional comments added to the report to reflect the division of

¹¹⁸ Report (Fifth Sess.), para. 28(c):

“(c) With respect to article C, several representatives reserved their positions. It was indicated that this provision would cause many complications and was unfair to the carrier because of the vicarious liability of the carrier for the wilful misconduct of his servants and agents imposed therein. Some representatives stated their preference for the approach taken in articles 2 (e) and 3 (4) of the 1968 Brussels Protocol. Observers of international non-governmental organizations, supporting the maintenance of the provisions of the 1968 Brussels Protocol, indicated that the words “within the scope of their employment” would cause serious difficulties of interpretation, thus giving rise to much litigation. They were also of the opinion that the proposed provision was contrary to the modern trend in favour of unbreakable limits, and would result in higher insurance premiums being payable than at present. It was pointed out that this provision was the result of negotiations in the Drafting Party as two representatives thought that this article might not be necessary if a sufficiently high limit of liability was ultimately provided for in article A; however, one of these representatives disagreed with the conclusions of the said observers as to higher insurance premiums. Another representative was of the opinion that this article should be confined to damage done with intent to cause damage. However, the Working Group was generally in favour of this article as a suitable compromise solution to the problem.”

¹¹⁹ *Ira S. Bushey & Sons Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968). See generally: Morris, *Enterprise Liability and the Actuarial Process—The Insignificance of Foresight* 70 *Yale L.J.* 554 (1961); Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 *Yale L.J.* 1172 (1952); Douglas, *Vicarious Liability and the Administration of Risk*, 38 *Yale L.J.* 584, 720 (1929).

opinion as to whether theft could be within the scope of employment of the carrier's servants. The I.C.C., I.C.S., I.U.M.I. and C.M.I. had pointed out difficulties with the scope of employment tests and argued that the unit limitation should be made unbreakable. There were further comments that the problem of serious fault could be solved by setting a very high unit limit of liability which would be unbreakable.

At the Second Reading the text was altered in favor of a formula which had been adopted in 1974 for the Athens Passenger Convention.¹²⁰

4. Extension of the carrier defenses to others

The "Himalaya Clause" problem concerns the general question whether the unit limitation as well as other carrier protections in the Hague Rules may be used by others in the maritime transport business and the Second Secretariat Report¹²¹ recommended the retention of the Brussels Protocol language (Article 3) which would extend the protections to servants and agents of the carrier but not to independent contractors. There was no support for the Secretariat proposal¹²² to make no separate provision for the problem and to include the language of Article 3 of the Brussels Protocol in the basic rule on unit limitation.

¹²⁰ The carrier shall not be entitled to the benefit of the limitation of liability provided for in article 6 if it is proved that the damage resulted from an act or omission of the carrier, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage resulting from an act or omission of such servants or agents, done with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

¹²¹ Second Report, Vol. I, Part One, para. 49; noting the source in Warsaw provisions:

"Article 3 of the Brussels Protocol contains the following provisions, which would extend the application of the limitation of liability to servants and agents:

"2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

"3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention."

¹²² Second Report, Vol. I, Part One, para. 50:

50. While the provision quoted above would add a useful clarification, it may be possible as a drafting matter to include servants and agents in the principal limitation rule, so that a separate rule for servants and agents would be unnecessary. Thus the basic limitation rule might state as follows:

"... Neither the carrier or his servants and agents nor the ship shall in any event be or become liable for any loss of damage to or in connexion with the goods in an amount exceeding ...".

This drafting suggestion is incorporated in the proposal for a rounded limitation of liability rule, set out below (at paragraph 59). Should this method of drafting be adopted, it might be useful to retain article 3 (3) of the Brussels Protocol, quoted above, as a separate provision. This is done in the above-mentioned proposal.

Norway favored the language of Article 3 of the Brussels Protocol to deal with this problem, although there should be separate paragraphs providing that servants and agents of the carrier might have the same defenses and limitations of liability as the carrier. Singapore supported this proposal, however the U.S.S.R. doubted the propriety of such provisions in a convention dealing essentially with contracts of carriage since such as servants and agents of the carrier were not parties to the contract of carriage.

The Argentine delegate proposed to amend the Norwegian proposal on Serious Fault to deal more specifically with the problem of servants and agents for whose serious faults the carrier would be responsible.

“The carrier shall not be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage was caused by an act or omission of the carrier or of persons conducting the business; including the Master, pilots, members of the crew, stevedores and other servants or agents who are utilized in the accomplishment of the contract of carriage, done with the intent to cause damage, or recklessly and with knowledge that damage would probably result . . .”

This proposal did not receive any support.

A consensus soon developed for the retention of the Brussels Protocol provision and the following language which is a slight modification of the original was approved. This provision is in line with Warsaw Convention provisions, and is preserved in Article 7 of the draft convention.

The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or damage to the goods covered by a contract of carriage whether the action be founded in contract or in tort.

If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defenses and limits of liability which the carrier is entitled to invoke under this Convention.

The aggregate of the amounts recoverable from the carrier and any persons referred to in the preceding paragraph, shall not exceed the limits of liability provided for in this Convention.

G. *Transshipment*

This topic proved to be the most difficult and controversial with which the fifth session was concerned. The problem is divisible into two aspects: accidental and intentional transshipment.¹²³ With respect to intentional

¹²³ Although there are complex and recurring problems, there has been very little case law on the questions raised by the development of the container revolution and the feedership system.

transshipment there are two types of provisions used: (1) where the contracting carrier specifies his port of discharge less than the ultimate destination and clearly notifies that he is acting as forwarding agent only; (2) where the contracting carrier specifies only the ultimate destination. In either situation the bill of lading has exculpatory clauses limiting the contracting carrier's liability to that portion of the voyage employing the contracting carrier's vessel from the port of loading.

The Second Secretariat Report favored a very simple approach¹²⁴ whereby the definition of port of discharge would be used to resolve the question of the contracting carrier's liability, but this approach received little support during an initial inconclusive discussion in Plenary. The preliminary debate showed that business practices respecting transshipment continue to vary widely, accordingly the United States delegation feared that complex rules on transshipment would be premature. The present danger seemed to be a provision that would permit the carrier alone to frame overly broad exculpatory provisions.

After the Plenary session Norway framed a proposal for the Drafting Committee's consideration, as follows:

1. *Optional transshipment or substitution*

If, according to an option contained in the contract of carriage, the entire carriage or a part thereof has been performed by a person other than the contracting carrier, the contracting carrier shall remain responsible according to the provisions of the convention as if he himself had performed the entire carriage. The person performing the carriage shall be deemed an agent of the contracting carrier.

2. *Transshipment or substitution according to agreement*

If, according to agreement, the entire carriage or a designated part thereof shall be performed by a person other than the contracting carrier, the contracting carrier shall remain responsible according to the provi-

Banking institutions no longer refuse letter of credit transactions where intentional trans-shipment occurs, however, Article 19 of the 1962 Uniform Customs and Practices of the I.C.C. requires that the entire voyage be covered by a single bill of lading. The 1975 U.C.P. will change this provision.

Early case law permitted the contracting (initial carrier) to assume liability only for that portion of the voyage using his vessel. By bill of lading stipulations, the contracting carrier would be deemed to be acting merely as agent for the shipper in arranging trans-shipment at intermediate ports, thereby excluding his own liability for the portions of the voyage not on his vessels. See *The Pioneer Land*, 1957 A.M.C. 50 (S.D.N.Y. 1950), *E. Hubschman & Sons v. M/V Black Condor*, 130 F. Supp. 320 (S.D.N.Y. 1955). Under this concept, the cargo is considered discharged at the intermediate port, although the contracting carrier is liable if he fails to make a careful and reasonable selection of an intermediate carrier. See *The Idefjord*, 114 F.2d 262 (2d Cir. 1940).

¹²⁴ Definition of Port of Discharge: Second Report, Vol. II, Part Two, paras. 35-40. The Report also notes that "clarifying the term 'port of discharge' would not dispose of all the problems that arise on transshipment" and suggests a draft provision "addressed directly to the responsibility of the first and succeeding carriers." (paras. 41-43.) This provision (Alternative D) was urged by Australia with the support of five nations. See Delegation Report, para. 47.

sions of the convention as if he himself had performed the entire carriage. The person performing the carriage shall be considered an agent of the contracting carrier.

However, the contracting carrier may exempt himself from liability for any loss or damage caused by events occurring while the goods are in the charge of such person.

3. *The liability of the person performing the carriage or a part thereof*

The person performing the carriage or a part thereof shall be responsible for the carriage performed by him according to the same rules as the contracting carrier.

In cases where such person and the contracting carrier are both liable, their liability shall be joint and several. The aggregate amounts recoverable from them shall not exceed the limits provided for in the convention.¹²⁵

Australia feared the effect of exculpatory clauses. He noted that carriers should not be prevented or discouraged from transshipping but that the contracting carrier must be responsible for the entire carriage, because the shipper could not know which carrier to sue nor where the damage occurred. He urged the addition of Secretariat's Alternative D (Para 41) which provides,

"If the contract of carriage is performed by more than one carrier, the first carrier shall be responsible to the owner of the goods for performance of the contract of carriage. Any intermediate carrier shall be responsible for performance of that part of the contract of carriage undertaken by him."

This language was also supported by Brazil, Singapore, Tanzania, Nigeria, the United States and Argentina, but disapproved by Poland, Japan, Belgium and the United Kingdom.

During subsequent sessions of the Drafting Committee, Norway reformulated an amended proposal, as follows:

Article D

"1. Where the carrier has exercised an option provided for in the contract of carriage to entrust the performance of the carriage or a part thereof to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention.

2. The actual carrier also shall be responsible for the carriage performed by him according to the provisions of this Convention.

3. The aggregate of the amounts recoverable from the carrier and the actual carrier shall not exceed the limits provided for in this Convention.

4. Nothing in this Article shall prejudice any right of recourse as between the carrier and the actual carrier."

¹²⁵ Norway's views on transshipment are contained in the Second Questionnaire at 100-102.

Article E

"1. Where the contract of carriage provides that a designated part of the carriage covered by the contract shall be performed by a person other than the carrier, the responsibility of the carrier and of the actual carrier shall be determined in accordance with the provisions of Article D.

2. However, the carrier may exempt himself from liability for loss of, damage (or delay) to the goods caused by events occurring while the goods are in the charge of the actual carrier provided that the burden of proving that any such loss, damage (or delay) was so caused, shall rest upon the carrier."

The United States took strong exception to section E 2 (*supra*), because it could be ambiguous and confusing. Moreover, there was an issue of public policy in view of the offers for through carriage in advertising made to the public which do not indicate the use of more than one carrier. Thus, when the carrier actually sells space to a shipper for a destination beyond the reach of the carrier's facilities, he must accept responsibility for the on-carriage just as he accepts the financial benefits thereof.¹²⁶

There was a consensus in favor of the language contained in Article D, because fewer problems were created by the transshipment option than with through bills of lading.

With respect to Article E Australia joined the U.S. opposition to E 2, although noting that air carriers had not abused a similar opportunity, however U.K., Poland, Norway, Japan and USSR endorsed the provisions of E 2, at which point Norway proposed a "compromise" whereby the words "exonerate" or "absolve" would be substituted for "exempt". Unfortunately, Nigeria said that such a compromise was acceptable, thereby making a majority of the Drafting Party in favor of Norwegian Article E 2. Nigeria viewed the word *exonerate* as requiring the actual carrier to meet a strict burden of proof to establish the exact circumstances of the loss. Others disagreed.

At the Plenary the United States urged the deletion of E 2, noting that the alleged compromise was no true compromise of conflicting positions, and restated the public policy opposition to overly-broad exculpatory

¹²⁶ In view of the fact that COGSA provisions are not directly applicable to the through carriage situation, U.S. courts have used the provisions of the Harter Act, which extend the carrier liability before the loading and after the discharge up to the time of *proper delivery* (46 U.S.C. 190), to invalidate trans-shipment clause provisions exonerating the contracting carrier from liability for loss or damage occurring during the intermediate stages. See *Fyfe v. Pan Atlantic S.S. Corp.*, 114 F.2d 72 (2d Cir.) cert. denied 311 U.S. 711 (1940); *Colton v. New York & Cuba Mail Steamship Co.*, 27 F.2d 671 (2d Cir. 1928); *Federal Insurance Co. v. American Export Line*, 113 F. Supp. 540 (S.D.N.Y. 1953). *The Alice K.* 1924 A.M.C. 1465 (S.D.N.Y.).

clauses. This view was supported in the Plenary by France, Tanzania, Australia, India, Singapore, Argentina, Brazil and finally by Nigeria. Strong opposition came from Norway supported by U.K., Japan, Poland, Belgium, USSR and the C.M.I.¹²⁷

As a result of the foregoing discussion to delete Article E 2 the delegations of Poland, Belgium, Japan and U.K. said that their agreement to E 1 was contingent on the acceptance of E 2, accordingly the entire article should be stricken with the result that there would be no provision for through bills of lading in the new Convention. The USSR, however, proposed that the entire article be placed in square brackets and this was reluctantly agreed to.

At the close of this discussion the United States proposed language to replace the broad provision of Article E 2 on exculpatory clauses with a more narrowly drawn provision which might prove to be an acceptable compromise at some future time. The proposal is as follows:

Article E

“2. The carrier may exonerate himself from liability for loss of or damage to goods caused by events occurring while such goods were in the charge of the actual carrier subject to the following conditions:

A. (1) Where the actual carrier has been held liable for damage to cargo and the judgment therefore has been satisfied, or

(2) Where the actual carrier has been properly subjected to legal proceedings at the instance of the shipper or consignee pursuant to Article () or

(3) Where the actual carrier has been properly subjected to arbitration proceedings at the instance of the shipper or consignee, pursuant to Article ().

¹²⁷The C.M.I. Observer noted that if the carrier were made responsible for the entire transit on a through bill of lading the carriers would stop issuing such bills and would issue a bill of lading only for its own leg of the transit while new bills of lading would have to be issued at each transshipment port, thereby impeding international trade through greater amounts of paperwork. Arguments In favor of Article E-2: Report (Fifth Sess.), para. 42:

“On the other hand, it was stated by other representatives that article E provided significant advantages to the cargo owner for the following reasons: (a) the provisions of the article would encourage the continued use of the through bill of lading rather than forcing each carrier to issue a bill of lading for his part of the carriage; consequently, the shipper would be able to obtain a negotiable bill of lading which would cover the entire carriage; (b) in addition, the contracting carrier would not escape from liability unless he proved that the events causing loss occurred while the goods were in the hands of the actual carrier; (c) moreover, according to the provisions of article E the carrier would also be responsible for loss or damage arising during the entire terminal period in the transshipment port, while he would not be so responsible if he felt that he could not assume responsibility for the goods during the on-carriage and consequently issued a bill of lading covering only the carriage to the transshipment port. However, several other representatives were of the view that the carrier is responsible for the goods in the port of transshipment until they have been taken in charge by the actual carrier.”

B. The burden of proving that any such loss or damage was so caused is upon the carrier.”

This proposal was not discussed at the sessions.

At the Second Reading the United States, supported by Australia attempted to delete the second section of Article 11, however there was insufficient support therefore and the Article was retained in tact.

H. *Deviation*

At the initial Plenary discussion of deviation India supported Draft Proposal A (Para 33 of Second Secretariat Report) which is based on U.S. COGSA 1304(4).¹²⁸ This view was endorsed by Brazil.

Norway noted that deviation was really a problem in delay and that no special provision on deviation would be necessary.¹²⁹ This view was endorsed by Hungary, Japan and Australia. The Norwegian view was also supported by Nigeria which held that deviation presented the carrier an opportunity to make a special defense and that treatment of the subject under the general burden of proof rules was sufficient. The Nigerian view was endorsed by Tanzania.

The United States supported the retention of a separate provision on deviation as found in Draft Proposal A, observing that it would be unfortunate if all the familiar landmarks of the fifty year old Hague Rules were removed.¹³⁰ The deviation provision was one of the

¹²⁸ Second Report, Vol. II, Part Three, para. 33

Draft proposal A

Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom, *provided*, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, *prima facie*, be regarded as unreasonable.

The proviso would respond to the desire that the carrier ought not to be permitted to deviate for the sole purpose of increasing his profits.

This duplicates the language of Art. 4(4) of the 1924 Brussels Convention and adds the *proviso* contained in the U.S. COGSA. A similar *proviso* is found in the laws of Liberia and the Philippines. Katsigeras, *Le Déroutement en Droit Maritime Comparé* 47 (1970).

¹²⁹ Norway's views on deviation are contained in the Second Questionnaire at 103-105.

¹³⁰ The consequences of deviation are confused in American law today. The Harter Act authorizes *reasonable* deviations to save life or property at sea (46 U.S.C. 192). Nevertheless the courts subsequently held that unjustifiable deviations would deprive the carrier of the bill of lading protection and thus also the statutory protection. See *St. John's Corp. v. S.A. Companhia Geral*, 263 U.S. 119 (1923); *S.S. Willdomino v. Citro Chemical Co.*, 272 U.S. 718 (1927). Under the Harter Act the shipper was not required to establish proximate cause between the deviation and the

landmarks of the Hague Rules that ought to be retained because of its close connection with the law on salvage. He felt that the strong public policy in favor of salvage of both property and lives at sea would be reenforced by retention of a separate provision on deviation.

The U.S. proposed to modify the language, thus:

Permissible Deviation

“Any act in saving or attempting to save life or property at sea or any reasonable departure from the contract of carriage shall not be deemed to be an infringement or breach of this convention or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom provided, however, that if the departure is for the purpose of loading or unloading cargo or passengers it shall, *prime facie*, be regarded as unreasonable.”

The USSR also favored a separate provision on deviation. This view was supported by Singapore and Belgium.

The Chairman noted that the following states were in favor of retention of a special provision on deviation: U.S.A., Brazil, Belgium, Argentina, USSR, Poland, U.K., India, and Singapore (9 states) while the following were opposed: Norway, Nigeria, Tanzania, France, Hungary, Japan and Australia (7 states). Because of this close division the entire subject was referred to the Drafting Committee.

At the Drafting Committee the Nigerian Delegate noted that he

subsequent loss. The Pelotas, 43 F.2d 571 (E.D. La. 1930), *aff'd*. 66 F.2d 75 (5th Cir. 1933).

Thereafter COGSA gave additional protection to the carrier, justifying reasonable deviations *not* connected with saving life or property at sea, and requiring the cargo interest to prove that unreasonable deviation was the cause of the loss (46 U.S.C. 1304(4)); nevertheless Congress limited the H.R.IV(4) protection (*supra*) to emergency situations approximating salvage rather than revenue earning. See *P & E Shipping Corp. v. Empresa Cubana Exportadore*, 335 F.2d 678 (1st Cir. 1964). A recent case involving deviation because of war in the middle east is *Hellenic Lines Ltd. v. U.S.* 1975 A.M.C. 679. Since COGSA the Supreme Court has not passed on the question of the consequences of deviation; thus there is strong but not unanimous authority to the effect that an unreasonable deviation voids the fundamental contract of affreightment thereby rendering the carrier an insurer not protected by the \$500 package doctrine limitation. *Encyclopaedia Britannica v. S.S. Hong Kong Producer*, 422 F.2d 7 (2nd Cir.) cert. denied 397 U.S. 964 (1970). *Searoad Shipping Co. v. E. I. DuPont de Nemours & Co.*, 361 F.2d 833 (5th Cir.), cert. denied 385 U.S. 973 (1966); *Jones v. The Flying Clipper*, 116 F. Supp. 386 (S.D.N.Y. 1953); compare *Atlantic Mutual Ins. Co. v. Poseidon Schiffahrt, G.M.B.H.*, 313 F.2d 872 (7th Cir.) cert. denied 375 U.S. 819 (1963) holding that although the contract of affreightment was ousted by unreasonable deviation, the protection of the \$500 package doctrine limitation, was applicable.

However deck stowage of a container on a container vessel is not an unreasonable deviation. *Du Pont v. S.S. Mormacvega*, 493 F.2d 97 (2d Cir. 1974).

The Second Circuit has also indicated that ouster of the bill of lading because of deviation will be limited to the stowage of underdeck cargo on deck. *Iligan Integrated Steel v. John Weyerhaeuser Co.* 507 F.2d 68 (2d Cir. 1974), so that unseaworthiness, no matter how extreme, does not oust the bill of lading.

preferred no separate provision on deviation but was prepared to accept Draft Proposal D

“The carrier shall not be liable for loss or damage resulting from reasonable measures to save life or property at sea.” There was considerable criticism of the language of Proposal D as

being too vague, accordingly a consensus developed in favor of Draft Proposal C which was supported by Japan, India, U.S.S.R. and U.K. Draft Proposal C which was finally adopted and endorsed by the Plenary. The language is as follows:

“The carrier shall not be liable for loss or damage resulting from reasonable measures to save life and from reasonable measures to save property at sea.”¹³¹

I. Time Bar or Statute of Limitations

This topic also proved to be very controversial at the fifth session and the debate between those favoring the merits of a two year as opposed to a one year statute of limitation did not produce any memorable arguments, although there was heated discussion in the Drafting Group.

At the Plenary Brazil insisted on amending Article 3 (d) of the Secretariat Draft Proposal (Para 68 of Second Report) to replace the word “suspend”¹³² with “interrupt”.¹³³ This brought on a lengthy debate among the civil law nations but the divergence of views on the subject of the effect of negotiations to interrupt or suspend the running of the time bar showed that it would not be possible to prepare a provision thereon which would be acceptable to all states. Eventually, after a renewed debate on this issue in the Drafting Committee it was decided to delete the provision concerning the effect of negotiations from the Draft.

Nigeria proposed a two year time bar, supported by Singapore, Australia, Tanzania, India, and Hungary.

Brazil favored the Brussels Protocol of 1968 approach with the retention of a one year time bar. This view was supported by U.S.S.R., France, Japan, Poland, Belgium, and the United States.¹³⁴

¹³¹ Second Report, Vol. II, Part Three, para. 40.

¹³² ie: before the limitation period begins.

¹³³ ie: during the course of the limitation period.

¹³⁴ The English text of the time bar in H.R.III (6) and the statutory language of COGSA 1303 (6) are identical,

“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.”

At the conclusion of the Plenary Discussion nine states favored the one year time bar (U.S., U.S.S.R., Japan, France, Poland, Belgium, Brazil, Argentina and U.K.) while six states favored the two year provision (Australia, Nigeria, Singapore, Norway, India and Hungary). Accordingly the entire topic was referred to the Drafting Party.

The Drafting Party reheard all of the foregoing arguments and eventually it was decided to put both the one year and the two year time bar in brackets because of the inconclusive nature of the debate.¹³⁵

The language approved by the Drafting Committee is as follows:

"1. The carrier shall be discharged from all liability whatsoever relating to carriage under this Convention unless legal or arbitral proceedings are initiated within [one year] [two years].

(a) in the case of partial loss of or of damage to the goods, or delay from the last day on which the carrier has delivered any of the goods covered by the contract.

(b) in all other cases, from the [ninetieth] day after the time the carrier

In 1936 Congress added a proviso to COGSA after the above language so as to insure that no bill of lading requirement that the cargo owner give written notice of damage could be used to lessen the one year time bar,

"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 affect 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."

Notice of loss provisions are now found in Article 19 of the draft convention. It would seem that the provisions of COGSA 1303 (6) and 1303 (8) forbidding bill of lading clauses which lessen the carrier's liability should forestall bill of lading attempts to decrease the actual time bar. Nevertheless there is an anomalous American decision, *J. Aron & Co. v. The Askvin*, 267 F.2d 276 (2d Cir. 1959) which approved a bill of lading clause requiring that *service of process* be effected within the one year period. It is submitted that this case is wrong in principle, although it may be distinguished on the ground that COGSA was not applicable therein by its own force but only through incorporation by reference in a bill of lading clause in view of the fact that time bars of less than one year are permitted where COGSA is totally inapplicable. *The Government of Indonesia v. The General San Martin*, 114 F. Supp. 289 (S.D.N.Y. 1953).

Doubt concerning party autonomy respecting waiver of the one year time bar by stipulation of the parties may be resolved in favor of the cargo interest. *United Fruit Co. v. J. A. Folger & Co.*, 270 F.2d 666 (2d Cir. 1959) cert. denied 362 U.S. 911 (1960); see also *American Oil Co. v. The S.S. Ionian Challenger*, 366 F.2d 509 (2d Cir. 1966).

Similarly, doubt concerning the applicability of the time bar in cases where an arbitration clause is incorporated by reference has been resolved in favor of the cargo interest in *Son Shipping Co. v. DeFosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952) cert. denied 345 U.S. 992 (1953). See also *Republic of Korea v. New York Navigation Co.*, 469 F.2d 377 (2d Cir., 1972).

Finally; the effect of the preliminary clause to the time bar, "In any event . . ." is difficult to determine at the present time in view of the contrary effect of *Atlantic Mutual Ins. Co. v. Poseidon Schiffahrt, G.M.B.H.* 313 F.2d 872 (7th Cir.) cert. denied 315 U.S. 819 (1963) and *Encyclopaedia Britannica v. S.S. Hong Kong Producer*, 422 F.2d 7 (2d Cir. 1969) cert. denied 397 U.S. 964 (1970).

¹³⁵ "However, some representatives who favored a one-year period indicated their willingness, as a compromise, to accept a two-year period if that period were supported by the majority." Report (Fifth Sess.), para. 64.

has taken over the goods, or if he has not done so, the time the contract was made.

2. The day on which the period of limitation begins to run shall not be included in the period.

3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

4. An action for indemnity against a third person may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than [ninety days] commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.¹³⁶

At the final Plenary there was further debate about the above language, especially the provision for extension of the time bar by agreement in writing.

The Second Reading was unable to choose between one year or two years, and both were retained for decision by the Plenary or Diplomatic Conference.

¹³⁶ Report (Fifth Sess.), at 28. The C.M.I. observer suggested that resolution of the through transshipment problem would be assisted by the Brussels Protocol provisions permitting recourse actions by carriers against sub-contractors.