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Joseph Sweeney

Fordham University School of Law

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

JOSEPH C. SWEENEY*

On February 21, 1975 the Second Reading of a New Convention on the Carriage of Goods by Sea, intended to replace the existing Convention of 1924 known as The Hague Rules, was completed by the Working Group on Merchant Shipping Legislation of UNCITRAL.¹ Preparation of this new text "by UNCITRAL" has been underway since April 1970. During this time a very wide debate, in a forum designed to accommodate the interests of shippers as well as shipowners, considered the accumulated problems of fifty years of operations under the Hague Rules and attempted to reach solutions which would not impede developments in the industry as we now see them.

This article is not an official statement of the views of the United States Government, nor is it an expression of the official views of any other government or the U.N. Secretariat but merely represents an analysis of the Draft Convention based on the personal notes taken by the author during the discussions.

In accordance with the wise practices of the United Nations, decisions within UNCITRAL are normally reached by consensus² with a mini-

* 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.

¹ The United Nations Commission on International Trade Law (UNCITRAL). The Draft Convention will be considered by the full Commission in April, 1976. Thereafter the text will be considered by the Sixth Committee and the United Nations General Assembly prior to the convening of a diplomatic conference, probably in 1977. The leader of the UNCITRAL Secretariat during the substantive sessions of the Working Group was Professor John O. Honnold of the University of Pennsylvania Law School. The Chairman of the Third Session was Nagendra Singh of India, now Judge of the International Court of Justice; of the Fourth and Fifth Sessions, Professor Jose Domingo Ray of Argentina; of the Sixth, Seventh and Eighth Sessions, Professor Mohsen Chafik of Egypt.

² The history of voting procedures at international conferences, starting with unanimity and quasi-unanimity prescribed for the Hague Conferences of 1899 and 1907 and continuing through the two-thirds majority rule of the League of Nations and some early U.N. Conferences and ending with the consensus rule now adopted for the Third Law of the Sea Conference is clearly traced in Sohn, Voting Procedures in United Nations Conferences for the Codification of International Law, 69 Am. J. Int'l L. 310-353 (1975).

imum amount of indicative voting. No verbatim transcript is made of the discussion, nor do the Reports reflect the identity of the speakers or the exact nature of the support received by proposals. Because of this strong precedent the author first attempted to prepare this article reflecting the use of the current expressions of U.N. terminology to describe the positions taken by the member states' delegations, but this proved to be inordinately complex and even misleading. Accordingly, it was decided to go beyond the official records to ascribe positions to delegations solely as an informal guide for decision makers so that the entire transportation industry can easily understand the strength of the positions taken and the wisdom of the compromises achieved. It is the hope of the author that a thorough understanding of the debates on the merits of proposals will lead to a reasoned and favorable judgment on the new text.

I. HARMONIZATION OF INTERNATIONAL MARITIME LAW BY THE C.M.I.: THE HAGUE RULES

From its very beginnings, the organizers of the Comité Maritime International³ recognized the importance of a harmonization of the law whereby risk of loss between carrier and cargo owner would be determined. The underlying hostility between these co-participants in maritime adventures clearly emerged during the first discussions of the Collision Damages Draft Convention in the last years of the nineteenth century when the question being considered was the right of the innocent cargo owner, whose cargo had been damaged in a collision, to sue the owners of both colliding vessels, jointly and severally, for his entire loss.⁴

In the economic warfare between cargo and carrier a truce of sorts had been achieved in the United States in the 1893 legislation, The Harter Act⁵ which had been the model for Legislation in Australia,⁶ New Zealand⁷ and Canada,⁸ nations of the British Empire in which the cargo owning interest was stronger than the ship owning interest. The traditional maritime states of Europe, all shipowning nations, feared the spread of legislative solutions to the risk of loss problem. Thus, after the

³ The Comité Maritime International (C.M.I.) was organized in 1897 as an outgrowth of the International Law Association for maritime specialists: lawyers, underwriters and shipowners, but not shippers, in the beginning.

⁴ See C.M.I. Bull. Vol. 1 pp. 30, 60; Vol. 2 pp. 6, 39. In United States law, the liability of the two colliding vessels to cargo carried on either vessel is joint and several. The Atlas, 93 U.S. 302 (1876); The Alabama and The Gamecock, 92 U.S. 695 (1875). Cf. The Milan, 167 Eng. Rpts. 167 (1861).

⁵ 46 U.S.C. 190-196 (1974).

⁶ Australia C.O.G.S.A. (1904). 3 Commonwealth Acts, 37.

⁷ New Zealand Shipping & Seamen Act (1908). No. 178.

⁸ Canada Water Carriage Act (1910). 9 & 10 Edward VII, c. 61.

successful conclusion of the new international rules on Collision Damages⁹ and Salvage¹⁰ in 1910, the C.M.I. prepared to take up the subject of the allocation of risk of loss between carrier and cargo by way of an international convention which would regulate the ocean bill of lading. This work of international harmonization was suspended during the First World War (1914–1918) which caused great losses to international shipping because of submarine warfare, blockades and nationalizations. After the war a draft convention based on the compromises contained in the United States Harter Act was circulated and formed the basis for the Hague Conference of September, 1921 at which the Hague Rules were adopted for voluntary inclusion in bills of lading to be offered to cargo owners by the ship owners, under pressure from insurance underwriters.¹¹

The Harter Act was a piece of reform legislation deriving its force from the same desire to preserve a free market place as the Sherman Anti Trust Act of 1890.¹² It was a radical interference with the illusory freedom of contract whereby shipowners offered printed form bills of lading, containing many exculpatory clauses, as contracts of affreightment. The United States Supreme Court had indicated a public policy objection to some of the more outrageous forms of clauses whereby carriers sought to exempt themselves from their own negligence.¹³

The essence of the truce, or compromise, of 1893 was the legislated warranty of seaworthiness in the form of a duty of the shipowner to exercise due diligence to make the vessel seaworthy¹⁴ in exchange for the preservation of the traditional common law defenses: . . . “acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried,”¹⁵ and the addition of the policy based defense of negligent navigation or management of the vessel.¹⁶

⁹ International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, September 23, 1910. N. Singh, *International Conventions of Merchant Shipping* 1047 (1963).

¹⁰ International Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, September 23, 1910. 37 Stat. 1658 (1913), T.S. No. 576.

¹¹ A. Knauth, *Ocean Bills of Lading*, 115–131 (4th ed. 1953).

¹² 15 U.S.C. 1–7 (1974).

¹³ *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.* 129 U.S. 397 (1889). Respecting clauses exempting corporate defendants from their own negligence, it should be noted that the United States Supreme Court has indicated that such clauses will not be enforced because of a strong public policy against them. See *Bisso v. Inland Waterways Corp.* 349 U.S. 85 (1955), and *Boston Metals Co. v. The Winding Gulf* 349 U.S. 122 (1955), both cases being concerned with towage.

¹⁴ 46 U.S.C. 191 (1974).

¹⁵ 46 U.S.C. 192 (1974), “dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process . . .”

¹⁶ *Id.* “faults or errors in navigation or in the management of said vessel.”

While the essence of this compromise was preserved in the voluntary Hague Rules, the drafting of these rules was more heavily influenced by lawyers for shipowning interests who were able to alter the burden of proof in disaster cases¹⁷ and spell out the list of defenses¹⁸ in such a way that these defenses took on an independent meaning.

The Voluntary Hague Rules of 1921 became the Mandatory Rules of 1924 at the conclusion of the Diplomatic Conference of August, 1924 in Brussels which also endorsed an international convention on the limitation of shipowner's liability.¹⁹ Despite the widespread agreement in 1924 in the maritime industry concerning the need for the international convention it did not come into force until 1931, one year after the deposit of ratifications by the United Kingdom, Spain, Belgium and Hungary.²⁰ In 1935 the United States began steps to ratify an amended version of the Hague Rules, United States ratification becoming effective after the enactment of domestic legislation.²¹ A similar situation occurred in France.²² Thereafter other traditional maritime states, including the Scandinavian countries completed the ratification process.²³

Dissatisfaction with the 1924 Hague Rules has come from two dissimilar sources: the traditional maritime states and the newly independent states of the developing world in Asia and Africa.

The traditional maritime nations (the shipowning nations) realized that the rules for unit limitation of liability which depended on shipments in boxes, bales or bags, appropriate for sailing ships as well as liberty-ships and victory-ships which had been built for wartime usage in 1917-1918 and 1944-1945, could not easily be accommodated to containerized shipping. The worldwide depression had already unsettled the monetary value of the unit limitation rule²⁴ so that wide disparities

¹⁷ The Article III duty to render the vessel seaworthy is made subject to the Article IV defenses. This language has been stricken from the United States Carriage of Goods by Sea Act. 46 U.S.C. 1303 and the U.S. ratification of the Hague Rules is subject to reservation on this point.

¹⁸ The list of defenses, other than the policy based defenses of negligent navigation and management (Article IV 2(a)) and fire (Article IV 2(b)), is a catalogue of defenses, each of which has its own case law: perils of the sea, act of God, act of War, act of public enemies, arrest or restraint of princes, quarantine, act or omission of the shipper, strikes, riots, saving life or property at sea, inherent vice of the goods, insufficient packing, insufficient marks and latent defects not discoverable by due diligence (Article IV 2(c)-(p).)

¹⁹ International Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, August 25, 1924. N. Singh, *supra*, note 9 at 1058.

²⁰ A. Knauth, 73.

²¹ 46 U.S.C. 1300-1313 (1974).

²² Loidu 2 avril 1936; See P. Chauveau, *Traité de Droit Maritime* 495-502 (1958).

²³ A. Knauth, *Id.*

²⁴ 46 U.S.C. 1304 (5) (1974). Article IV (5) of the Hague Rules limited carrier liability to £100 per package or unit. United States legislation, however, provides for a limitation of \$500 per customary freight unit.

existed even under the laws of those states which were parties to the Hague Rules. Furthermore, the method of determining the unit was subject to variant interpretations.²⁵ There were also problems respecting the time bar or statute of limitations, especially as it concerned recourse actions in transshipment situations. Lastly, there had been considerable problems in applying the law of Agency to the Hague Rules, reflected in *The Muncaster Castle*²⁶ and *The Himalaya* decisions.²⁷ The *Muncaster Castle* problem concerns the non-delegable nature of the shipowner's duty to use due diligence to make the vessel seaworthy, it being the desire of the traditional maritime states to transform that duty into a duty to make a careful selection of ship repairers. The *Himalaya* problem concerns the use of the carrier defenses—especially the unit limitation—by other parties to the maritime transaction such as the Master, Officers and crew of the vessel where wilful acts are involved. Finally there is the question of the use of carrier defenses by Stevedores.²⁸

The dissatisfaction of the traditional maritime states led to an examination of the question of proposed changes to the Hague Rules at the C.M.I. Rijeka Plenary Conference in 1959 where the decision was taken to seek an amending protocol to the existing rules. Work on the new rules, proceeded over the next four years and a text was approved by a Sub-committee of CMI at the historic Swedish resort of Visby²⁹ so that the CMI proposals came to be referred to as the Visby Rules. The Visby Rules were approved by the C.M.I.'s Stockholm Plenary Conference in 1963 and the Belgian Government convened the Diplomatic Conference to consider these amendments in May, 1967 and an adjourned session in February, 1968. The Brussels Protocol of Amendments to the Hague Rules was finally signed on February 23, 1968, but there have been few ratifications, and as of this time (May, 1975) it is not in effect.³⁰

Dissatisfaction of the developing world stems essentially from the belief that the operation of traditional maritime law (along with other aspects of international trade law) impairs the balance of payments position of developing states so as to insure continued poverty and perpetual under-development in an industrial age. In the field of

²⁵ There is uncertainty as to the effect of weight in determining the proper size unit. The concept of the package doctrine fit much earlier modes of transport by boxes, bales and bags, but immediately became unsuitable for the ever larger units of shipment on pallets or in containers.

²⁶ *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.* (1961) A.C. 807.

²⁷ *The Himalaya*. (*Adler v. Dickson*) [1955] 12.B.158.

²⁸ *Scruttons v. Midland Silicones Ltd.* (1962) A.C. 446.

²⁹ Visby, a powerful city of the Hanseatic League, preserves a maritime code of the Fourteenth Century which is usually cited as a principal source of Scandinavian Maritime Law. The Code of Visby is translated in 30 Fed. Cas 1189.

³⁰ Norway, and Sweden have ratified; Singapore and Syria have adhered.

traditional maritime law this dissatisfaction is clearly spelled out in the UNCTAD Secretariat Report on Bills of Lading of 14 December 1970.³¹ A summary of the developed country objections might be that the allocation of risks in the Hague Rules³² is already slanted too much in favor of carriers while the further protection of the unit limitation of liability³³ together with the possibility of over-all limitation of shipowner liability³⁴ tips the balance so much in the shipowner's favor that it must necessarily have affected the cost of insurance, although no compensation is given by way of lower freight rates for shippers. It has also been argued that alteration of the balance of risks in favor of shippers should not lead to additional costs of operations for shipowners so as to lead to an increase in the freight rate.³⁵ This, however, is surely debatable in view of the long time spans required to build a history of claims experience as a foundation of proper rate making.³⁶

II. THE UNITED NATIONS AS A FORUM FOR MARITIME QUESTIONS: UNCTAD AND UNCITRAL

It was in the context of dissatisfactions with the Hague Rules by carriers and shippers that a major change in the sources of international maritime law occurred in the United Nations in two new organizations: UNCTAD and UNCITRAL. No international organization now exists (or has ever existed) which can deal with all aspects of the uses of the seas in maritime commerce.

The scope of IMCO's³⁷ charter may eventually be interpreted to include more commercial matters than are presently considered there, but generally the scope of IMCO's operations is technical rather than

³¹ Doc. No. TD/B/C.4/ISL/6.

³² The fact that the carrier's Article III duties to the cargo are subject to the defenses of Article IV, together with the policy based defenses of negligent navigation and management and fire in Article IV (2) (a) and (b).

³³ Article IV (5).

³⁴ See fn. 19 *supra*.

³⁵ Hellawell, *Less Developed Countries and Developed Countries' Law: Problems from the Law of Admiralty*, 7 *Col. J. Transnat. L.* 203-50 (1968).

³⁶ Marine (and Inland Marine) Underwriters prefer a five year claims experience as the basis for rate making, thus it is likely that the premium for cargo insurance might not decrease very much while the premium for the shipowner's P. & I. (Protection and Indemnity) insurance would probably increase for a few years. For an excellent discussion of marine insurance, see L. Buglass, *Marine Insurance and General Average* (1971) and C. McDowell, & H. Gibbs *Ocean Transportation* (1954).

³⁷ The Intergovernmental Maritime Consultative Organization, established in 1958 when the multilateral convention setting up the organization finally received the necessary ratifications. IMCO headquarters are in London; every major maritime power being among the 75 member states. Convention on the Intergovernmental Maritime Consultative Organization, March 6, 1948. [1958] U.S.T. 621; T.I.A.S. No. 4044; 289 U.N.T.S. 48. Article I.

commercial. In that regard, IMCO took over the functions of a number of public international law conventions concerned with actual vessel operations such as load lines,³⁸ safety of life at sea and ship construction,³⁹ and rules of the road.⁴⁰ The C.M.I.,⁴¹ organized in 1897, had prepared a series of private international law conventions on maritime commercial matters such as collision damages,⁴² salvage,⁴³ limitation of shipowners liability,⁴⁴ arrest of vessels in civil cases,⁴⁵ and maritime liens and ship mortgages.⁴⁶ The IMCO Conventions on the subject of oil pollution by vessels represents the joint effort of these two organizations to arrive at a satisfactory solution to a pressing environmental problem.⁴⁷

At the outset it is necessary to make a clear distinction between UNCTAD and UNCITRAL as new sources of maritime law.

UNCTAD,⁴⁸ established in 1964, is an organization in which all 138 members of the United Nations are entitled to participate. It owes its origins to the demands of the developing world for a greater share in the riches of the industrial world, as guaranteed by the U.N. Charter.

UNCTAD is an organ of the General Assembly, meeting at three year intervals, with a permanent organ the 55 member Trade and Development Board and a permanent Secretariat. At the First United Nations Conference on Trade and Development in Geneva, 23 March to 16 June 1964, Special Principle XII was agreed to, as follows:

“All countries should cooperate in devising measures to help developing countries to build up maritime and other means of transport for their economic development, to ensure the unhindered use of in-

³⁸ International Convention on Load Lines, April 5, 1966 [1967] 2 U.S.T. 1857; T.I.A.S. No. 6331; 640 U.N.T.S. 133.

³⁹ International Convention for the Safety of Life at Sea, June 17, 1960. [1965] 1 U.S.T. 185; T.I.A.S. No. 5780; 536 U.N.T.S. 27.

⁴⁰ Annex B to the 1960 International Convention for the Safety of Life at Sea.

⁴¹ The C.M.I. is made up of maritime law associations in 228 countries. Since 1897 C.M.I. prepared thirteen private international law conventions on maritime matters.

⁴² See fn. 9 supra.

⁴³ See fn. 10 supra.

⁴⁴ See fn. 19 supra.

⁴⁵ International Convention Relating to the Arrest of Seagoing Ships, Mary 10, 1952, N. Singh, supra note 9 at 1126.

⁴⁶ International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, April 10, 1926, N. Singh, supra note 9 at 1087.

⁴⁷ Draft International Convention on Civil Liability for Oil Pollution Damage, November 28, 1969, 1 J. Marit. L. & Comm. 373 (1970); Draft International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, December 18, 1971, 3 J. Marit. L. & Comm. 624 (1972).

⁴⁸ The United Nations Conference on Trade and Development (UNCTAD). To assist its work in maritime matters the permanent UNCTAD secretariat has established the Joint Shipping Legislative Unit at Geneva. See generally U.N.Y.B. (1964) 195-207.

ternational transport facilities, the improvement of terms of freight and insurance for the developing countries, and to promote tourism in these countries in order to increase their earnings and reduce their expenditure on invisible trade.”

The Second Conference at New Delhi, 1 February to 29 March 1968, adopted ten resolutions relating to shipping, among which was a resolution for the creation of a Working Group on international shipping legislation.⁴⁹ Pursuant to these decisions the UNCTAD Working Group was established in December, 1969 with first priority given to a study of bills of lading to be completed prior to the February, 1971 meeting of the Working Group.

At that 1971 Session the Working Group was armed with a lengthy study of problems in bills of lading and was preparing to go ahead with the work.⁵⁰ However, it was at this point that the emergence of UNCITRAL capability in this area of international maritime law brought about the shift of the legal questions arising out of bills of lading to UNCITRAL while UNCTAD's activities in the area of shipping concentrated on the Code of Conduct for Liner Conferences, Port Development, Combined (or Multi-modal) Transport of Goods, Merchant Marine Development, Freight Rates and legal and economic questions in charter parties, marine insurance and general average. At the time the decision to discontinue the work on bills of lading in UNCTAD seemed wise in view of the opposition which the proposals on international shipping legislation had encountered.⁵¹ Now, in retrospect, the foresight of the decision has been proven in that UNCITRAL has produced a Draft Convention free of the political and economic discords which have occasionally appeared in the larger body, UNCTAD.

UNCITRAL is a much smaller organization, a commission, meeting annually, of 36 states elected to membership on regional principles by the General Assembly.⁵² It is also an organ of the General Assembly reporting to the General Assembly itself, having been established in 1966, with its first session at New York from 29 January to 26 February 1968.⁵³ It owes its origins to the felt needs for cooperation and harmonization in the field of East-West trade, perceived and urged by Hungary in the General Assembly, but it also fulfills the U.N. Charter mandate for the progressive harmonization and unification of international trade law.

⁴⁹ U.N.Y.B. (1968). 375 The vote by roll call was 73 to 19 with 5 abstaining.

⁵⁰ Bills of Lading, Report by Unctad Secretariat, TD/B/C.4/ISL/6 of 14 December 1970.

⁵¹ U.N.Y.B. (1968). 375. See fn. 49 *Supra*.

⁵² U.N.Y.B. (1966). 920.

⁵³ U.N.Y.B. (1968). 837.

From its beginnings UNCITRAL had confined its work to three priority items: international sales of goods, international payments, and commercial arbitration. Largely because of this decision on UNCITRAL priorities the Second UNCTAD Conference, by a divided vote, had moved to establish the Working Group on International Shipping Legislation, however, at the second session of UNCITRAL in March, 1969 the subject of international shipping legislation was added to UNCTAD's priority items,⁵⁴ thereafter it required several discussions to determine the composition of the working group for shipping in order to insure that there was a proper representation to commercial interests as well as regional blocs. The original Working Group on International Legislation on Shipping was composed of only seven members,⁵⁵ but at the fourth session of UNCITRAL in March 1971 the objections raised by a great many interests were satisfied by the enlargement of the Working Group on International Legislation on Shipping to twenty one members.⁵⁶ The Working Group on International Legislation on Shipping thereafter held six substantive sessions from January, 1972 to February, 1975 during which the Draft Convention was prepared.

III. SUBSTANTIVE ISSUES

A. *The Period of Carrier Responsibility: Before and After the Ocean Voyage.*

The problem first dealt with was the question to what extent the scope of the Hague Rules should be modified to increase protection for shippers against clauses in bills of lading relieving carriers of responsibility for loss or damage to cargo in the periods not covered by the Hague

⁵⁴ U.N.Y.B. (1971) 595.

⁵⁵ Chile, Egypt, Ghana, India, U.S.S.R., U.K. and U.S.A.

⁵⁶ The following states were members of the Working Group for all sessions: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Tanzania, U.S.S.R., United Kingdom, U.S.A., and Zaire. Spain attended the third fourth and fifth sessions but was replaced by the Federal Republic of Germany for the sixth, seventh and eighth sessions. Of the 21 members chosen in 1971 five were among the ten largest shipowning nations, both by tonnage and by number of ships: Japan, Norway, U.K., U.S.S.R. and U.S.A. (Germany, chosen in 1974, makes six.) Other states from the list of ten largest shipowners, not members of the Working Group were: Liberia, Greece, Panama and Italy. The situation in 1975 has not changed appreciably except that France has changed places with Germany in fleet size by gross tonnage. The statistics are published annually in Lloyd's Register of Shipping. The documentation of the Working Group is found in the U.N. Doc. series A/CN.9/numbers 63, 74, 76, 88, 96 and 105.

Rules which, by negative definition, had limited carrier responsibility to the "tackle to tackle" period.⁵⁷

The Working Group considered the question on the basis of the Report of the Secretary General.⁵⁸ Two problems concerning the operation of existing Article I(e) of the Hague Rules were cited:

(1) Doubt as to whether the rules apply to loss or damage occurring during loading or unloading operations, to which the Report offered a suggested draft, as follows,

"Carriage of goods covers the period from the commencement of loading operations until the completion of discharge of the goods from the ship."⁵⁹

(2) The fact that the existing rules do not cover loss or damage occurring prior to loading or subsequent to discharge even while goods are in the charge or control of the carrier or its agents, to which the Report offered a suggested modification of the above suggested draft,

"Carriage of goods' covers the period from the time the goods are [in charge of] [accepted for carriage] [received by] the carrier to the time of their delivery."⁶⁰

The Plenary session quickly established a consensus on two points:

(1) The Hague Rules should be extended rather than merely clarified, so that the carrier would be liable for the entire period during which he was actually in charge of goods.

(2) The period of responsibility under the Hague Rules should not begin prior to carrier's custody at port of loading and should not continue beyond port of discharge.

It was further agreed that the suggested text should serve as a basis for work of the Drafting Party in developing a draft text to reflect the consensus on the above points. It subsequently developed that exact precision on the length of the period of carrier responsibility would be very difficult to put into language which would satisfy a majority of members.

Japan questioned the entire approach whereby the question of the

⁵⁷ Article I (e) achieves the exclusion of portions of the transit other than the ocean voyage through a pseudo-definition of carriage of goods as, "the period from the time when the goods are loaded on to the time when they are discharged from the ship."

⁵⁸ "Responsibility of Ocean Carriers for Cargo: bills of lading" Doc. No. A/CN.9/63/Add. 1.

⁵⁹ *Id.* Para. 26.

⁶⁰ *Id.* Para. 37.

carrier's liability would be strictly defined by the Convention, believing that the matter should be left to private agreements between carrier and shipper, so that account could be taken of the circumstances peculiar to each port.

Norway noted that a landward extension of the carrier's liability beyond the port of loading or discharging would not be desirable, and presented a Draft Proposal, as follows

“Carriage of goods covers the entire period during which the goods are in the custody of the carrier from the time of receipt of the goods at the port of loading until the time of delivery of the goods at the port of discharge.”

In its reply to the Secretariat Questionnaire, Norway had said.

“The question whether the scope of application of the rules on carriers' liability should be extended beyond the period now fixed by *art. 1(e)* of the Convention, would in the opinion of the Norwegian Government depend to some extent on the content of the liability rules in question. Assuming that the liability of the carrier would be based on the principles now contained in the Convention in particular in *art. 4(2)q* and *4(5)*, the period during which the carrier should be responsible for the goods, could be extended to cover the periods before the loading or after the discharge during which the goods were in the custody and control of the carrier and his agents. In the opinion of the Norwegian Government, however, such an extension of the period of responsibility should be considered in connection with the question relating to the liability of terminal operators and warehousemen.”

Argentina agreed with the Secretariat's Draft solutions, noting that the Argentinian courts had interpreted the carrier liability to begin with the actual reception of the goods by the carrier and terminating with the delivery, unless a customs warehouse were involved. Brazil objected to the term “delivery,” essentially because of customs problems, and offered a proposed draft,

“Carriage of goods covers the period from taking charge of them for loading operations until the completion of discharge of the goods from the ship or from any port depository or other facilities operated or owned by the carrier or his agents.”

Chile felt that the carrier liability should begin with the commencement of loading operations until the actual delivery by the carrier.

Ghana raised the question whether the nature of the carrier's liability ought not to be different when the goods were not onboard a vessel but were on the dock or in a warehouse in view of the fact that more factors

were outside the carrier's control in sea transport than in air or rail, and proposed a substitute for the existing Article VII of the Hague Rules, as follows

1. "Nothing herein contained shall prevent a carrier or shipper from entering into any agreement, stipulation or condition, as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

PROVIDED that where the carrier accepts custody for the goods prior to the loading and subsequent to their discharge from the ship, any clause, covenant, or agreement relieving the carrier of liability for loss or damage to or in connection with goods arising from the actual fault or privity of the carrier, his servants, or agents shall be null and void and of no effect.

2. Where [during the period] prior to the loading on or subsequent to the discharge from the ship the carrier is, by the municipal law of the port authority, required to [relinquish] [give] custody or control of the goods to such authority, its servants, agents or other permitted operator, the carrier shall not be responsible for the goods during such period as the goods are in such custody of control.

Nigeria, however, urged that the ocean carrier should be liable for cargo damage at least from the commencement of loading operations until the completion of discharge from the ship unless the carrier remained in actual custody and control of the goods at the port of loading or discharge in which case the carrier responsibility should continue.

The United States noted that under its domestic legislation, the Harter Act extended the carrier's period of liability during his custody of the goods, both before loading and after discharge.⁶¹

The Harter Act liabilities before loading and after discharge are created by the language in section one forbidding exculpatory clauses

⁶¹ Carrier liability before loading and after discharge is in accordance with the Harter Act where applicable by reason of transport from the United States (46 USC 190, 191). Where the Harter Act does not apply and COGSA liability under the "tackle to tackle" rule is not in force, the situation respecting liabilities depends upon whether the cargo leaves the custody of the carrier or his agent. Thus, in *Standard Brands Inc. v. Nippon Yusen Kaisha*, 42 F. Supp. 43 (D. Mass., 1941) the carrier is liable for loss occurring to the cargo while in its warehouse, although the shipper must plead and prove carrier negligence. See also *North American Smelting Co. v. Moller Steamship Co.*, 204 F.2d 384 (3rd Cir., 1953). However, where the carrier discharges into the mandatory custody of the Port Authority, the carrier's liability will have ceased. *Tan Hi v. U.S.*, 94 F. Supp. 432 (N.D. Cal. 1950). See also *Miami Structural Iron Corp. v. Cie Nationale Belge de T.M.*, 224 F.2d 566 (5th Cir. 1955); *The Milwaukee Bridge*, 26 F.2d 327 (2nd Cir.) cert. denied, 278 U.S. 672 (1928). See generally, Chiang, *The Applicability of COGSA and the Harter Act to Water Bills of Lading*, 14 B.C. Ind. & Com. L. Rev. 267 (1972).

relieving the carrier from liability for losses from "... negligence, fault or failure in proper loading, stowage, *custody*, *care*, or proper delivery..." of cargo (Emphasis added from 46 USC 190) and the language in section two forbidding exculpatory clauses lessening the carrier's obligations of due diligence to "... carefully handle and stow her cargo and to *care for* and properly deliver same..." (Emphasis added from 46 USC 191).

This did not mean, however, that the "tackle to tackle" definition of ocean carriage in the Hague Rules was unreasonable at the time it was adopted. The 1924 Convention was concerned solely with bills of lading in ocean transport, and at that time the majority of vessels issuing bills of lading were general cargo ships operating either in liner service or as tramp steamers. It was not possible then to reconcile the operations of liner vessels where there were usually considerable shoreside establishments, often including warehousing facilities at each port of call, with the more casual operations of tramp steamers often dependent on shoreside facilities provided by the shipper himself or some other authority. Also, transport by multi-purpose container was unknown in 1924 so that the international transport industry could ignore the problems of through transport of goods involving road, rail, air and ocean segments. The language chosen in 1924 was the best resolution as of that time of the different circumstances of the shipping industry, concentrating on the operations of the vessel herself regardless of whether the vessel operator was a liner company or a single ship tramp operator.

Nevertheless, the United States believed that it would be appropriate to change the Hague Rules now, and could certainly not recommend a period of carrier liability any less than that already provided in domestic law. The United States recommended the deletion of Article I(e), the tackle to tackle rule, and a reformulation of the carrier's duties to read as follows,

"The carrier shall properly and carefully take over, load, handle, stow, carry, keep, discharge and hand over the goods in his charge."

France explained its 1966 legislation,⁶² and offered it as a model for the new rules. French law took note of five phases wherein the carrier's liability remained the same: the taking over of the goods, the loading of the goods, the carriage of the goods in the ship, the discharge of the goods and the dispatch of the goods for delivery to the consignee. France believed it to be essential to unify the responsibility rules also with

⁶² Law No. 66-420 of 18 Jun 66; Decree No. 66-1078 of 31 Dec 66.

respect to the port authority, whether public or private. France offered a draft proposal, as follows:

1. "Carriage of goods" covers the period from the time the goods are taken in charge at the port of loading until their delivery at the port of discharge.
2. The carrier shall be deemed to have taken charge of the goods when they have been accepted by him, his servant or any other person acting on his instructions, and
3. The carrier shall be deemed to have delivered the goods when he has [placed them at the disposal of] [produced them to] the consignee or any other person either pursuant to the instructions of the consignee or pursuant to the rules or usages of the port of discharge.

Spain, however, took the position that the carrier should be liable at all stages of his actual control of the goods from the time of reception until the time of delivery.

Australia noted that the question of port authority liability was very difficult. Perhaps neither the carrier nor the cargo owner would be in a good position with respect to such authorities.

Australia suggested that the carrier should be liable from the time the goods leave the custody of the consignor until they come into the custody of the consignee, with the carrier responsible for insuring them while in the custody of port authorities, stevedores or others.

The United Kingdom felt it could support the Secretariat Draft so long as there was no attempt to go beyond purely maritime carriage to some sort of combined transport scheme. The U.K. government's response to the questionnaire had sought to balance liability with physical control and considered that such a proposed solution might delay revision of the rules almost indefinitely. Thus, the response stated,

The Government of the United Kingdom regard it as most important that any revision of the Hague Rules should not increase the overall costs of world trade, in particular by increasing loss of cargo through lack of adequate care. It is their view that loss and damage are generally minimised by matching as closely as possible responsibility for and physical control of cargoes. If therefore liability is to be placed on the carrier for the period in which the goods are under the control of stevedores, warehousemen, etc., it would seem essential that the carrier should have a right of recourse against such parties for any loss occurring while the goods were in their custody who in turn should perhaps be able to limit their liability to the same extent that the carrier can. The establishment of a general rule for this will be a difficult exercise going rather outside the scope of maritime law into more purely domestic legislations; furthermore, in the United Kingdom at least the situation is complicated by the great variety in the legal status of such bailees and the

Government of the United Kingdom anticipate that considerable work will be necessary to establish suitable rules world-wide. However, they would be in favor of a solution along these lines.

The U.K. solution to the problem could be simply framed,

“Subject to the provisions of Article V there shall be no liability on the carrier for loss or damage to goods at the port of loading, during the carriage or at the port of discharge except in accordance with these rules.”

This proposal was similar to the proposal of the International Chamber of Shipping, however, consideration of this provision was deferred and not taken up again.

India had replied to the questionnaire that the Hague Rules should be applicable during the entire period that the goods are under the control or custody of the carrier. This liability would begin with the delivery by the consignor to the carrier or his agent for the purpose of being carried by the ship and would continue until delivery by the carrier or his agent to the consignee. India also noted that a new convention would be necessary to provide for port authority liability.

The Soviet Union began by noting that the reasons for making changes in the international convention must be proven, but stated that under Soviet law the carrier was liable for loss or damage to cargo from the point of loading to the point of delivery to the consignee, although the carrier was permitted to contract out of this liability.

The Drafting Party,⁶³ using the Secretariat's proposed draft as the basic text, reached agreement on the following text:

- (i) “Carriage of goods” covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage, and at the port of discharge.
- (ii) For the purpose of paragraph (i), the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:
 - (a) by handing over the goods to the consignee; or
 - (b) in cases when the consignee does not receive the goods, by placing them at the disposal of the consignee in accordance with the contract or with law or usage applicable at the port of discharge; or
 - (c) by handing over the goods to an authority or other third party to

⁶³ Under the chairmanship of Prof. Erling Selvig of Oslo University, Chairman of the Norwegian (or rather Scandinavian) delegation, the following members of the Working Group acted as the Drafting Party: Argentina, Egypt, France, India, Japan, Nigeria, Norway, Spain, Tanzania, U. K., U.S.S.R., and the United States.

whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

(iii) In the provisions of paragraphs (i) and (ii), reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

In the closing plenary sessions regarding the revised Article I(e) the United States delegation attempted to have the words "or usage" in subparagraph (ii)(b) deleted or at least bracketed on the ground that the inclusion of such language could be productive of substantial litigation. Usages applicable in particular ports of discharge could be difficult to determine and establish leading to uncertainty in a revised text which was intended to remove uncertainties, however, the majority view supported the inclusion of the phrase without its being bracketed.

The United States repeated its concerns about "usage" at the Second Reading of the text and it was then decided to rephrase the expression slightly as, "usage of the particular trade." With this slight exception, the language of the Third Session Report has been incorporated into Article 4 of the 1975 Draft Convention.

In addition to its consideration of the period of carrier responsibility the Working Group also considered a possible revision of Article VII of the Hague Rules and a revision of the formula of Article III(2). This third session agreed to the elimination of Article VII completely and the fourth session eventually determined that the statement of carrier duties in Article III(2) would no longer be necessary in view of the new formulation of carrier defenses.

B. Responsibility for Deck Cargo and Live Animals

1. Deck Cargo

The definition of "goods" in Hague Rules art. I(c) excludes "live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried." Separate consideration was given to (a) deck cargo, and (b) live animals of these pseudo-definitions which operate as exclusions of carrier liability, in that bill of lading clauses place the risks of carriage on the shipper.

The Secretariat Report (paras 42-66) discussed three problems that have arisen as a result of the exclusion of deck cargo:

(1) Carriers might escape liability for losses or damage to deck cargoes resulting from causes wholly unrelated to any special risks that might exist in the carriage of such cargoes on deck;

(2) Freight containers, which could be carried as safely on deck as below deck, were not covered by the Rules when they were stated to be carried on deck; and

(3) It was not clear whether cargoes stowed above the main deck but within certain types of protective enclosures were "deck cargo" for purposes of the Hague Rules' exclusion.

The Report suggested amendments to deal with these problems.

If it were decided to amend the Hague Rules to cover deck cargo, the simplest amendment would be to omit this exception from Article I(c); the relevant language would then read:

"Goods' includes goods, wares, merchandise and articles of every kind whatsoever . . ."

A more complicated approach, which came from the United Kingdom reply to the questionnaire, would supplement the above amendment by the following addition to Article IV, a proposal which had been made for the Brussels Protocol but was rejected there,

"In respect of cargo which by the contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in or incident to such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention."

The United States delegation took strong exception to the expression "incident to such carriage" in the above formulation as a vague term which might unduly expand carrier defenses.

In order to take account of the container revolution in ocean shipping the Hague Rules could be amended in two possible ways, according to the Secretariat Report.

Art. I(c):—"Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo (*other than freight containers*) which by the contract of carriage is stated as being carried on deck and is so carried." or

Art. I(c):—"Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. *However, 'goods' shall include all freight containers, whether carried on deck or below deck.*"

Furthermore, the Secretariat offered another proposal to handle the problem of cargoes stowed above the main deck but under cover, as, for example, in Shelter Deck vessels or the "C-3" type vessels launched at the end of the Second World War.

“Cargo that is stowed above the main deck but within permanent enclosures that provide for the cargo substantially the same security as if it were stowed below deck shall not be considered to be ‘deck cargo’ within the meaning of this article.”

These suggested drafts by the Secretariat took into account the fact that replies to the Secretariat’s questionnaire generally supported removal of the exclusion for “deck cargo”. Those of Brazil, Hungary, Greece, India, Iraq, Nigeria, Norway and Sweden indicated that removal of the exclusion be accomplished, while the reply of Korea stated that the present rules on this topic need improvement, and the replies of France and Austria suggested that “deck cargo” should be brought within the Rules, but indicated that it should be possible to limit responsibility by contract. The reply of the United Kingdom stated that, with regard to deck cargo, “there is no reason why the shipowners should not be subject to the Rules except for damage arising from the deck carriage itself”. Poland appeared to ‘favour removal of the exclusion but cautioned that “cargo not resistant to atmospheric conditions . . . would not be duly protected”. Replies supporting the continued exclusion of “deck cargo” came from Cambodia, Canada, Ceylon (“as shipowners”), Japan, Philippines and Saudi Arabia.

It should be noted at this point that 30 nations and four international organizations responded to the Secretariat’s questionnaire.⁶⁴

In that regard, the reply of the International Chamber of Shipping stated,

“In certain trades general cargo, which would previously have been carried under-deck, is now regularly carried on-deck in containers with the contract of carriage subject to the Hague Rules.

In some countries such contractual arrangements do not have the same legal effect as statute law. Accordingly there is scope for change here. Shipowners would willingly participate in attempting to find a form of words which widens the definition of cargo to include cargo which although stowed on deck, is by agreement between the parties carried on Hague Rules terms.”

At the Plenary India and Tanzania urged the elimination of the distinction between on deck and under deck cargo. This view was supported by Argentina, with the comment that Argentine courts do not exclude claims against the carrier for damage to on deck cargo. France also urged strongly that all distinctions between on deck and under deck cargo be eliminated. There was general agreement that the exception of deck cargo was indefensible even though the freight rate charged for on

⁶⁴The questionnaire and replies are contained in Doc. No. A/CN.9/WG.III/WP.4/Add.1 (Vols. I, II and III).

deck shipment was usually less than for under deck shipments. There was a consensus that the protective measures to be taken by the carrier might necessarily differ in the case of on deck cargo from those undertaken with respect to under deck, but that this different treatment could not justify the absence of a duty of care on the part of the carrier and there was no longer a need for the exclusion of deck cargo, especially in view of the development of container vessels in which the container's position might be shifted at different ports from being technically under deck to technically on deck.

Japan noted that on deck cargo was more likely to be lost at sea because it had less protection, and that the inclusion of deck cargo within the new rules would necessitate either a higher freight rate or refusal to carry deck cargo altogether.

The Soviet Union stated that the existing deck cargo exclusion was unacceptable and that general principles of liability should apply.

The United States noted that while deck cargoes were excluded from the coverage of the Hague Rules and the United States Carriage of Goods by Sea Act (hereinafter C.O.G.S.A.) such cargoes were within the protection of the Harter Act which excluded only live animals from coverage,⁶⁵ accordingly the United States could not support the continued exclusion of deck cargoes. Furthermore, the United States said that the on deck exclusion had aggravated problems of container transportation generally and therefore proposed a series of amendments to the Hague Rules to deal with both problems, as follows

“Article 1(c)—Goods includes (goods), wares, merchandise and articles of every kind whatsoever [except live animals.]”

Proposed new article—“Goods which are stored within freight containers shall be subject to these rules. A freight container is:

(a) of a permanent character and accordingly strong enough to be suitable for repeated use;

(b) specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading;

(c) fitted with devices permitting its ready handling; particularly its transfer from one mode of transport to another;

(d) so designed as to be easy to fill and empty;

(e) having an internal volume of 1 m³ (35.3 ft.³) or more;

(f) the term freight container includes neither vehicles nor conventional packing”.

Proposed amendment to Article III, (7)—“Cargo for which a bill of lading has been issued which bill of lading does not provide for on deck stowage must be carried under deck. Failure to so carry will make the carrier liable for all losses direct and indirect of on deck stowage.”

Proposed amendment to Article IV—“In respect of cargo which by

⁶⁵ 46 U.S.C. 195 (1974).

the contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention.”

It was the intention of these proposed amendments to clarify the situation respecting cargoes deliberately intended by the consignor to be shipped on deck and those cargoes intended for under deck shipment but which are actually carried on deck.⁶⁶

Norway immediately opposed the United States proposal as being too complicated and indicated a belief that there should be no special provisions for on deck liability, the general rules being sufficient for that purpose. This Norwegian view was supported by Spain, Australia, Argentina, and Egypt. Subsequently, however, Norway introduced a proposed new article on deck carriage, as follows

⁶⁶ Since deck cargo is not within the terms of COGSA the preexisting case law continues. There are, however, two separate types of problems:

- (1) Cargo deliberately shipped on deck.
- (2) Cargo designated for underdeck shipment which is actually shipped on deck.

Knauth has said that the exception of deck cargo was intended to protect the Baltic timber trade (A. Knauth, "Ocean Bills of Lading, 236 4th ed. [1953]). Prior to the recent development of the containership the carriage of live animals was not an important part of American foreign trade although timber cargoes were. The 1893 Harter Act specifically excepted live animals from its coverage 46 USC 196, whereas there is no exclusion of deck cargo from the coverage of the Harter Act. Thus, an exculpatory clause in a bill of lading will not relieve the carrier-time charterer of liability for negligence, since COGSA does not supersede Harter even as to the "tackle to tackle" period for deck cargoes. *Blanchard Lumber Co. v. S.S. Anthony II*, 259 F. Supp. 857 (S.D.N.Y. 1967)

(1) *Cargo deliberately shipped on deck*

There is a presumption that cargo paying full freight and shipped under a clean bill of lading must be stowed under deck unless there is an express written agreement to the contrary or unless there is clear evidence of contrary custom. See *The Sarnia*, 278 Fed. 459 (2nd Cir.) cert. denied 258 US 625 (1921). Although cargo deliberately shipped on deck is not covered by COGSA it is possible that COGSA terms could apply when the goods are shipped under a bill of lading which incorporates the provisions of COGSA by reference, in which case the carrier will be liable for failure to take proper precautions to care for the cargo. See *Diethelm & Co. Ltd. v. S.S. Flying Trader* 141 F. Supp. 271 (S.D.N.Y. 1956), aff'd. 244 F.2d 542 (2d Cir. 1957).

(2) *Cargo designated for underdeck shipment which is actually shipped on deck.*

Because of the presumption of underdeck storage the carrier has been held to a strict liability for damage to cargo stowed on deck after a clean (or "under deck") bill of lading has been issued and full freight has been paid. See *The Delaware* 81 US 579 (1871). This strict liability has been enforced, as against bill of lading clauses and provisions in both the Harter Act and COGSA, by the

Add to Article III, (7)

"If the goods have been stowed on deck, a statement to that effect shall be inserted in the bill of lading unless deck stowage is in accordance with usage or statutory requirements. In cases of non-compliance with the preceding provision, the bill of lading shall be *prima facie* evidence of stowage under deck. However, proof to the contrary shall not be admissible when the bill of lading had been transferred to a third party acting in good faith."

Thereafter, a further draft proposal was offered by Norway on this subject,

1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, with usage or with statutory requirements.
2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier, shall insert in the bill of lading a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into. However, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired the bill of lading in good faith.
3. Where the goods have been carried on deck contrary to the provisions of paragraph 1, the carrier shall be liable for loss of or damage to the goods which result solely from the carriage on deck in accordance with the provisions of [Article 4, paragraph 5 as amended by the 1968 Additional

concept that on deck storage of cargo shipped under a clean bill of lading is a deviation which ousts the contract of carriage and restores the parties to the bailment relationship with strict liability of the bailee, the carrier. Thus, in *St. Johns N. F. Shipping Corp. v. S.A. Companhia Geral*, 263 U.S. 119 (1923), decided under the Harter Act, the bill of lading clauses limiting cargo's recovery and exculpating the shipowner from liability were voided because the contract of affreightment itself had been ousted by the deviation. At the present time there is a conflict between the circuit courts whether the COGSA language condemning unreasonable deviations (COGSA 1304 (4); H.R. IV (4)) means that the contract of affreightment itself is not ousted by the deviation. In *Atlantic Mutual Ins. Co. v. Poseidon Schiffahrt, G.M.B.H.* 313 F.2d 872 (7th Cir.) cert. denied, 375 U.S. 819 (1963), the court held that the carrier would be protected by the \$500 Package Limitation of COGSA 1304 (5) even in cases of unreasonable deviation. However, in *Encyclopaedia Britannica v. S.S. Hong Kong Producer*, 422 F.2d 7 (2nd Cir.) cert. denied 397 U.S. 964 (1970), the court found that the issuance of a clean bill of lading (which did not provide liberty to stow on deck or under deck) would require the carrier to pay full damages without the benefit of the COGSA \$500 Package Limitation or bill of lading clauses by reason of the unreasonable deviation of on deck stowage of cargo. See also *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).

Deviation in American law concerns geographical distances as well as the methods of carriage; nevertheless the recent decisions have exonerated the carrier on the grounds of reasonable geographical deviation while holding the carrier liable for on-deck stowage and dry-docking with cargo onboard. See *Haroco Co., Inc. v. The Tai Shan*, 111 F. Supp. 638 (S.D.N.Y. 1953) aff'd 218 F. 2d 822 (2d Cir. 1955); *Kroll v. Silver Line, Ltd.*, 116 F. Supp. 443 (N.D.Cal. 1953); *Accinanto Ltd. v. Cosmopolitan Shipping Co.*, 99 F. Supp. 261 (D. Md. 1951) aff'd 199 F. 2d 134 (4th Cir. 1952); *American Cyanamid v. Booth SS Co.*, 99 F. Supp. 232 (S.D.N.Y. 1951) aff'd F. 2d 529 (2nd Cir. 1952). See also *American Metal Co. v. M/V Belleville*, 284 F. Supp. 1002 (S.D.N.Y. 1968).

Protocol]. The same shall apply when the carrier in accordance with paragraph 2 of this Article is not entitled to invoke an agreement for carriage on deck.”

Poland also introduced a draft proposal respecting deck cargo,

“Goods” include goods, wares, merchandise and articles of every kind whatsoever, except cargo carried on deck. However, “goods” shall include cargo carried on deck, if:

- a) they are so carried without the shipper’s consent;
- b) they are carried in all freight containers;

c) they are stowed above the main deck but within permanent enclosures that provide for the cargo substantially the same security as if they were stowed below deck.

In the event, it is proved that loss of, or damage to deck cargo, results exclusively from unseaworthiness of the ship, or from a fault made by the carrier recklessly, such deck cargo shall be considered to be “goods” within the meaning of this Article.

Cargo carried on board “container-ships” are always considered as “goods”, whether stowed on or below deck.

After a lengthy and difficult discussion in the Plenary and the Drafting Party it proved to be impossible to achieve consensus on any basis other than a removal of the exclusion of deck cargo from the scope of coverage of the Hague Rules. The Drafting Party definition was accepted by the Plenary, as follows

“Goods” includes goods, wares, merchandise and articles of every kind whatsoever [except live animals].”

There was another division of opinion regarding the possible addition to Article IV proposed initially by the United Kingdom to place upon the shipper all risks of loss or damage arising or resulting from perils inherent in or incident to carriage on deck, or to relieve the carrier from liability for all losses connected with the special risks of on deck carriage. A decision on this question was postponed for a later session, however the following suggestions were made by various members of the Drafting Party:

(a) That the words “incident to” be deleted from the text;

(b) That the phrase “which by the contract of carriage is stated as being . . . and is so carried” be deleted, so that the clause would read as follows: “In respect of cargo carried on deck”, etc.;

(c) That the provision be modelled upon article 17, paragraph 4, of the Convention on the Contract for the International Carriage of Goods by Road (CMR) done at Geneva on 19 May 1956. This Convention states in part: “. . . The carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

(a) Use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note; . . .”.

In view of the decision to eliminate the exclusion of deck cargo it would not be necessary to provide for an exact description of the places onboard ship where cargo would be considered under deck.

While there was no consensus on the general regime of liability for damage to cargo carried on deck either deliberately or inadvertently, against the directions of the consignor, the Drafting Party and the Plenary Session separated the proposals on deck and container cargoes into a group of proposals for which there was almost a consensus in favor and a group of proposals for which there was not yet a consensus in opposition. Thus, the group of proposals for which considerable support had been received were stated as agreed principles for a future session:

(a) The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, or with statutory requirements, and possibly with usage.

(b) Any agreement between the carrier and the shipper to the effect that the goods can or may be carried on deck must be reflected in a statement in the bill of lading.

(c) If the bill of lading does not contain the statement referred to in paragraph (b) above, it shall be presumed that the carrier and shipper have not entered into such an agreement, but as against the shipper, the carrier shall be entitled to prove and invoke the true agreement.

Some delegates stated that these principles would be required only if provisions containing special rules regarding the carrier's responsibility for deck cargo should be included in the Hague Rules.

The group of proposals against which opposition was recorded were the following principles to be given further consideration:

(d) If an agreement with the shipper that cargo shall be carried on deck is not reflected in the bill of lading, then the carrier shall not be entitled to invoke such agreement against a consignee who has acquired the bill of lading in good faith.

(e) If goods are carried on deck in breach of the principles referred to in paragraph (a) above, then the carrier shall be liable for all losses direct and indirect of on-deck storage.

The United States warned that the many problems for shippers associated with the exclusion of deck cargo from the Hague Rules would not be solved simply by the elimination of the exclusion, and that the container revolution had not been so complete that developing countries might not in the future have problems with cargoes intended for under deck shipment but actually carried on deck. While the solution in the

United States gave the cargo owner a drastic and possibly illogical remedy, in that the bill of lading itself was ousted and the carrier became an insurer, nevertheless it was believed that the new Hague Rules should contain some serious penalization of the carrier who deliberately or inadvertently carries under deck cargo on deck.

Reconsideration of these issues took place during the sixth session of the Working Group and during the Second Reading. This proved to be a very contentious issue and it may provoke further debate at the UNCITRAL Plenary or the Diplomatic Conference. At the present time the provisions of the Draft Convention respecting deck cargo are to be found in Article 9.

2. Live Animals

The proposal offered by the Secretariat for the removal of the exclusion of live animals from the Hague Rules was based on replies to the questionnaire from Brazil, India, and Iraq. France and Austria had suggested that "live animals" should be brought within the Hague Rules, but indicated that it should be possible to limit responsibility by contract. Japan had stated that it is a "considerable risk, almost tantamount to gambling, to undertake the carriage of live animals, while ensuring their life or health" (except "in the trade of sheep on a large scale, where a certain mortality rate is agreed upon . . ."). Removal of this exclusion was further opposed in the replies of Cambodia, Canada, Ceylon ("as shipowners"), Denmark, Greece, Norway, Philippines, Poland, ("the problem of carrying live animals calls for a separate and detailed regulation"), Saudi Arabia and Sweden.

Nevertheless, the discussion in the Plenary Session reflected uncertainties as to the extent of carriage of live animals and the carrier's duties and exemptions from liability. India clearly supported the removal of the live animal exclusion. Egypt noted that in draft legislation the carrier would be responsible for normal care of animals while the shipper's representative would be responsible for special care, the type of division of risks in the European Road and Rail Conventions.

Thus a provision might be modeled on Article 27(3) of the CIM Convention (The International Convention Concerning Carriage of Goods by Rail) which provides,

"3. . . . the railway shall be relieved of liability when the loss or damage arises out of the *special risks* inherent in one or more of the following circumstances:
(g) the carriage of livestock"

or Article 17(4) of the CMR Convention (The International Convention Concerning Carriage of Goods by Road) which provides,

“... the carrier shall be relieved of liability when the loss or damage arises from the *special risks* inherent in one or more of the following circumstances:

(f) the carriage of livestock”.

The United States noted that live animals were excluded from the 1893 Harter Act because of the peculiar risks to both carrier and shipper.⁶⁷ There were several United States shipping companies engaged in the movement of live animals on specially designed vessels; for example, one company offered a “cow-tainer” service from Southern United States ports to Latin America. There had not been a demand from United States shippers for the removal of the exclusion, but one government department, the Department of Agriculture, was greatly concerned with humane and healthful conditions in the shipment of live animals, and the United States could support an international duty on the part of all states to draw up regulations to prevent inhumane and unhealthy transportation of live animals. India noted its support for such a proposal.

Poland offered a proposal that live animals, whether carried on deck or below deck, should be considered as goods if it is proved that damage or loss was sustained exclusively because of the unseaworthiness of the vessel or reckless faults of the carrier.

Concern was expressed that a removal of the exclusion alone would not properly resolve problems associated with the carriage of live animals. The carrier would not have an adequate defense against ordinary risks simply in the “inherent vice of the cargo” exception. Nevertheless, most speakers did not regard live animal carriage as an important problem.

Because there was no consensus on the resolution of the live animal problem, it was deferred for future consideration, at which point the UNIDROIT observer, whose organization was anxious to have a function in the remaking of international maritime law, suggested that if UNCITRAL would request UNIDROIT to undertake a study of live animal carriage, it would be done. The UNIDROIT study on live animals was considered at the Sixth Session of this Working Group and the approved language is in Article 5(5) of the Draft Convention.

C. Jurisdictional Provisions: The Problem of “In Rem”

The most controversial and difficult portion of the third session, from the United States’ viewpoint, concerned the proposal for international

⁶⁷ 46 U.S.C. 195 (1974).

legislation on the subject of jurisdiction in cargo damage disputes. This subject matter is not directly regulated in the Hague Rules, and an extensive practice has grown up over the years for the question of jurisdiction of courts (and arbitration) to be determined by a clause in the printed form bill of lading. The enforceability of these clauses in the United States is very controversial.⁶⁸ The principal argument against their validity is that the jurisdiction clause has the effect of "lessening the carrier's liability" and is therefore null and void.⁶⁹ It was the fear of the United States delegation that any international legislation on the subject could only restrict the cargo owner's rights, and that very delicate compromises would have to be achieved in order for the new rules to become acceptable to cargo-owning nations. Another factor adding to the difficult nature of this drafting task was the vast procedural and conceptual differences among the groups of member states respecting the bases for the exercise of jurisdiction over defendants.

⁶⁸ A 1955 decision of the Second Circuit of the Court of Appeals had dismissed, as against the presumed validity of the jurisdictional clause, an argument based on COGSA 1303 (8) *infra* and held that jurisdictional clauses would be valid unless the shipper proves the clause unreasonable. *Wm. H. Muller & Co. v. Swedish American Line*, 224 F.2d 806 (2nd Cir.) cert. denied 350 U.S. 903 (1955). This decision was in line with that court's earlier decision in *Kloekner Reederei und Kohlenhandel G.M.B.H. v. A/S Hakedal*, 210 F.2d 754 (2nd Cir. 1954) cert. dismissed, 348 U.S. 801 (1955) discounting the argument that the possibility of different and unfavorable results in another forum should influence the decision of an American court on a motion to dismiss for *forum non conveniens* reasons where both parties were foreign. Subsequently the Fifth Circuit took an approach to jurisdiction which conflicted with that of the Second Circuit in *Muller and Kloekner*. In *Motor Distributors, Ltd. v. Olaf Pedersen's Rederi A/S*, 239 F.2d 463 (5th Cir. 1956) cert. denied, 353 U.S. 938 (1957) the court held that the carrier must prove extreme prejudice in order to obtain dismissal of the complaint because of public policy against agreements to oust the jurisdiction of the court in advance of controversy. An attempt to obtain Supreme Court review of the conflict between the circuits was unsuccessful in *Carbon Black Export Co. v. S.S. Monrosa*, 254 F.2d 297 (5th Cir. 1958), cert. dismissed 359 U.S. 180 (1959) reh. denied, 359 U.S. 999 because the Supreme Court considered that it did not have to reach the validity of the jurisdictional clause in a case begun by *in rem* process against the ship since by the terms of the particular jurisdiction clause the ouster of plaintiff's choice of jurisdiction would occur only in *in personam* suits. Now, however, the Second Circuit has reconsidered its 1955 decision and has specifically overruled it in the case of *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (2nd Cir. 1967) wherein the court held that the jurisdictional clause in question had the effect of lessening the carrier's liability in accordance with COGSA 1303 (8) and was thereby rendered invalid. (For a general discussion of the earlier aspects of the problem, see A. Yiannopoulos, *Negligence Clauses in Ocean Bills of Lading*, 110-22 (1962).)

⁶⁹ Opinion concerning jurisdiction clauses in bills of lading is sharply divided in the worldwide shipping industry. It is obvious that the Hague Rules contain no provisions explicitly regulating such clauses; however, there is an implicit prohibition in 46 U.S.C. 1303 (8), Article III (8)

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter shall be null and void and of no effect . . . "

The Secretariat Report offered four basic approaches:

- (1) No provision on jurisdiction, in accordance with the existing Hague Rules;
- (2) A provision prohibiting all forum selection clauses;
- (3) A provision prohibiting those forum selection clauses which evidence abuse of economic power or the use of unfair means;
- (4) A provision on jurisdiction following the examples of other international transport conventions, especially the Warsaw Convention,⁷⁰ the road and rail conventions,⁷¹ and the Passenger Luggage Convention.⁷²

In realizing the fourth alternative, the Secretariat had prepared Draft Proposal A, as follows:

- A. In a legal proceeding arising out of the contract of carriage the plaintiff, at its option, may bring an action.
 1. In a state within whose territory is situated:
 - (a) the principal place of business of the carrier or the carrier's branch or agency through which the contract of carriage was made; or
 - (b) the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or
 - (c) the place where the goods were delivered to the carrier; or
 - (d) the place designated for delivery to the consignee; or
 2. In a contracting state or place designated in the contract of carriage.
- B. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above.
- C. Notwithstanding the provisions of paragraphs A and B above, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

Although there were slight differences, a substantial number of delegates were in favor of a jurisdictional statement along the lines of Draft Proposal A: United Kingdom, France, Brazil, Chile, Egypt, Japan, Nigeria, Ghana, Norway, Belgium and the Soviet Union.

⁷⁰ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929. 49 Stat. 3000; T.S. 876; 137 L.N.T.S. 11.

⁷¹ The European Road Convention (C.M.R.) is the Convention on the Contract for International Carriage of Goods by Road, May 19, 1956. The European Rail Convention (C.I.M.) is the Convention on the Transport of Goods by Rail, Berne, Feb. 25, 1961.

⁷² Draft International Convention Respecting Carriage of Passengers and their Accompanied Baggage. 1 J. Marit. L. & Comm. 513, 523 (1970).

The United States, Australia and Argentina expressed considerable reservations about Draft Proposal A, but this opposition could not overcome the strong support which the Secretariat Draft had attracted.

Australia objected that they had had considerable trouble with jurisdictional clauses respecting inbound shipments, but that today no bill of lading clause could oust the jurisdiction of Australian courts, nor would the Australian courts recognize the ouster by bill of lading clause of the jurisdiction of a court at the place of shipment or delivery. (The Australian C.O.G.S.A. is applicable by its terms to all outward shipments.) Australia would insist that if there were to be any international legislation, the minimum right of the cargo owner must be the right to sue the carrier at the place of delivery and the place of shipment.

The United States objected that the criteria selected for jurisdiction of cargo disputes were insufficient and that the omission of a provision for some sort of *In Rem* jurisdiction⁷³ was a fatal defect which would create great difficulties for the United States and render any eventual adherence to the new convention very uncertain because paragraph B of Draft Proposal A would forbid the commencement of legal proceedings in any place not specified in paragraph A which did not include the place of arrest of the offending vessel. Thus the choice for the United States would be at best a reservation to the jurisdictional portion of the convention or at worst a failure to ratify. Although the *In Rem* jurisdiction might be regarded as an historical anachronism, nevertheless, there was a strong public policy in favor of its retention in the United States, especially in cargo damage cases because such a small portion of United States foreign trade by volume (about 5%) was carried in United States flag vessels.

Argentina supported the United States position that jurisdiction, based on an embargo or seizure of the vessel (*In Rem* Process) should be preserved. Argentine courts had held jurisdictional clauses in bills of lading to be null and void, thus Argentina had many reservations about Draft Proposal A and therefore offered the suggestion that the jurisdiction provisions of the Convention might be placed in a separate protocol which states ratifying or adhering to the Convention might accept or reject. The United States responded to the Argentine suggestion that the

⁷³ Torts or contracts caused by the vessel herself or the Master and crew serving in her give rise to a claim against the vessel supported by a property right in the vessel herself created, not by the parties but by operation of law. This property right, the maritime lien, determines the right of the maritime claimant to bring his action against the offending thing, *In Rem*. See *Todd Shipyards Corp. v. City of Athens*, 83 F. Supp. 67 (D. Md., 1949).

problem with protocols of jurisdiction was that what was essentially a private dispute would quickly become an international dispute.

During the subsequent debate the United States proposed to add language to Draft Proposal A so as to preserve the jurisdiction of courts at the place where the vessel upon which the goods were shipped when damaged, was found, and an amendment to Draft Proposal A to provide jurisdiction wherever the carrier was doing business. Ghana, Nigeria, Chile, Brazil, and Argentina indicated that they could support the addition of *In Rem* jurisdiction to the Draft Proposal.

With respect to Draft Proposal A itself, Hungary favored the proposal generally, but felt that the expression "place" of business or residence was inexact, favoring reference only to "contracting states." Others, however, pointed out the dangers to the entire convention during a delayed ratification process.

Objections to subparagraph 1(b), the plaintiff's domicile or residence, were made by Japan, United Kingdom, Norway, Belgium and France for varied reasons. The United Kingdom preferred the present situation in the Hague Rules but was prepared to accept Draft Proposal A as a compromise which would legislate jurisdiction of claims, although the most important goal must be the prevention of forum shopping, which meant that the United Kingdom could not support subparagraph 1(b).

Norway felt that 1(b) was objectionable because the forum might have little or nothing to do with the specific transaction, and therefore a lack of cost effectiveness would dictate the omission of such a provision. Norway objected to any *In Rem* attachment at places other than the states listed in subparagraphs 1(a), (c), and (d), and Norway further argued that provisions for jurisdiction in many places, through the use of an outmoded procedural device, while appropriate in the consumer context of aviation passenger injuries, would not be appropriate in the commercial context of cargo claims.

The Soviet Union preferred Draft Proposal B⁷⁴ rather than Draft Proposal A, which was the choice of most delegations because in land and air transport the carrier normally had permanent representatives at places of loading and discharging cargo, but the ocean carrier (especially the tramp steamer on charter hire) did not have permanent representatives at all ports of call. It was for this reason that the parties must be free to make suitable provisions among themselves respecting the jurisdiction of disputes. Furthermore, the essential goal of an international agreement would be the ability of the parties to agree to arbitrate disputes which was the customary method for the resolution of

⁷⁴ Draft Proposal B provides that the claimant's choice of forum is limited only if he and the other contracting party have agreed to the limitation of fora as prescribed in the Convention.

commercial disputes among the states of the Council for Mutual Economic Assistance.⁷⁵

France preferred Draft Proposal A because of its assimilation to the existing rail, road, and air transport conventions. At first France believed the *In Rem* problem to be solved by the 1952 C.M.I. Convention on the Arrest of Vessels⁷⁶; however, in view of the small number of states parties to that convention, it would not be an acceptable resolution of the *In Rem* problem, which, in any event, presented an unacceptable theoretical basis for the exercise of jurisdiction. Spain concurred in the French opposition to the *In Rem* process as the creation of a purely accidental forum without sufficient contacts to the transaction.

There followed a heated debate on the nature of *In Rem* jurisdiction. The British practice whereby the arrest of the vessel is used to compel personal jurisdiction over the shipowner⁷⁷ was compared to the American practice, which establishes the jurisdiction of the court even in the absence of personal jurisdiction over the shipowner.⁷⁸ The United States believed that there was a great need for a study of the *In Rem* process because in many states which do not formally recognize it, the same effect can be obtained through other means. However, there was no support for this proposal.

During the course of the debate in the Drafting Party, it became apparent that some modifications of the traditional *In Rem* process would be necessary in order to preserve it. Thus the United States had at first proposed the addition of the place of *In Rem* jurisdiction to the list of available jurisdictions in Draft Proposal A. In the face of considerable opposition to this, the United States proposed to permit the defendant to force plaintiff to remove the action to one of the other jurisdictional sites by providing adequate security, with the decision on the adequacy or sufficiency of the security to be made by the transferee court. There was no demand for the removal state to determine adequacy. This was

⁷⁵ The Council for Mutual Economic Assistance (CMEA), once known as COMECON, with headquarters in Moscow, is responsible for improving conditions of trade among the centrally planned economies of Eastern Europe. Arbitration has proven to be the most effective means of dispute resolution in those countries. The C.M.E.A. statute is in 368 U.N.T.S. 264.

⁷⁶ See fn. 45, *supra*.

⁷⁷ C. Price, *The Law of Maritime Liens* (1940). The historical development of the newer British concept of *In Rem* Attachment as a method of compelling personal jurisdiction is traced from the downfall of the historic Admiralty Court's Doctors' Commons to the absorption of Admiralty by common law trained lawyers in F. Wiswall, *Development of Admiralty Jurisdiction and Practice since the Eighteenth Century* (1970).

⁷⁸ The United States theory of personification of the vessel thereby justifying the conferral of jurisdiction by reason of the arrest of the vessel is given a clear exposition in O. Holmes, *The Common Law* 25 et seq. (1881), although the historical explanation therein may be erroneous. Cf. the Holmes opinion in *The Western Maid*, 257 U.S. 419 (1922).

changed so that the transferor state would finally determine adequacy of security. These changes produced some additional support, and the United States then made a further amendment that this new *In Rem* remedy would be available only where the vessel could be properly attached in accordance with the local law.

The United States recognized that these concessions on the traditional *In Rem* process represented a major departure from existing law in the United States and might cause some delay in the ratification process, especially in view of recent reaffirmations of the necessity for it.⁷⁹ The absence of this kind of jurisdiction in air and rail conventions was irrelevant in view of the nature of the permanent installations for rail transportation and the bilateral agreements and guarantees supporting air transport. The United States believed that its proposal on *In Rem* process should not be further refined by distinguishing the liner service with permanent port installations from the tramp steamer.

Japan, the United Kingdom, and the Soviet Union remained strongly opposed to the compromise *In Rem* jurisdiction.

Ghana disapproved both the United States proposal and the language of paragraph B of Draft Proposal A, and would solve the *In Rem* problem by removal of the prohibition of legal proceedings otherwise than provided for in the jurisdiction article of the convention. The United Kingdom felt the United States compromise would create an itinerant forum and would derogate from the 1952 Arrest of Ships Convention, which had obtained 26 ratifications or adhesions and that any *In Rem* process must remain purely provisional and protective, not jurisdictional.⁸⁰ Finally, Norway urged that paragraph B was essential, but that Norway could support the United States proposal as a jurisdiction of last resort when there were no other means to enforce a claim.

The compromise solution to the *In Rem* process was approved by a majority of the Working Group, although there were some dissents to it. There were no changes at the Second Reading of the text, and the text in Article 21 of the Draft Convention was not placed in brackets.

It should be clearly noted that the language of Paragraph 2 of Article 21 is a basis for jurisdiction conferred by the general maritime law, and

⁷⁹ The 1966 merger of the Admiralty side of the federal courts into the civil side reexamined the question of retaining the peculiar Admiralty remedies found in the old Supreme Court Admiralty Rules. The Admiralty remedies, including *In Rem* process are now found in Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. Preservation of the traditional Admiralty practice possibly accounts for the lack of success, after years of effort, in codifying the Admiralty jurisdiction of the Federal courts and the procedures respecting state owned vessels in commercial service.

⁸⁰ See fn. 77 and 78 *supra*.

as such is not concerned with merely provisional protective measures against absconding defendants which are recognized by all legal systems⁸¹ and are preserved in the second sentence of Paragraph 3 of Article 21. It is believed that Paragraph 2 is the product of comparative law analysis and refinement which is not an adoption of the views of any single delegation. There is no question that Paragraph 2 will present conceptual difficulties for continental legal scholars. Also, there is no question that the transfer provisions upon posting of security represents a great change in United States law. If this provision should not be adopted, it would then be necessary for the United States to reconsider its position with respect to a reservation to the entire Article 21 on jurisdiction.

An issue which received slight consideration before its adoption was the provisions of the 1952 Brussels Convention on Civil Jurisdiction in matters of collision⁸² respecting the effect of an initial proceeding in one forum on a subsequent attempt to bring the same action in another forum (*Lis Alibi Pendens*).⁸³ There was some discussion of the problem in federal states, as in the United States, Canada and Mexico, where there are federal and local (state or provincial) courts operating in the same territory. Also the United States expressed concern that the reasons for commencement of a second suit, such as the lack of assets at the *situs* of the first suit, should be spelled out. The Plenary Session of the Working Group had referred Draft Proposal A to the Drafting Party, where many of the arguments previously made against it were made again. The Drafting Party then took Draft Proposal A as a foundation and attempted additions and modifications from other conventions. The resulting text eliminated the proposal of subparagraph 1(b) respecting the plaintiff's domicile or residence, and further modified the choice of the place of contracting by the qualifying provision that the defendant must have a place of business where the exact bill of lading was prepared. The provision respecting jurisdiction at places designated in the contract⁸⁴ was strongly opposed by the United States, Argentina, and Spain.

The United States also opposed the use of the word "plaintiff" as inappropriate in the context of the purpose for which these rules were

⁸¹ An example of attachment to protect the status quo in a dispute may be found in Article(s) 75 and 76 of the new Soviet Merchant Shipping Code, (W. Butler & J. Quigley transl. 1970).

⁸² International Convention on Certain Rules Concerning Civil Jurisdiction in Matters of Collision, May 10, 1952, N. Singh at 1131 (1963). See Article 1 (3).

⁸³ *Lis Alibi Pendens* is a discretionary doctrine which would justify a court in declining to exercise jurisdiction where the parties are litigating the same issues in another court. See *The Kaiser Wilhelm Der Grosse*, 175 Fed. 215 (S.D.N.Y. 1909) Cf. *Petition of Bloomfield Steamship Co.*, 422 F.2d 728 (2d Cir. 1970).

⁸⁴ See fn. 68, *supra*.

being drafted. "Plaintiff" would mean either the cargo interest or the carrier interest, whereas the true purpose of the provision was to replace choice of law and choice of forum clauses in bills of lading limiting the effective remedies for the cargo interest. The cargo interest might be considerably disadvantaged as to forum selection by the action of carrier interest in forestalling cargo claims by commencing actions for the payment of additional charges (for example, charges for demurrage, general average and lighterage are not included in the freight charge and can be enforced against the cargo itself⁸⁵) even though the carrier interest has not had difficulty with enforcement of its rights under local law or by reason of control over the goods themselves.

An issue which remains for consideration by the Diplomatic Conference is the limitation of the choice of forum to contracting states. This may be much too narrow and may even have a multiplier effect in delaying ratifications by those states which would insist on the maximum number of available remedies for cargo claimants. This is the jurisdiction provision, adopted at the third session and now incorporated in Article 21 of the Draft Convention,

1. In a legal proceeding arising out of the contract of carriage the plaintiff, at his option, may bring an action in a contracting State within whose territory is situated:

(a) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or

(b) The place where the contract was made provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) The port of loading; or

(d) The port of discharge; or

(e) A place designated in the contract of carriage.

2. (a) Notwithstanding the preceding provisions of this article, an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph 1 of this article for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action;

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court at the place of the arrest.

3. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraphs 1 and 2 or this article. The

⁸⁵ See *Yone Suzuki v. Central Argentine Ry.*, 27 F.2d 795 (2d Cir. 1928), cert. denied 278 U.S. 652 (1929).

provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

4. (a) Where an action has been brought before a court competent under paragraphs 1 and 2 of this article or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought;

(b) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement shall not be considered as the starting of a new action;

(c) For the purpose of this article the removal of an action to a different court within the same country shall not be considered as the starting of a new action.

5. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

At the conclusion of the third session, preliminary consideration was given to the problem of arbitration clauses, but final decisions were not taken until the fourth session when that subject was considered independently.

D. Liability of the Carrier: The Fault Principle Preserved and the Carrier Defenses Reformulated

At its February 1972 session one morning had been devoted to a preliminary consideration of the basic rules governing responsibility of the carrier. Alternative schemes of liability to replace the existing Articles III and IV of the Hague Rules, as suggested in the Secretary General's Report (Pars. 150-269 of "Responsibility of Ocean Carriers for cargo: bills of lading" A/CN.9/63/Add.1), were considered. There was no support for an absolute liability where the risk allocation would be in favor of the shipper and against the carrier.⁸⁶

Both carrier nations and shipper nations supported the principle of carrier liability based on fault, and it was believed to be desirable, at the outset, that the basic principle of fault be simply stated while the rules for the burden of proof be separately elaborated together with a separate consideration of the exceptions to liability.

Proposals asked complete harmonization with other international conventions on carriage of goods such as the Warsaw Convention, the

⁸⁶ Report of the Third Session, A/CN.9/63.

European Convention on Transport of Goods by Rail (CIM), and the European Convention on Transport of Goods by Road (CMR). Although there was support for harmonizing the different international transport conventions to the greatest extent practicable, most delegations expressed the view that ocean transport was sufficiently different in nature, being subject to vastly different risks than other forms of transport, so as to make full harmonization impossible.

A third approach was to consider the modification of specific substantive provisions of the Hague Rules, especially the policy based defenses such as Article IV (2) (a), negligent navigation or management of the ship and Article IV (2) (b), the exception for fire, coupled with changes in the rules regarding burden of proof. The United States delegation supported this approach at the outset and set forth proposals in accordance with the positions contained in the United States memorandum. The United Kingdom delegation advanced a somewhat similar position. It stressed principally, however, the undesirability of taking any action which could have the effect of increasing shippers' costs. This same point was raised by the observer representatives from the IUMI, ICS and ICC.

A fourth approach was the more drastic reformation of the Hague Rules set forth in paragraph 269 of the Secretariat Report. This proposal would replace Article IV (1) and (2) of the Hague Rules with a simple statement that neither the carrier nor the shipowner is responsible for loss or damage "arising without the actual fault or privity of the carrier, or without the fault or neglect of the servants or the agents of the carrier." A second paragraph would place the burden of proof on the carrier to establish that neither his fault or privity nor the fault or neglect of his agents or servants cause, concurred in, or contributed to the loss or damage." This proposal was supported by a majority of the delegations.

Practically all of the developing countries supported paragraph 269 as did also Australia, Norway, Spain, and Hungary.

France proposed a stricter version of the paragraph 269 draft whereby the carrier would be fully responsible for the arrival of the goods in a satisfactory state unless the carrier proved a fault on the part of the shipper, some defect in the goods or a case of *force majeure*. For this purpose *force majeure* would consist in an unforeseeable fact, force or event irresistible and external to the carrier or his agent. The French proposal would not have required separate provisions respecting burden of proof, since the burden of proving non-liability always was on the carrier.

In the fourth session in September, 1972, there were lengthy discus-

sions in the Plenary Session and the Drafting Party, attempting to state the basic principle of carrier liability separately from the exceptions or the burden of proof rules, but this proved to be an impossible task.

The debate on the fault principle of liability quickly turned into a discussion of the merits of preserving the two policy-based exceptions to fault liability in the existing Hague Rules: Errors of navigation and management of the vessel (H.R.IV 2 (a)) and Fire (H.R.IV 2 (b)).

The United Kingdom opposed any changes to the existing Hague Rules because changes would increase costs in view of greater concentration of risks on the carrier. Shipper and shipowner groups in the United Kingdom believed that increases of 1-2% in freight rates would inevitably follow any change in the liability scheme, and such a proposed change would destroy the ancient institutions of salvage and general average since carriers would be less likely to give guarantees for cargo to salvors and the concept of joint venture underlying general average would be nullified if the cargo did not bear some of the risks of navigation. The United Kingdom indicated that the exception for negligent management might be removed in the interest of eliminating friction, although the navigational error and fire exceptions must be retained.

Norway cited statistics solicited from Norwegian P & I clubs showing that the removal of the navigational error and fire exceptions would result in the absorption by liability insurers (i.e.: P & I clubs) of double the amount now being paid on cargo claims; accordingly, further study of the economic factors might be appropriate before any change in the risk allocation scheme. Nevertheless, Norway supported deletion of the navigation and management error and fire exceptions.

The Polish and Belgian delegates supported the United Kingdom position to retain the navigational error and fire exceptions although the Belgian delegate did not agree that the negligent management exception might be dropped.

The Belgian delegate proposed a text to simplify the policy-based exceptions as follows:

- a. The carrier shall be liable for loss or damage to the goods during the carriage of same and arising or resulting from his fault or neglect or that of his servants or agents.
- b. In the case of shipwreck, stranding or collision the carrier will not be liable when the incident arises or results from a fault or neglect of the captain, a member of the crew or pilot in a navigational operation.
- c. In the case of an explosion or fire the carrier shall only be liable when

the claimant proves that the incident arises or results from the fault or neglect of the carrier or his agents or servants.

d. Subject to the provisions of paragraphs 2 and 3 the fault or neglect shall be presumed unless the contrary is proved.

To the United States this draft proposal would have been a drastic expansion of the carrier's policy-based defenses in that the Fire Defense would be expanded to explosions.

Although preferring to harmonize the Maritime Rules with the Warsaw Convention, Egypt eventually submitted a proposed text as follows:

“a. The carrier shall be liable for all loss or damage to the goods carried occurring while the goods were in his charge unless he proves that he, his agents or servants have taken all necessary measures to avoid damage or that it was impossible for them to take such measures.

b. Neither the carrier nor the ship shall be liable for loss or damage resulting or arising from

- 1) fire, if the carrier proves that the fire was not caused by his act or that of his agents or servants;
- 2) perils, damages or accidents of the sea or other navigable waters;
- 3) force majeure;
- 4) acts of a public authority or of a third party when these acts are neither foreseeable nor avoidable;
- 5) acts of the shipper;
- 6) inherent vice of the goods.

c. The carrier shall not be liable for loss or damage to the goods resulting from a saving or attempting to save life or property at sea.”

When this proposal was criticized by developing states, Egypt stated that the list of exceptions were merely illustrative and not mandatory. Subsequently, Egypt came to approve the French proposal, although the formula respecting the saving of life or property was approved by most delegates and fitted into a final draft convention together with other “deviation” rules.

The United States commented on the compromise nature of the Harter Act of 1893 whereby the shipper received a warranty of seaworthiness at the commencement of the voyage together with suppression of bill of lading clauses exculpating the carrier's failure to properly care for cargo while the carrier received the defense of negligent navigation and management of the vessel. The fire exception had been in

U.S. law since 1851.⁸⁷ In 1893 Congress believed that the ocean freight rate was not for carriage only but was also for insurance for losses even where carrier negligence was not the sole cause, and that in support of this policy our courts had framed burden of proof rules which were difficult for the carrier to meet, so that the carrier would be liable for damage to cargo even where unseaworthiness did not cause or contribute to the loss.⁸⁸ The original intention was that the carrier have the defense of negligent navigation for major disasters such as collisions and groundings, but this had been subverted when the courts in the United States and other countries permitted the carrier to claim the navigational fault exception for all acts of ordinary seamanship, thus the courts were often contradictory in determining when an act was merely incident to care for cargo or when an act was merely incident to navigation or

⁸⁷ 46 U.S.C. 182 (1974).

The first limitation of liability statute in 1851 contained a provision exempting the shipowner from liability for fire damage unless the fire was caused by "design or neglect of the owner." The statute evidenced congressional disapproval of the 1848 Supreme Court decision in *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 47 U.S. 343 (1848). The 1924 Hague Rules also contains a provision exempting the carrier from liability for fire damage unless the fire was caused by "the actual fault or privity of the owner" Article IV(2)b; COGSA 1304(2)b. "Design or neglect" and "fault or privity" are apparently synonymous, *Accinanto, Ltd. v. A/S J. Ludwig Mowinckels Rederi*, 199 F.2d 134 (4th Cir. 1952), cert. denied 345 U.S. 992 (1953); thus the carrier will not be liable for the acts of the master and crew members. *Consumers Import Co. v. Kabushiki K. K. Zosenjo*, 320 U.S. 249 (1943). COGSA 1308 preserving the limitation of liability act also includes the Fire Statute, thus there are two concurrent fire exemptions in American law but they are *not* given similar treatment in the courts. Thus, the carrier has been accorded a broader fire defense under the 1851 Statute. See *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd.*, 287 U.S. 420 (1932).

⁸⁸ *The Isis* (May v. Hamburg-Amerikanische Packetfahrt A.G.) 290 U.S. 333 (1933). In the United States except as to single ship disaster cases the exception for negligent navigation and management of vessels is irrelevant because of United States law on joint and several liabilities in collision cases. United States law on joint liability of both colliding vessels differs widely from that followed in the rest of the maritime world where the Brussels Collision Convention of 1910 applies.

Prior to the enactment of the Harter Act the Supreme Court had held that in both to blame collisions the damages will be divided equally. *The Schooner Catharine v. Dickinson* 58 U.S. 170 (1855), overruled in *U.S. v. Reliable Transfer Co.* 95 S.Ct. 1708 (1975). The entire damage, consequential expenses and all payments made to third parties such as cargo owners and personal injury claimants are divided equally before the limitation of liability figure is applied. *The North Star*, 106 U.S. 17 (1882). Also the tort principles of joint and several liability had been held applicable in admiralty so that the cargo owner could collect his entire loss from one of the colliding vessels in a both to blame collision, *The Alabama and the Gamecock* 92 U.S. 695 (1875); *The Atlas* 93 U.S. 302 (1876), so that the cargo owner had a high degree of protection in these mutual fault cases which account for the overwhelming number of collision losses.

After enactment of the Harter Act shipowners contended that the negligent navigation defense had eliminated any direct or indirect liability of the carrier to its own cargo. However, the Supreme Court's opinion in *The Chattahoochee* 173 U.S. 540 (1899) concluded that Congress had not changed the operation of the existing rules of joint and several liability of the carrier to its own cargo where the defense of negligent navigation would prevent a direct liability. Thus, the cargo interest does not claim for collision loss from its own carrier but demands 100% of the loss from the other

management.⁸⁹ Difficulties in reconciliation of this area of the law had resulted in "friction" as noted in the Secretariat Report.

To the United States the United Kingdom argument seemed to presuppose the worst possible cases; necessitating also a shift from the present methods of vessel ownership to the single-ship corporation operating with minimum capital. The United Kingdom felt that courts would be unlikely to pierce the corporate veil of the single-ship

colliding vessel as joint tort-feasor. When the other colliding vessel sues the carrier for collision damages it may recover amounts due or paid to third parties. Shipowning interests unsuccessfully contested this indirect liability as a violation of the Congressional policy expressed in the Harter Act, but faced with Supreme Court rejection in *The Chattahoochee*, supra, the carriers added the "Both to Blame Collision Clause" to bills of lading requiring the cargo owner to indemnify the carrier for any amount of indirect liability to its own cargo. The Supreme Court had held that such clause violates public policy. *United States v. Atlantic Mutual Ins. Co.* 343 U.S. 236 (1952).

The defense of negligent navigation of COGSA 1304 (2) (a) is used in single ship disaster cases in American law to deprive cargo owners of their effective remedy against the carrier. See *Firestone Synthetic Fibers Company v. M/S Black Heron*, 324 F.2d 835 (2d Cir. 1963). However the use of this defense is extremely complicated due to uncertainty as to the proper burden of proof of the carrier to overcome the carrier's duty to cargo in COGSA 1303 (2) and then to establish the defense of negligent navigation and management. Thus, in *Compagnie de Navigation Fraissinet v. Mondial United Corp.* 316 F.2d 163 (5th Cir. 1963) the carrier could not meet his burden of proving care for the cargo so that his defenses of negligent navigation could not be considered.

⁸⁹ "An error in the navigation of the ship or in her management is an error fundamentally affecting, primarily, the ship . . . an error in the care of the cargo is an erroneous act or omission directed principally towards the cargo." (W. Tetley, *Marine Cargo Claims*, 103 (1965)). This analysis often leads to indistinguishable distinctions. In American law these distinctions have confused the jurisprudence under the Harter Act duty to care for cargo (46 U.S.C. 190) and the exception for negligent navigation under 46 U.S.C. 192 which is conditioned on the owner's due diligence in furnishing a seaworthy vessel. Thus the carrier may be held liable for cargo damage due to improper discharging procedure causing the vessel to be submerged, *The Joseph J. Hock*, 20 F.2d 259 (2d Cir. 1934); failure to care for refrigeration equipment and check temperatures in refrigerated spaces, *Barr v. International Mercantile Marine Co.*, 29 F.2d 26 (2d Cir. 1928); and failure to close a cargo-ventilator, *W. T. Lockett Co. v. Cunard S. S. Co.*, 21 F.2d 191 (E.D.N.Y. 1927). On the other hand, the cargo owner has been denied recovery when the damage was due to negligent failure to inspect cargo holds, *The Milwaukee Bridge*, 26 F.2d 327 (2d Cir.) cert. denied, 278 U.S. 632 (1928); failure to fasten manhole covers over tanks which caused loss to cargo, *The Steel Navigator*, 23 F.2d 590 (2d Cir. 1928); improperly tipping a ship for hull examination causing the vessel to take on salt water, *The Indrani*, 177 F. 914 (2d Cir. 1910); and negligent failure to pump bilges, *The Merida*, 107 F. 146 (2d Cir. 1901).

The case law under COGSA on the difference between carrier liability for negligent care of cargo and the defense of negligent navigation and management is quite as complex as that encountered under the Harter Act.

The carrier has been held liable for failure to care for the cargo where there has been improper ventilation (*The Rita Sister*, 69 F. Supp. 480, (E.D.Pa 1946); stowage of leaking cargo in proximity to cargo susceptible of damage therefrom (*Armco International Corp. v. Rederi A/B Dist*, 151 F. 2d 5 (2d Cir. 1945); improper refrigeration due to inadequate and inexperienced personnel (*Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422 (5th Cir. 1968); filling a bilge sounding pipe rather than a double bottom sounding pipe because of indistinct markings (*Hydaburg Cooperative Assoc. v. Alaska S.S. Co.*, 404 F. 2d 151 (9th Cir. 1968)); failure to take precautions on observing smoldering cargo (*American Mail Line Ltd. v. Tokyo Marine Ins. Co., Ltd.* 270 F. 2d 499 (9th Cir. 1959)).

corporation, but the United States pointed out that our experience has been considerably different.⁹⁰

The United States criticized observations of a division of opinion in the Working Group between carrier nations and shipper nations, noting that these distinctions were in fact unclear since many carrier nations used foreign flags extensively to carry their own foreign trade. All states desired safe and cheap transport and these goals would not suffer if the friction in the present legal system was removed.

It was unlikely that solicitation of information from insurance companies would provide a hard factual basis to determine whether a change in the law would cause a change in rates since the marine insurance industry was highly competitive and regarded any information used in fixing rates as proprietary information to be kept confidential. There were dangers in overconcentration of insurance risks, but the proposed suppression of the policy-based exceptions to fault liability would not remove the need for cargo insurance in view of the principle of unit limitation, general average liabilities, and overall limitation of liability by statute or international convention. Also it was conceivable that a competitive insurance industry would accommodate itself to the change. Predictions that air passengers and aircraft would become

The carrier has *not* been liable due to the defense of negligent navigation and management in the following cases of loss or damage to cargo: injecting water into a hold without inspection because of an erroneous belief that there was fire therein (*Ravenscroft v. United States*, 88 F. 2d 418 (2d Cir.) cert. denied, 301 U.S. 707 (1937)); ballasting erroneously into deep tanks containing cargo rather than an empty deep tank (*Firestone Synthetic Fibers Co. v. M.S. Black Heron*, 324 F. 2d 835 (2d Cir. 1963)); failure to inspect plating after severe bump caused during departure from port. (*Mississippi Shipping Co., Inc. v. Zander & Co.*, 270 F. 2d 345 (5th Cir. 1959) vacated as moot 361 U.S. 115 (1960)).

Subsequent cases decided under COGSA have preserved the temptation to litigate, thus the carrier has been held liable for cargo damage due to failure to provide proper ventilation for cargo: *Schroeder Bros., Inc. v. The Saturnia*, 226 F.2d. 147 (2d Cir. 1955), *Hunt Foods & Industries, Inc. v. Matson Navigation Co.*, 249 F. Supp. 572 (E.D.La. 1966), and *General Foods Corp. v. U. S.*, 104 F. Supp. 629, (S.D.N.Y. 1952); and for improper loading of wet ores and dry coffee in the same hold, *General Foods Corp. v. The Troubador*, 98 F. Supp. 207 (S.D.N.Y. 1951). However, there are also recent cases in which the cargo owner has been denied recovery when the damage was due to water damage from an overfull ballast tank, *General Foods Corp. v. The Mormacsurf*, 276 F.2d. 722 (2d Cir.) cert. denied 364 U.S. 822 (1960), and *Leon Bernstein Co. v. Wilhelmsen*, 232 F.2d. 771 (5th Cir. 1956). See also *India Supply Mission v. West Coast S.S. Co.*, 327 F.2d 638 (9th Cir. 1962) cert. denied 377 U.S. 924 (1963).

Despite these decisions in which lower federal courts have attempted to distinguish between carrier's duty to cargo and the carrier's defense of negligent navigation the United States Supreme Court has taken a much stricter view of the carrier's defenses. The Supreme Court has not sustained a defense of negligent navigation or peril of the sea in the face of shipper's proof of carrier's specific failure to care for cargo. See *The Edwin I. Morrison*, 153 U.S. 199 (1894); *Calderon v. Atlas S.S. Co.*, 170 U.S. 272 (1898); *Knott v. Botany Mills*, 179 U.S. 69 (1900); *The Germanic*, 196 U.S. 589 (1905); *Schnell v. The Vallescura*, 293 U.S. 296 (1934).

⁹⁰ *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.* 339 U.S. 684 (1950).

uninsurable at the time of the proposed United States denunciation of the Warsaw Convention in 1966 had turned out to be unfounded, thus in the absence of hard economic data it would be necessary to rely on rational argument and it seemed that conditions requiring the negligent navigation and management exceptions in 1893 and 1924 had now disappeared so that the policy-based exceptions to the principle of fault liability should be suppressed in the new Hague Rules.⁹¹

The United States put forth a proposed amendment to the existing Hague Rules as follows:

Article III

“(1) The carrier shall properly and carefully take over, load, handle, stow, carry, keep, care for, discharge, and hand over the goods carried.

(2) The carrier shall be required to make the ship seaworthy before the voyage, at the beginning of the voyage and throughout the voyage.

(3) The carrier shall be required to properly man, equip, and supply the ship before the voyage, at the beginning of the voyage and throughout the voyage.

(4) The carrier shall properly and carefully navigate and manage the ship.

Article IV

(1) In case of loss or damage to goods or cargo covered by the provisions herein, the claimant shall have the burden of proof to show:

(a) that the claimant is the owner of the goods or is otherwise entitled to make the claim;

(b) that the loss or damage took place during the period for which the carrier is responsible;

(c) the physical extent of the damage;

(d) the monetary value of the loss or damage.

(2) Thereafter, the burden of proof shall be on the carrier as to all other matters. In order to avoid liability, the carrier must establish that neither the actual fault or neglect of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in, or contributed to the loss or damage.”

Japan opposed any changes to the policy-based exceptions for negligent navigation, management or fire.

⁹¹ See Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 *Harv. L. Rev.* 497 (1967).

The 1929 Warsaw Convention gave defenses to the carrier if the damage to cargo was, “occasioned by an error in piloting, in the handling of the aircraft, or in navigation . . .” (Art. 20 (2)). These defenses are removed in the 1955 Hague Protocol (Art. X).

India questioned whether any connection between the liability rules and either general average or salvage could be shown. While preferring to operate on the basis of definite information about possible increased costs, India questioned whether any international authority would be able to gather the required information in any reasonable time. India then urged the removal of any policy-based exceptions from the general principle of fault liability, noting that the Hague Rules had been prepared under the shipowner's influence in an earlier time which did not match the conditions found today in international trade. The Indian position was supported by the delegations of Brazil, Nigeria, Singapore, Spain and Tanzania.

France again urged the rejection of any attempt merely to modify the old Hague Rules, noting that the existing distribution of liabilities caused duplication of insurance coverage and increased costs of shipment. France doubted that any connection could be shown between change in the system of liability and increased freight rates since the competitive insurance industry would soon find a way to resolve problems created by such changes. France then proposed a single simple statement of the entire problem of liability, defenses, and burden of proof, as follows:

The carrier shall be liable for all loss or damage to the goods carried occurring from the time when the carrier has taken over the goods until the time when he has delivered them. The carrier shall not be liable if he can prove that the loss or damage resulted through circumstances which the carrier, his agents or servants, could neither foresee nor avoid and the consequences of which he was unable to prevent. The burden of proof shall be on the carrier to show that neither the actual fault or privity or act of the carrier nor the fault or neglect or act of the agents or servants of the carrier contributed to or concurred in the loss or damage.

The final recommendation of the Drafting Committee came fairly close to this French proposal, but not until all texts which attempted to state a positive rule of liability together with positive rules for the burden of proof had been exhausted. The language is now found in Article 5 of the Draft Convention, and should be compared with Article VI of the 1971 Guatemala Protocol to the Warsaw Convention.

The U.S.S.R. noted that the exceptions for negligent navigation and management and fire had been added to recent Soviet legislation recodifying the law with respect to cargo damage. The U.S.S.R. proposed that the Working Group report two texts—one containing the policy exceptions and one deleting them. Belgium supported this proposal but in view of the subsequent general criticism of the dual text approach, the U.S.S.R. delegate proposed retention of the exceptions but that they be put in brackets.

At the conclusion of this preliminary debate on Rules for Carrier Responsibility, the Chairman surveyed the opinions which had been expressed and noted that the majority seemed to favor deletion of any reference to seaworthiness and the view that the carrier should be affirmatively liable for fault causing loss or damage to cargo. There should be no policy-based exception for negligent navigation and management. Most nations clearly favored the suppression of the Hague Rules catalogue of defenses (Art. IV (2) (c)—(p)). The nations supporting these conclusions were Argentina, Australia, Brazil, Chile, Egypt, France, Ghana, India, Nigeria, Norway, Singapore, Spain, Tanzania and United States. Nations opposing deletion of the negligent navigation exception were Belgium, Japan, Poland, U.S.S.R., and United Kingdom. No formal vote was taken, but the subject was referred to the Drafting Committee with the understanding that the majority position would be reflected in the draft and that those nations opposed would reserve their position.

During the Drafting Committee's deliberations, the debate on the policy-based exceptions continued under the guise of an attempt to draft a general formula for stating affirmatively that the carrier's liability would be based on fault. The basis for discussion in the Drafting Group was Paragraph 269 of the Secretariat Report (A/CN.9/63/Add.1) of December 3, 1971, which was redrafted as Paragraph 42 of the Working Paper prepared by the Secretariat for the September meeting (A/CN.9/W.G.III/WP.6 of 31 Aug 72).

The Secretariat's draft language, which was the basis for many subsequent drafting attempts, was drawn from the European Road and Rail Conventions (CIM and CMR), and was as follows:

“The carrier shall be liable for all loss or damage to the goods carried occurring while in the charge of the carrier. However, the carrier shall not be liable if the loss or damage resulted through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

The burden of proof shall be on the claimant to show:

- (a) that the claimant is the owner of the goods or is otherwise entitled to make the claim;
- (b) that the loss or damage took place during the period for which carrier is responsible;
- (c) the physical extent of the loss or damage;
- (d) the monetary value of the loss or damage.

The burden of proof shall be on the carrier as to all other matters; to avoid liability the carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage."

As a result of the first discussions of the Drafting Group, there was a consensus in favor of the following text:

"(1) The carrier shall be liable for all loss or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge.

(2) However, the carrier shall not be liable for loss or damage arising without fault or neglect on the part of the carrier, his servants or agents.

(3) The carrier shall have the burden of proving that the loss or damage arose without fault or neglect on the part of the carrier, his servants or agents.

(4) Where the carrier's fault concurs with another cause to produce loss or damage, the carrier shall be liable only for that portion of the loss or damage attributable to its fault, provided that the carrier bears the burden of proving the amount of loss or damage not attributable to its fault."

At the Drafting Party, the United States considered the draft language in the light of modern tort theory, specifically, the view that modern law permits claimants merely to show injury or damage plus causation, thereafter the issue of liability being determined by the nature of the defenses which would be admitted. The U.S. supported the removal of the list of 17 specific defenses on the ground that disputes would hereafter be concerned with facts rather than the historical meaning of the wording used in the 17 defenses of Article IV. The language to be chosen to state the burden of proof must be clear because of the danger of conflicting interpretation which might evolve wherein one court might exonerate the carrier who shows that he is usually careful by use of impressive experts, whereas other courts would not exonerate the carrier unless he shows that in the specific instance he did all that could be done at the time and place.

The U.S. view was supported by Ghana and Spain.

Nigeria proposed a "horse-trader's compromise" whereby the defense of negligent navigation would be removed while the fire exception would be retained.

Brazil proposed that the only defense would be "vis maior" or "force majeure" but that there was uncertainty as to whether the defenses should be named specifically or be derived from the rule on burden of proof.

Norway proposed that the Drafting Group should achieve as much

agreement as possible on other aspects of risk allocation before discussing the policy based exceptions. Also, the language in Article III concerning seaworthiness was antique and should be removed by reason of the proposed consolidation of all liability and burden of proof rules into a single article, and the category of 15 non-policy based defenses be stricken while the topic of deviation to save life be set aside for consideration at a later meeting. A general consensus did develop for the deletions of the concept of seaworthiness and the catalogue of defenses.

Norway eventually proposed that the new rule be framed as follows:

“The carrier shall be liable for loss of or damage to the goods occurring while the goods are in his charge except to the extent that such loss or damage has arisen without fault or neglect on the part of the carrier or his agents or servants.”

“The carrier shall have the burden of proving the extent to which the loss or damage has arisen without fault or neglect on his part. However, if loss or damage has been caused by fire, the burden of proving that the fire was due to fault or neglect on the part of the carrier or his agents or servants, shall be on the shipper or consignee.”

Spain proposed to state the rule very simply,

“The carrier shall be liable for loss or damage to the goods during their carriage, unless he can establish the occurrence which caused it and show that neither he nor his agents or servants could avoid this occurrence and its consequences by using due diligence.”

France preferred to adhere to its original draft, although the French delegate said he could accept the Spanish proposal with a modification, thus,

“The carrier shall be liable for loss or damage to the goods while in the charge of the carrier. However, the carrier shall not be liable if he proves that the event which caused the loss or damage could not have been prevented. To this end, the carrier shall be required to prove that he and his servants have taken all measures that could reasonably be required to avoid the loss or damage (in the particular case).”

After lengthy and heated discussions there was a consensus in behalf of the following statement of the basic rule on liability including a non-controversial rule (paragraph 3) on the carrier's burden of apportioning concurrent cause⁹², as follows:

⁹² Where carrier negligence is a concurrent cause of damage together with one of the causes excepted in COGSA 1304 (2) Article IV (2), the carrier has the heavy, if not impossible, burden of

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

(2) In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.

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

The following subsidiary comments were made part of the Formal Text:

“(4) The Drafting Party recommends the foregoing text as a compromise of the divergent views on the subject of carrier’s responsibility.

(5) The text prepared by the Drafting Party would replace articles 3 (1) and 3 (2) and articles 4 (1) and 4 (2) of the Brussels Convention of 1924.

(6) The Drafting Party further recommends that the question of ‘saving or attempting to save life or property at sea’ (article 4 (2) (1)) be considered at the February 1973 session, in connexion with the consideration of ‘deviation’ under article 4 (4), which also, *inter alia*, deals with saving or attempting to save life or property at sea.”

The above language appeared to be the only possible compromise available. While it might be regretted that the policy based exception for fire was retained, nevertheless some refinement of the language might be attempted later after the question had been reexamined at leisure instead of attempting another exhausting debate. The United States could, however, be content because proof of origin of fire was always difficult and experience showed that fire damage was often the result of

apportioning losses between concurring causes and proving the amount of damage for which the carrier would not be liable. *Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro*, 159 F2d, 661 (2d Cir.) cert. denied 331 U.S. 836 (1947). A Supreme Court case decided under the Harter Act held that the carrier had to bear the entire loss of a cargo of spoiled onions, where the loss to cargo was caused by failure to care for cargo (closing of ventilating hatches in fair weather) and peril of the sea (closing of ventilating hatches in heavy weather). *Schnell v. The Vallescura*, 293 U.S. 296 (1934). In order to escape liability the carrier must prove, *onion by onion*, how much spoilage was due to closure of the ventilating hatches in heavy weather. The Supreme Court’s view of burden of proof in cargo damage cases seems clear,

“. . . the carrier is charged with the responsibility for a loss which, in fact, may not be due to his fault, merely because the law, in pursuance of a wise policy, casts on him the burden of showing facts relieving him from liability.” 293 U.S. 307

spontaneous heating and combustion in the cargo. Thus, the United States had had special legislation on fire since 1851. Other delegations, such as France, Egypt and Spain, indicated their support was based on the fact of compromise only and that they disapproved the lack of legal symmetry in the draft.

The text which was adopted on fire was hurriedly adopted after verbal proposals of U.K. Belgium, and Norway had not been able to muster support; although there had been a greater amount of support for a proposal that read as follows,

“However, if the loss or damage arose from a fire the carrier shall be relieved of his burden of proof if he has adduced all the evidence available to him concerning the origin of the fire.”

India, Tanzania, Ghana, and Singapore pressed for the complete elimination of the fire exception and it was on the proposal of Nigeria that the compromise text on fire was adopted, the language having been taken from an earlier Norwegian Draft.

At the Plenary the United States noted that it was not satisfied with the fire proposal but that it could be accepted as a compromise. Ghana, Spain, France and Singapore made specific reservations to the fire exception.

In the closing minutes of the Plenary Spain proposed a new text on fire which was not considered by the Plenary,

“However, if the loss or damage is the result of fire, the carrier shall not be liable if he proves that the ship had suitable means to avert the fire and that he, his servants and agents, took all reasonable measures to avoid it and reduce its consequences, unless the claimant proves the fault or negligence of the carrier, his servants or agents.”

During the Second Reading the United States returned to the problem of the language of the fire proposal, offering the Spanish draft, with the rationale that while the carrier's general defense of “all measures that could reasonably be required to avoid the occurrence and its consequences” is also applicable in the fire situation, nevertheless the fire defense would be applicable in a more narrow and specific factual area when the carrier proves that, “the ship had suitable means to avert the fire.” The United States and Australia were agreed about the need for a change in the fire exception language. Norway, however, urged that the situations were really indistinguishable, and in view of the compromise nature of the entire text on the General Rules of Liability, no changes should be made. The United States, however, believed that in view of the

major effort being made at that time by Belgium, Poland, Japan, U.K. and U.S.S.R. to retain the defense of negligent navigation and management, that it would be appropriate to open the fire question also, however the Working Group voted to preserve the compromise fire text intact.

At the Plenary of the Fourth Session U.K. stated a preference for the Belgian Draft Proposal on navigational fault, but indicated that the U.K. could support the compromise text if there were a suitable revision of the amount of unit limitation of liability.

Japan, Poland, Belgium and the U.S.S.R. made specific reservations to the compromise text and urged the retention of the exception on navigational fault.

During the Second Reading the C.M.I. observer, supported by Belgium, Poland, Japan, U.K. and U.S.S.R. attempted to restore the policy based defense of negligent navigation and management. Economic arguments were made, but the information available to the Second Reading in February, 1975 was essentially the same as had been available in October, 1972; no hard data being available from which a definite decision can be made. The United States, however, believed that if the 1893 policy based exception of negligent navigation and management was to reappear, that these would not be new Hague Rules but a mere reshuffling of the old rules, accordingly the colossal absurdity of negligent navigation—a major exception to the normal rules of principal and agent in common law, civil law and socialist law, should be suppressed. There was concern, however, during the Second Reading, whether there was still a majority of the Working Group in favor of the compromise text in view of the absence of Argentina, Spain (no longer a member of UNCITRAL) and Tanzania, and some uncertainty about the positions of other member states. Nevertheless, upon a vote of the Working Group, twelve states supported the existing compromise text, without the defense of negligent navigation while five states voted to reintroduce the exception.

The language of the General Rules on Liability, containing therein the burden of proof rule and defenses, had to be reexamined in the light of the discussion of deviation to save life and property at the Fifth Session and damages for delay in delivery at the Sixth Session. The General Rules are now found in Article 5 of the Draft Convention, as follows:

1. The carrier shall be liable for loss, damage or expense resulting from 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 4, 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.

* * *

4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.

* * *

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

E. Arbitration Clauses

Although the 1924 Hague Rules contained no provisions on arbitration, clauses in the bill of lading calling for arbitration of disputes were beginning to be found, although not so frequently as with charter parties where arbitration has become the sole method of dispute resolution. In addition to the intentional incorporation of arbitration clauses in bills of lading there were instances of the incorporation by reference of an arbitration clause from a charter party into the bill of lading.⁹³

The Secretariat Report noted that regulation of the subject of jurisdiction clauses by the new rules could result in more widespread use of arbitration clauses in printed form bills of lading as carriers attempt to control the situs of claims more closely, accordingly Paragraphs 127-149 of the Report considered the topic which was then taken up at the Third Session. In the discussions in the Working Group a consensus developed that there should be some reference made to arbitration clauses in the proposed revision of the Hague Rules. In the Drafting Party, however, a substantial split developed over how the subject should be treated.

There was a limited consensus in favor of a Draft Proposal of the Secretariat (Para. 113) giving the plaintiff a range of locations in which to choose an arbitral forum.

1. In legal proceedings arising out of the contract of carriage, provision may be made in the contract for arbitration proceedings in accordance with an arbitration clause. These proceedings may take

⁹³ *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d (687 (2d Cir. 1952); *Instituto Cubano de Estabilizacion Del Azucar v. The Golden West*, 128 F. Supp. 754 (S.D.N.Y., 1955) See also *McMahon, The Hague Rules and Incorporation of Charter Party Arbitration Clauses into Bills of Lading*, 2. J Mar. L. & Comm. 1 (1970).

place, at the option of the plaintiff, in a contracting State within whose territory is situated:

- (a) the principal place of business of the carrier or the carrier's branch or agency through which the contract of carriage was made; or
- (b) the place where the goods were taken in charge by the carrier; or
- (c) the place designated in the contract for delivery of the goods to the consignee; or
- (d) the place designated in the contract of carriage [or selected by the person or body designated in the arbitration clause].

2. The arbitration clause shall state that the designated arbitrator must apply this Convention; otherwise, such clauses shall be null and void.

3. After a dispute has arisen, the parties may enter into an agreement selecting the territory of any contracting State as the place of arbitration [or any person or body in a contracting State]. The parties may agree that the arbitrator shall act as an *amiable compositeur*.

The United States believed it could not support this proposal because location of the arbitration in and of itself is substantially less important than the specific provisions for selection of arbitrators and the specification as to what rules of a procedural and substantive nature will be applicable in addition to the new Hague Rules.

Furthermore, the designation of the place of arbitration in the bill of lading would bring up the arguments about adhesion "agreements" violating public policy by forcing the abandonment of small claims where the carrier chooses arbitration sites at great distance from the shipper.

France supported the introduction of a more complicated formula which permits the inclusion of arbitration clauses in bills of lading but requires application of subparagraph (a) (1) of the jurisdiction clause to select the place where the arbitration would be held as well as request that the provisions of the convention be applied in the arbitral proceedings.

The Soviet Union, supported by Hungary and Poland, argued strongly in favor of complete freedom for carriers to include provisions in bills of lading providing for arbitration. These States were probably prepared to accept the formula requiring the application of the revised Hague Rules by the arbitrators. Some of the major ship-owning States, such as Japan, also indicated support for this type of approach.

The Soviet Union and other states with centrally planned economies will not tolerate preventing recourse, within the maritime bill of lading system, to the arbitral system which is a standard feature of their commercial transactions.

Argentina, Chile, Spain and France offered a draft proposal, with United States support under which arbitration could be agreed to by the parties only after the occurrence of the event which gave rise to the claim.

The split in approach was such that the drafting party was unable to make any recommendation to the Working Group. As a result the Working Group decided to defer discussion of the matter until its next meeting.

At the Fourth Session Plenary Spain again introduced the proposal to which the U.S., Argentina, and Chile had given support previously. The language incorporated by the Secretariat in Draft Proposal F (Para. 26 A/CN.9/WG.III/W.P.7), is as follows,

“Notwithstanding the provision of the preceding paragraphs [on jurisdiction clauses], after the occurrence of an event giving rise to a claim the parties may agree on a jurisdiction where legal action may be commenced or submit the case to arbitration for a final decision in accordance with the rules of this convention.”

At the February session the U.S.S.R. Delegate had proposed the following alternative texts on arbitration clauses, which were made part of the Secretariat Report (Paragraphs 6 and 11 of A/CN.9/WGIII/W.P.7)

Alternative A

Notwithstanding the provisions of the preceding Article [...dealing with jurisdictional matters...] arbitration clauses in a contract of carriage shall be allowed provided the designated arbitration shall take place within a contracting state and shall apply the [substantive] rules of this Convention.

(Art. 32 of the Warsaw Convention (para. 134 of the Secretariat Report) and Draft Proposal E (para. 147 of the Report).

* * *

Alternative B

Notwithstanding the provisions of the preceding Article [...dealing with jurisdiction matters...] arbitration clauses in a contract of carriage shall be allowed provided it has been thereby stipulated that the arbitral body or arbitrators designated in the contract:

- (a) shall apply the [substantive] rules of this Convention, and
- (b) shall hold the [arbitration] proceedings within a contracting State at

one of the places referred to in [the said] Article [...] or at the place chosen by such arbitral body or arbitrators.

(Art. 32 of the Warsaw Convention (para. 134 of the Secretariat Report) and Draft Proposals D and E (paras. 141 and 147 of the Report).

Alternative F, favored by U.S., Spain, Chile and Argentina was at the one extreme of the spectrum on arbitration clauses and Alternatives A and B favored by U.S.S.R., Japan and Poland were at the other extreme. Alternative E restricts the validity of arbitration clauses in advance of the dispute and Alternatives A and B offer the least amount of restraint. The extreme positions did not pick up additional support after the Plenary, thus the Plenary referred the entire subject to the Drafting Group but with a recommendation that compromise be sought along the lines of Draft Proposal D, favored by Tanzania, Nigeria, India and Egypt or Draft Proposal E, favored by Belgium, Singapore, U.K., Australia, Norway, France, and Brazil.

Draft Proposal E which had the seven supporters listed above provides as follows,

"1. In legal proceedings arising out of the contract of carriage, provision may be made in the contract for arbitration proceedings in accordance with an arbitration clause. These proceedings may take place, at the option of the plaintiff, in a [contracting] State within whose territory is situated:

(a) The principal place of business of the carrier or the carrier's branch or agency through which the contract of carriage was made; or

(b) The place where the goods were taken in charge by the carrier; or

(c) The place designated in the contract for delivery of the goods to the consignee; or

(d) The place designated in the contract of carriage [or selected by the person or body designated in the arbitration clause].

2. The arbitration clause shall state that the designated arbitrator must apply this Convention; otherwise, such clause shall be null and void.

3. After a dispute has arisen, the parties may enter into an agreement selecting the territory of any [contracting] state as the place of arbitration [or any person or body in a contracting state]. The parties may agree that the arbitrator shall act as an *amiable compositeur*."

The French Delegate proposed to add the following language in two alternate forms to modify Draft Proposal E in the second paragraph,

"Alternative 1

The arbitration clause shall, on pain of nullity, provide that the arbitrator appointed shall apply this Convention and any award which

fails to apply the Convention shall be null and void unless, in virtue of a special provision of the contract of carriage, the said contract is subject to application of the Convention.

Alternative 2

No arbitration clause or agreement shall be valid unless it provides that the arbitrator appointed shall apply this Convention and any award which fails to apply the Convention shall be null and void unless, in virtue of a special provision of the contract of carriage, the said contract is subject to application of the convention.”

During the Drafting Group's Preliminary Discussions of Draft Proposal E a consensus rapidly developed that the convention must be applied in all arbitrations and that post-dispute arbitration agreements may name the situs of the proceeding, and a majority of the Drafting Group agreed that the principles of Draft Proposal E should conform to the principles previously agreed on for jurisdiction clauses. This majority consisted of Belgium, Egypt, Australia, Norway, France, India, U.K., Singapore, and Brazil. Spain and USSR also indicated they could support Draft Proposal E.

Hungary, speaking for land-locked countries, said the new Convention must make provision for arbitrations at places other than the ports of loading or discharge so that arbitrations can be held in the land-locked countries.

Norway said that five principles must govern the choice of a Draft Proposal:

- a. Arbitration must apply the rules of the convention;
- b. Situs of arbitrations must be fairly restricted to prevent abuses;
- c. Situs choice should depend on objective criteria of convenience, presumably place of delivery of goods to the carrier or the consignee;
- d. Arbitrations should be in contracting states;
- e. Arbitrations should be under conditions of certainty as to the rules to be applied, thus, there can be no provision for a *compositetur amiable*.

Australia preferred draft Proposal E but indicated that provision must be made so that the applicant will always have the right to arbitrate in his own country.

Argentina noted that the jurisprudence of his country would never confer validity on any clause which would oust the jurisdiction of Argentine courts.

The United States noted that the U.S. had always regarded arbitration of commercial disputes as desirable and to that end there had been a federal arbitration statute for fifty years.⁹⁴ Furthermore, the United

States had ratified the 1958 U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards⁹⁶ which had been previously ratified by eleven other UNCITRAL members. The United States could support Draft Proposal E, provided that the arbitration situs would not be named in the adhesion agreement prepared by the shipowner. Long-term changing patterns of world trade may replace break-bulk shipments with bulk and container shipments where shippers would be large commercial or state trading organizations on an economic equality with carriers, however, at the present time small shippers of break-bulk cargo must be protected from wasteful arbitration of small claims in distant places. The United States noted that Draft Proposal F would permit the parties to select the procedures for arbitration at their leisure but that any of the other Draft Proposals would require additional procedural provisions respecting minimal standards to be applied in any arbitration under the new Convention. To that end he proposed that there be an annex to any Arbitration provisions of the new convention which would deal with the following subjects:

- a. stay of legal proceedings pending arbitration;
- b. compulsory arbitration where one party refuses to arbitrate;
- c. choice of panel members voluntarily or involuntarily;
- d. requirement of reasoned decision at the time of the award;
- e. use of equitable principles;
- f. the grounds for appealing the award;
- g. enforcement of the award.

There was support of this proposal from Spain and Argentina but most speakers thereafter expressed disapproval. The U.S. also proposed an amendment to Draft Proposal E, "An arbitral decision in contravention of the provisions of this Convention shall be null and void and of no effect."

The U.S. also proposed an amendment to the language of Draft Proposal E requiring that the arbitration be held in contracting states. Although universality was the ideal, yet even after fifty years many states had not ratified or adhered to the Hague Rules, accordingly the following language taken from Article 60 of the I.M.C.O. Treaty should be used:

"The word 'State' within the meaning of Article (... jurisdiction clause) and Article (... arbitration clauses) shall be deemed to mean

⁹⁴ U.S.C. 1-10 (1974). See also *M/S Bremen and Unterweser Reederei GmbH v. Zapata Offshore Co.*, 407 U.S.1 (1972).

⁹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958. 21 U.S.T 2517; T.I.A.S. No. 6997, 330 U.N.T.S. 3; entered into force for the United States, Dec. 29, 1970.

contracting state at such time as instruments of ratification shall have been deposited with the (U.N. Secretariat) by (25) states of which (5) must possess merchant fleets in excess of (1,000,000) deadweight tons.”

There was a general consensus in favor of this amendment, however the Secretariat proposed, with the concurrence of a majority of the members of the Drafting Group that the actual formulation of the proposal be deferred until the new Convention shall have been completely drafted.

After two days of discussions there was considerable support for a modification of Draft Proposal E along the following lines,

“1. Arbitration proceedings instituted pursuant to an agreement in a contract of carriage shall, at the option of the claimant, be held in:

a. the principal place of business or in the absence thereof the ordinary residence of the carrier or the place designated in the contract of carriage provided that it is not the principal place of business or the ordinary residence of the carrier;

b. the state in whose territory is situated the port of loading;

c. the state in whose territory is situated the port of discharge; or

d. the place designated in the contract of carriage provided that this place is not situated in a state within whose territory is situated the principal place of business or in the absence thereof the ordinary residence of the claimant.

2. The arbitration agreement shall be valid only if it states that the provisions of this Convention shall be applied in the Arbitration proceeding or if the contract of carriage otherwise provides that the provision of this Convention shall apply.”

After two more days of debate the Drafting Group majority supported the following revision, which was eventually approved by the Drafting Group.

“(1) Subject to the rules of this article, any clause or agreement referring disputes that may arise under a contract of carriage to arbitration shall be allowed.

“(2) The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

(a) A place in a State within whose territory is situated

(i) The port of loading or the port of discharge, or

(ii) The principal place of business of the defendant or, in the absence thereof, the ordinary residence of the defendant, or

(iii) The place where the contract was made, provided that the

- defendant has there a place of business, branch or agency through which the contract was made; or
- (b) Any other place designated in the arbitration clause or agreement.

“(3) The arbitrator(s) or arbitration tribunal shall apply the rules of this Convention.

“(4) The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

“(5) Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen.”

At the closing Plenary the United States reserved its position with respect to Para. 2b of the Proposed Draft. Ghana, Egypt, Tanzania and Spain also joined in making reservations to Para. 2b. In addition, Spain made a proposal that the choice of specific arbitrators in advance be forbidden. The Soviet Union reserved its position in favor of Draft Proposal A.

At the Second Reading the above draft was approved without change, and the Arbitration provisions are now incorporated in Article 22 of the Draft Convention.

* * *

End of the first part of the article. Subsequent issues of the Journal will contain the remaining parts in the following order:

Fifth Session

- F. The Unit Limitation of Liability, exclusive of the amount
- G. Transshipment
- H. Deviation
- I. The Period of Limitation of Actions or Time Bar.

Sixth Session

- J. Liability for Delay
- K. Geographic and Documentary Scope of the Convention
- L. Invalid Clauses in Bills of Lading
- M. Reconsideration of Deck Cargo and Live Animals
- N. Definitions

Seventh Session

- O. Contents and Legal Effect of Documents evidencing The Contract of Carriage
- P. Letters of Guarantee

Eighth Session

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

