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Preparation of a draft instrument on the carriage of goods [by sea]

Compilation of replies to a questionnaire on door-to-door transport and additional comments by States and international organizations on the scope of the draft instrument

Note by the Secretariat

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Introduction

1. In the context of the preparation of a draft international instrument on the international carriage of goods [by sea], an important issue to be discussed by the Working Group is the sphere of application of the draft instrument. That discussion commenced at the ninth session of the Working Group (A/CN.9/510, paras. 26-34), continued at its tenth session (A/CN.9/525, paras. 25-28), and is expected to be carried further at its eleventh session. In preparation for the continuation of that discussion, the Secretariat, in August 2002, circulated to interested non-governmental organizations a short questionnaire intended to gather information regarding the practice of containerized transport and the utilization of door-to-door contracts by carriers. With a view to identifying precisely the needs and wishes of the international shipping community with respect to containerized door-to-door movements, that questionnaire was addressed primarily to representatives of the industry involved in both the sea and the land leg aspects of door-to-door transport. The questionnaire was also circulated to States and to interested inter-governmental organizations for information. It is reproduced as an annex to this note.

2. Responses to the questionnaire received from non-governmental organizations are reproduced in section I below.

3. One inter-governmental organization submitted comments to the Secretariat in connection with the questionnaire. These comments are reproduced in section II below.

4. Additional statements and contributions were submitted to the Secretariat by States, inter-governmental and non–governmental organizations in connection with the preparation of the draft instrument. These statements and contributions are reproduced in section III below.

5. The responses, comments, statements and contributions referred to in paragraphs 2 to 4 above are reproduced in the form in which they were received by the Secretariat.

I. Replies to the questionnaire from non-governmental organizations

A. International Federation of Freight Forwarders (FIATA)

[Original: English]

1. Do you feel it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

Whilst a single liability from door-to-door may be desirable at first glance, it does not appear feasible or realistic.

2. If so why?

Single liability from door to door would conflict with existing international and national unimodal law such as CIM and CMR in the land transport sector. CMR application is mandatory if place of loading and/or place of discharge are in a contracting State. Moreover CMR and CIM include provisions for land-sea transport which would further

aggravate the situation in view of the question, which regime will apply for a transport operation that includes both sea- and land transportation.

The shippers' and transport industry developed the UNCTAD/ICC Rules some ten years ago. They deal with the central liability of the transport and include a network liability system which prevails if loss or damage can be attributed to a particular stage of transport. The system of the Rules meets the reality of commercial practice if more than one mode of transport is involved. An unrestricted network liability system has proven successful and should be retained.

Any single liability regime from door-to-door would lead to disharmony of international transport law, rather than unification. An international maritime liability regime should therefore only cover port-to-port ocean transport and permit an intact network liability system that takes international and national transport law into account.

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

The characteristics of ocean carriage on one hand, and the different kinds of land transport on the other are too different from each other to be covered by the same law.

4. Should all of the participants in door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and other be subject to the same liability regime as the ocean carrier?

No, for the same reason as explained under 3.

5. Should the participants in door-to-door carriage, such as stevedores, terminal operators, truckers, railroads, warehouse and others be subject to direct claims by cargo interests or their underwriters under a single multimodal regime for damage caused by the particular participant?

Whilst we do not advocate a single multimodal regime, we are of the view that claims should exclusively be made against the contracting party having entered into the contract of carriage or other contracts with the shipper (see also remarks under 9).

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods by Road (CMR), should those conventions continue to control the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carriers?

Involvement of a land carrier in sea transport is only perceivable if the land carrier who acts as carrier has concluded the contract of carriage with the shipper for a carriage including a sea portion (Art.2 CMR). In this capacity, the land carrier is, in principle, subjected to the regime applicable on the transport portion where loss or damage occurred. For land operators subjected to CIM (railway companies in border crossing transport), the CIM liability will, in a similar way, apply to the sea transport portion.

9. Dou you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of

the carrier who issues the bill of lading for damage or loss that occurred whilst the subcontractor's custody?

There may be cases where a shipper deals with an impecunious carrier who subcontracts other parties for the performance of the contract of carriage. However, in view of the principle of freedom of contract in this respect, any shipper has a responsibility to his own organisation to ensure that his contracting party is financially viable. It is not be the purpose of a Convention to protect a shipper who is not prepared to protect himself.

10. Please take this opportunity to indicate if you have any further comments or observations to the instrument as currently drafted by UNCITRAL.

The UNCITRAL instrument should take the form of an international convention, where, however, only the core provisions referring to sea transport, including carriers liability for loss or damage relating to sea transport on a port- to- port basis, should be mandatory. More importantly, any interference with other international conventions or national law must be avoided. If the UNCITRAL Instrument should take the form of an international Convention that supersedes such law, the number of potential Contracting States may be diminished. It will inevitably be as unsuccessful as the 1980 Multimodal Convention.

As regards the proposal by Canada reflected in UNCITRAL document A/CN.9/WGIII/WP23, we are of the view that option 1 and 3 would contribute to disruption of international transport law, as each State would be able to ratify a different scope of regime. The proviso under option 2 that it would be difficult to establish which law applies is in our view without merit, because this question is solved by the facts of the case. CMR will apply for international road carriage, CIM for international rail carriage, or, as the case may be, the applicable national law will apply.

Additional comments from FIATA

[Original: English]

In consequence of recent discussions at our World Congress and the possibility that our position concerning certain aspects of these questions may not be as clear as we had hoped we would kike to stress the following.

With reference to question 5 we wish to ensure that it is understood that while we acknowledge the MTO as liable under the terms of the contract of carriage issued by them, we DO support the right of cargo interests and their underwriters to initiate direct claims on any participants in the door to door move, should they wish to do so.

With reference to question 9 we also wish to add that the obvious benefit of such a process is that which currently exists, that being the reduction in needlessly drawing parties into a litigation where there is no doubt as to the party responsible, i.e. in whose care and custody the cargo was in at the time of the damage and consequent savings in litigation costs, and likely hastening of the entire process.

B. INSTITUTE OF CHARTERED SHIPBROKERS (ICS)

[Original: English]

The Institute of Chartered Shipbrokers thanks UNCITRAL for the opportunity to comment on its questionnaire relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea and has pleasure in responding as follows:

1. Yes, it would be helpful to have a single liability scheme applicable to door to door shipments which involve an overland leg.

2. The object of drafting a new instrument covering liability in respect of carriage of goods by sea must be to re-establish the international uniformity that has been lost during the last seventy years since the Hague Rules were defined. The original rules were drafted to cover all shipped under bills of lading. In effect all traffic not covered by a private charter party contract and in particular all 'liner cargoes'. It is a matter of fact that today a large majority of liner cargo moving in the mainstream world trades is shipped on combined transport bill of lading contracts. It would therefore seem inconsistent, in the context of uniformity, to exclude the through or multi-modal transport aspects of the movement from the instrument.

3. There is no reason why the same law should be applicable to the entire transport of the goods when it is possible to determine at what point in the combined transport any loss, damage or delay took place. This works perfectly well under most combined transport regimes at present. However, when it is not possible to determine where in the combined transport the loss took place, then maritime liability scheme should apply.

4. No, this complicates matters far too much. The underlying concept of door to door carriage is that a carrier contracts with the cargo owner to take responsibility for the whole of the door to door movement. What liability regimes apply between that carrier and its subcontractors are quite irrelevant to the cargo owner.

Many of those sub-contractors, railroads, terminals and truckers for example are national operators who contract only to provide a domestic service. They are not concerned that the movement, from say port to factory, is part of an international through movement. Other sub-contractors such as port terminals may have all or part of their trading conditions imposed by national statute.

It seems unreasonable as well as impractical that such sub-contractors should be required to operate under two different liability regimes when providing the same service.

5. Certainly not. The cargo owner contracts with the carrier identified in the evidence of the bill of lading. The combined transport industry has created numerous methods of working that utilise both sub-contract and joint operational working to secure maximum efficiencies. In almost all cases the sub-contractor has now knowledge, nor need to know, of the cargo owner. Any demand for direct access for cargo claims seems to be a request for 'double indemnity'. In fact it might be considered that permitting the contract chain to be short circuited in this way is against the public interest, in so far as it might encourage 'unreliable' through transport operators if there is an alternative route for compensation in the event of that carrier's failure.

6. This is in part answered in 3 and 4 above. It is not necessary for this instrument to have any impact on CMR or other conventions. However there is another issue identified by the question which refers to 'the land carrier'. Many, if not most, international through transport carriers today are genuine multi-modal operators. They will be involved in sea, land and air services issuing combined transport bills of lading, CMR consignment notes or air waybills. It should be possible to draft a satisfactory wording to ensure that this instrument covers door to door transport where the sea leg is the main international movement but excludes an international movement where for example a ferry crossing is incidental to a door to door road or rail transport.

7. None but it is important that the 'sea' regime applies to door to door transport as set out in 2 and 3 above. The adoption of this instrument should result in there being no need for a separate 'multi-modal liability convention'.

8. In practical operational terms there are few difficulties. The Hague and Hague/Visby rules have been very well tested in most jurisdictions and there is a substantial body of interpreting law. The piecemeal adoption of Hamburg rules is responsible for much of the current lack of uniformity and also leads to jurisdiction shopping. (e.g. when a Hague or Hague/Visby country is exporting to Hamburg country). Any new instrument must meet the reasonable requirements of the major international liner carriers, some twenty of whom probably account for more than three quarters of all bill of lading general cargo movements. This includes the issues relating to Hague Rules 'exceptions' and particularly 'fault in navigation'.

The only other practical difficulty concerns the 'number of packages' issue and the per package limitation when applied to container traffic. Carriers have no way of knowing or checking the number of packages contained in FCL shipper loaded containers. It is therefore illogical that the per package limitation should apply to the container contents. A possible solution is that the 'package' limitation should not apply to FCL container movements and only the limitation based on weight should apply. Alternatively 'the container' is recognised as the package with a specific (higher) limitation applicable to 'container packages'

9. No! Again see 5 above. There will be a separate contract between the carrier and sub-contractor which may operate under a very different liability regime, and which is different for perfectly valid reasons of that business. It may well also interfere with the proper application of 'Himalaya' clauses.

10. Clauses 4.2 and 4.3

The comments above support the inclusion of Clauses 4.2.1 and 4.2.2 in order to incorporate door to door transport.

The commentary relating to clause 4.3 highlights the misunderstandings that do arise in respect of these 'mixed contracts'. It is suggested that there is a case for incorporating in the definitions of the draft instrument the two terms that are widely used commercially throughout the international industry to distinguish carriage under Clause 4.2 (Combined Transport) and that under 4.3 (Through Transport). Their incorporation would lead to some rigour in their use.

Suggested definitions, which will need legal drafting, might be:

"Combined Transport Contract" is a contract of carriage under which a carrier, against payment of freight, undertakes to carry goods from an inland place of receipt by land and by sea to an inland place of delivery.

"Through Transport Contract" is a contract of carriage under which a carrier, against payment of freight, undertakes to carry goods by sea and/or land between two named places but in addition expressly agrees that in respect of a specified part or parts of the transport of the goods will acting as an agent arrange carriage by another carrier or carriers.

Clause 5.4
The inclusion of the duty to "keep" the ship seaworthy "during" the voyage introduces unnecessary uncertainties into the new instrument, which are already covered by the duty to care for the cargo.

Clause 6.1.2
The retention of exception for fault in 'navigation' is supported. 'Management' could be removed. The reasons are:

The purely pragmatic view that without retention there will be a much harder route to securing adoption of the draft instrument. (e.g. the fate of the 'Unctad Multi Modal Convention').
Problems with the 'half world of exemption under compulsory pilotage'.
Change in the spread of risk impacting upon insurance.

The need for new case law to distinguish 'fault in navigation' from 'perils of the sea' – did the former cause the latter or v.v.

Clause 6.4
Liability for delay should only apply when time for performance is expressly agreed.

Clause 8.4
It is strongly believed that owners with vessels on time charter should benefit from the same defence as those whose vessels are on bareboat charter. In both cases the merchant is contracting with a demise charterer. Why should the registered owner of a vessel be responsible for the cargo owners contract with the demise operator when he has no way of knowing what measure of liability he may be accepting? This clause merely encourages cargo owners to take insufficient care when entering into contracts of carriage with speculative demise charter operators.

Inclusion of door-to-door transport.

While preparing this response a further questionnaire has been received from Unctad who it seems are preparing to revisit the matter of the UNCTAD Multi-modal Convention**.** Their questionnaire raises many of the same issues that are discussed in the context of this draft instrument. **It is considered most important that there is a single convention covering port to port and pier to pier transport.**

The Institute trusts these comments prove useful to the on-going discussions on this issue and looks forward to providing UNCITRAL with further input as may be required.

C. INTERNATIONAL CHAMBER OF SHIPPING (ICS)

[Original: English]

1. Do you feel that it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

Yes, a legal regime applicable to door-to-door transport would be helpful. We support the development of a "maritime plus" convention based on the draft instrument prepared by CMI for UNCITRAL ("the proposed instrument").

2. If so, why?

A large part of the containerised transport of goods is conducted on a door-to-door basis. There would be little added value in developing another regime for tackle-to-tackle or port-to-port shipments. It would be remiss to ignore door-to-door transport. Provided that carriage by sea is contemplated at some stage, the provisions of the proposed instrument should apply to the full scope of the carriage.

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

No. A network liability system should apply. To the extent that damage can be localised, mode specific regimes should apply.

4. Should all the participants in the door-to-door carriage of cargo, including stevedores, terminal operators, truckers, railroads, warehouses and others, be subject to the same liability regime as the ocean carrier?

No. Truckers, railroads, etc. should be subject to mode specific rules and not the same liability regime as the carrier.

5. Should the participants in door-to-door carriage, such as the stevedores, terminal operators, truckers, railroads, warehouses and others be subject to direct claims by cargo interests or their underwriters under a single multimodal regime for damage caused by the particular participant?

Not by virtue of the proposed instrument. There should be no performing carrier liability under the proposed instrument. This would seem to be essential to avoid conflicts of law. In this connection, we note that the 1980 Multimodal Convention did not contain any provisions on performing carrier liability.

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

To the extent that existing conventions such as CMR, COTIF and Montreal apply to multimodal transport, they should be excluded from the proposed instrument.

7. What advantages, if any, do you see in applying a uniform liability regime to both land and sea transport in multimodal carriage?

A uniform liability regime would create a certain amount of predictability but litigation would still be necessary to establish liability in individual cases. In practice a uniform system would give rise to considerable extra costs. The claimant would first have to settle the claim with the MTO in accordance with the uniform rules. The MTO would then have to pursue a recourse claim against the subcontractor according to another set of rules applicable to the specific mode of transport. Thus two different sets of liability rules would be involved whenever claims were settled.

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

Although we are not aware of any significant problems, it would be of great assistance to the industry as a whole to have an international convention applicable to door-to-door carriage.

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

On the contrary, we perceive considerable disadvantages. Cargo interests have the right to proceed against their contractual counterpart. To allow claims to be made against e.g. the CMR subcontractor will promote litigation and give rise to conflicts of laws problems. Far better to channel claims to the contracting carrier, who would then have recourse rights against subcontractors.

10. Please take this opportunity to indicate if you have any further comments or observations in respect of the instrument as currently drafted by UNCITRAL.

ICS supports the instrument and in particular we welcome the proposed provisions concerning the period of responsibility, delivery and contractual freedom.

ICS strongly supports application of the proposed instrument to door-to-door maritime transport. The proposed instrument provides the commercial parties with flexibility in determining the scope of the contract, including the period of responsibility. Where tackle-to-tackle transport is agreed (as will often be the case in bulk trades), the responsibility of the carrier will not extend beyond tackle and the instrument will apply. However, where door-to-door transport (or any transport beyond tackle-to-tackle is agreed, a network liability system will apply. In cases where it is not possible to establish when the damage occurred (concealed damage), the instrument will apply.

It is of great importance that sensible provisions regarding delivery of cargo are included in the proposed instrument. This will be of great value to the industry.

The proposed instrument provides an opportunity to modernise the outdated approach of firm and inflexible regulation of contracts of carriage. In principle, ICS supports the development of provisions which would allow greater freedom to the contractual parties in

recognition of the commercial realities, while at the same time safeguarding the interests of third parties.

II. Comments from an intergovernmental organization in connection with the questionnaire

A. ANDEAN COMMUNITY (Bolivia, Ecuador, Colombia, Venezuela)

[Original: Spanish]

CONSOLIDATED REPLIES TO THE UNCITRAL QUESTIONNAIRE
ANDEAN COMMITTEE OF WATER TRANSPORT AUTHORITIES
(CAATA)
GENERAL SECRETARIAT OF THE ANDEAN COMMUNITY

1. Do you feel that it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

BOLIVIA

Yes, it would be appropriate, provided that a fair balance can be found that takes into account the different types of risk to which multimodal transport is subject.

COLOMBIA

No. The single liability scheme should not differentiate between modes of transport.

ECUADOR

Yes, it would be helpful to have a single scheme, but the Andean Community already has such a scheme through its multimodal legislation.

VENEZUELA

From analysis of the document "Transport Law" and the discussions which have been conducted within UNCITRAL, a clear possibility has emerged of transport law governing door-to-door operations which include other modes of transport, such as land or rail transport. However, there are well-founded opinions that the draft should not be endorsed in such terms: it is argued that the proposal has not been studied by land transport organizations, or that previous attempts have been made, without success, to reach agreement, or that door-to-door operations are currently governed by the UNCTAD/ICC (United Nations Conference on Trade and Development/International Chamber of Commerce) Rules for Multimodal Transport Documents.

As is well known, Venezuela is not a party to any of the international conventions on private maritime law currently in force in all the States with which Venezuela maintains maritime trade relations; accordingly, it is not a party to the Hague Rules or the Hamburg Rules.

This is not an obstacle to considering a liability scheme for the goods carrier which covers different modes of transport so as to avoid a proliferation of different legal regimes relating to liability.

2. If so, why?

BOLIVIA

Because this would give users a sufficient and clear idea of their rights and obligations when they order a transport service.

COLOMBIA

No reply.

ECUADOR

Because a single entity would be liable for the whole voyage and for all the modes of transport used during the voyage.

VENEZUELA

Because efforts are being made to harmonize contract regimes covering liability for the carriage of goods by sea and how they relate to auxiliary operations which have not in the past been subject to international conventions.

The draft law states that its provisions are applicable to the place of receipt or delivery of the goods when it is in a Contracting State, irrespective of whether or not it is a port, so that door-to-door shipments are covered by the draft law. This will result in a general framework covering various modes of transport, thereby ensuring legal security, and is consistent with the proposal to apply the regime to international transport.

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

BOLIVIA

This would be a good option, but would be very difficult to put into practice because the risks affecting maritime transport are more serious than those affecting land transport. There are more control mechanisms for land transport, whereas with regard to maritime transport there are many issues to be considered, including risks that cannot be anticipated.

COLOMBIA

No. Each mode of transport should have its own liability regime.

ECUADOR

Different regimes should be applicable to land transport and maritime transport, because each mode of transport has its own law.

VENEZUELA

The aim of this draft instrument on transport law is to find a way to replace the regime which comprises the Hague, Hague-Visby and Hamburg Rules with a regime that covers multimodal transport by land or by rail and the transhipment of goods so as to achieve uniformity of conventions and the regulations they lay down.

In the Andean Community, specifically in the Andean Committee of Water Transport Authorities (CAATA), Resolution CAATA No. XIX.EX-91 was adopted. This resolution establishes the Strategic Plan 2001-2005 for Water Transport in the Subregion, whose general objectives include the promotion, adaptation and harmonization of maritime law in the Andean context so as to facilitate the well-regulated development of water transport.

One of the objectives which the same resolution establishes is the revision and application of international conventions and practices regarding water transport, ports and other related services.

This confirms the need to conclude a single instrument which standardizes the law relating to the transport of goods by water.

4. Should all of the participants in the door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and others, be subject to the same liability regime as the ocean carrier?

BOLIVIA

No. The liabilities and risks for each operator are very different, as are the mechanisms for avoiding those risks; therefore, they cannot be treated on the same basis. For example, a warehouse and a shipping company have to cover completely different eventualities.

COLOMBIA

No—only if the contract of carriage is covered by the multimodal system.

ECUADOR

They should not be subject to the same liability regime as the ocean carrier.

VENEZUELA

Yes, in the interests of the legal uniformity of multimodal transport and with due regard to amplifying the rules in the draft in order to cover the liability not only of the carrier or of the performing parties but also of other persons which no longer qualify as performing carriers. This is indicated in the draft instrument: in cases where an action is brought against any person other than the carrier, that person is entitled to the benefit of the defences and limitations of liability available to the carrier under the instrument, provided that the person proves that it acted within the scope of its contract, employment or agency.

5. Should the participants in door-to-door carriage, such as the stevedores, terminal operators, truckers, railroads, warehouses and others be subject to direct claims by cargo

interests or their underwriters under a single multimodal regime for damage caused by the particular participant?

BOLIVIA

Yes, if the source of the damage is identified, it would be a good idea for users to be able to submit their claims directly. However, this is not the spirit on which multimodal service is based.

COLOMBIA

Yes.

ECUADOR

Yes, the participants in door-to-door carriage should be subject to a single multimodal transport regime.

VENEZUELA

Pursuant to the draft instrument, the period of responsibility of the carrier covers the time and location of receipt of the goods, which must correspond to the time agreed in the contract of carriage or, in the absence of such a provision, the time [and location] when and where the carrier or the performing party actually takes custody of the goods.

The carrier is also obliged during the period of its responsibility to preserve and care for the goods properly and carefully. Accordingly, it must maintain the condition of the goods when loading, stowing, carrying and discharging them. This may mean that the different participants in door-to-door carriage bear responsibility in the same way as the carrier bears responsibility under the scheme presented in the draft instrument during the period when the goods are in their charge.

It follows that it would be possible to adopt a single regime which establishes parameters for direct claims to be made by cargo interests and their underwriters in view of the responsibility of the above.

6. In the event that existing conventions apply to land transport, such as the Convention on the Contract for the International Carriage of Goods by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

BOLIVIA

The land carrier should be handled separately, as is currently the case. As stated above, the risks are not the same; therefore, the liability cannot be the same either. Even the insurance procedures are different.

COLOMBIA

No. Each mode of transport should have its own liability regime. However, if a single door-

to-door liability regime existed, it would be applicable to all modes of transport involved in the movement of a particular cargo; that is, from receipt of the cargo up to its delivery to the agreed location, which would be covered by the multimodal system.

ECUADOR

Transport by road has its own liability legislation and cannot be subject to the liability regime for water transport.

VENEZUELA

It is necessary to distinguish between the single liability scheme applicable to door-to-door operations and the conventions which govern land transport.

The single liability scheme may be displaced only where an international convention has been adopted as law to regulate land transport and is applicable only to the land leg of a contract of carriage by sea if the losses or damage occur solely during the transport of the goods over land. This means that if the damage occurs during more than one leg of the carriage, or if it cannot be determined where it occurred, the single liability regime will prevail during the whole door-to-door transit period.

7. What advantages, if any, do you see in applying a uniform liability regime to both land and sea transport in multimodal carriage?

BOLIVIA

If it were possible, the advantage would be that the user would have a simpler procedure and clearer responsibility for making a claim.

COLOMBIA

The multimodal transport regime establishes that the multimodal transport operator assumes full liability from the time of receipt of the goods until the time of delivery to the consignee; therefore, in the event of any damage to or loss of the cargo, the only person required to answer to the consignee must be the multimodal transport operator which signed the relevant contract. Consequently, the advantage is considerable because only one operator is answerable to the consignee for any damage to or loss of the cargo.

ECUADOR

The multimodal transport regime provides that the multimodal transport operator assumes full liability for the carriage and creates a single liability regime. This facilitates international carriage because any claim by the owner of the cargo is made to the multimodal transport operator, and the operator for its part has to submit the damage claim in respect of the mode of transport where the damage occurred and pursuant to its domestic law.

VENEZUELA

The advantage is that although there are some conventions which are applicable to land transport, such as the CMR Convention, many contracts of carriage by sea include a land

leg. It would therefore be more practical to apply the single liability scheme to all the legs of door-to-door carriage, using a uniform and harmonized regime which would cover the different modes of transport.

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

BOLIVIA

The problem is that the user has to understand many procedures in order to make a claim and the operator has many options for finding a way to avoid liability.

COLOMBIA

The impossibility of identifying at what time and in which mode of transport the damage or loss could have occurred.

ECUADOR

The fact that the owner of the cargo has to make the damage claim in respect of the mode of transport in which the damage occurred and under the liability regime applicable to that mode of transport.

VENEZUELA

The single liability scheme could become the basis for a new single global regime for the regulation of maritime transport in terms which would meet the requirements of trade and modern technology. This suggests that any new regime must cover all legs of carriage.

The single liability scheme must therefore be adapted to the realities of modern trade, cover the whole period in which the carrier has the goods in its custody, irrespective of whether they are in port or on land, and establish rules applicable to modes of transport complementary to those for the carriage of goods by sea.

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

BOLIVIA

This would be an advantage more for the operator than for the user because damage, whether or not it results from negligence, is caused by operators subcontracted to cover part of the carriage. That is to say, most damage is caused during handling of the cargo rather than during the carriage itself. However, it is important to bear in mind that the reliability and quality of service which an operator offers is dependent on the quality of the agents and subcontractors it chooses to provide the service.

COLOMBIA

We see no advantage because generally neither the shipper nor the consignee has influence

or is a party to the subcontract, and they would therefore be prevented by law from taking any action against the subcontractor.

ECUADOR

No, because the multimodal transport operator assumes full responsibility and it is easier for the owner of the cargo to direct its claim against the multimodal transport operator than against any person in any mode of transport in the chain.

VENEZUELA

The advantage is that costs can be reduced and multiple claims avoided.

10. Please take this opportunity to indicate if you have any further comments or observations in respect to the instrument as currently drafted by UNCITRAL.

BOLIVIA

No reply.

COLOMBIA

The UNCITRAL document should govern only door-to-door carriage by sea, bearing in mind that the liability regimes which it seeks to amalgamate and update are the Hague, Hague-Visby and Hamburg Rules.

It is important that there should be a single liability regime for carriage by sea.

UNCTAD is completing studies on unification of the rules for multimodal transport.

It should be specified precisely that the draft instrument is limited to "door-to-door" carriage, otherwise it would be necessary to regulate multimodal transport activity under the same instrument, if it were accepted that multimodal transport is equivalent to door-to-door transport. That would be a very lengthy and expensive task with far-reaching consequences, and to date there has been no success in achieving uniform rules, except in the Andean Community, which has community rules in this sphere.

Article 5.3 in the Spanish version, which reads "… el transportista puede negarse a descargar, o puede descargar, destruir o …" ("… the carrier may decline to unload, or may unload, destroy, or …"), should be amended to read "… el transportista puede negarse a cargar, o puede descargar, destruir o …" ("… the carrier may decline to load, or may unload, destroy, or …").

With regard to article 6.3, "Liability of performing parties", relevant notes should be added to make it clear that there is joint and several liability between the carrier, the performing parties and their agents.

If we manage to progress as far as article 15, "General average", this provision should be deleted from the draft for the same reasons as have been indicated for article 6.1.2 (a). Moreover, since this is an agreement which does not fall into the category of public treaty, it would not be legally acceptable to implicitly elevate the instrument to such a category.

It should also be noted that the limitation period for instituting judicial proceedings against the ocean carrier should follow the lines of the Hamburg Rules—that is, a maximum period of two years for instituting any judicial proceedings.

ECUADOR

The UNCITRAL document should govern door-to-door carriage by sea, because the liability regime which is supposed to be applied - the Hague, Hague-Visby and Hamburg Rules—establishes liability only for carriage by sea, and also because the other modes of transport are governed by their own legal procedures.

The aim must be to establish a single liability regime bringing together all the existing ones, because any other situation creates legal uncertainty in international trade, as is currently the case.

To that end, the following recommendations have been formulated:

1. Scope of application.—The role of the carrier in the case of door-to-door carriage should be to assume full responsibility for the contract of carriage, since this is the only way the person responsible can be fully identified and accessible.

2. Liable subject.—The carrier should be severally liable with its agent, when the agent is involved in one of the legs of carriage. Commercial agents would be excluded from this liability.

3. Liability regime.—Insofar as nautical fault should be removed as one of the grounds for the liability of the carrier, the provision in the draft which allows nautical fault to be invoked as grounds for exception from liability should be deleted.

3.1 With regard to nautical fault and the work of the pilot, it is also recommended that cases of intervention by the pilot should not be admissible as an exception, since this would represent a form of nautical fault as an exception. Similarly, exoneration from liability should not be permitted either for the carrier or for the pilot.

3.2 In the event of fire, it should be clear that the carrier should assume liability, but the burden of proof should be transferred to the existence of causes outside its control.

3.3 The envisaged option of partial liability of the carrier—under which the carrier in principle bears total liability – should be maintained.

4. Limits of liability of the carrier.—With regard to the limitations of liability of the carrier, the draft sets out a proper framework, and the only point which should be analysed is whether the level of the limits is adequate. In this regard, it is proposed that the criteria established in the Hague-Visby Rules be maintained, but that the carrier be given the opportunity to opt for the legislation of the country of origin of the carriage if the level of the limit is greater.

5. Jurisdiction.—The draft contains no rules pertaining to jurisdiction. Rules should therefore be introduced to establish the competence of the courts and tribunals in the place of destination of the cargo.

6. Arbitration.—There appears to be an assumption that the arbitrators or arbitration bodies in the place of destination of the cargo should have jurisdiction, but that the parties should continue to have contractual freedom to allow a submission to arbitration, provided that such agreement is reached after the events which caused the dispute.

7. Electronic communication.—Provision clearly needs to be made for the fact that contracts of carriage by sea may also be concluded electronically, so that there is uniform regulation of contracts of carriage, whether the contracts are concluded in writing or by digital means. Similarly, it was suggested that the word "images" in the draft be replaced with the phrase "means or records" to make it consistent with the correct international nomenclature.

7.1 It was also suggested that the characteristics of the electronic signature be registered with the competent bodies so as to ensure the legal security of documents issued electronically. In this respect, it should also be noted that the electronic signature of the electronic record should meet the requirements of confidentiality, integrity, authenticity and non-repudiation of the data message.

Conclusions

(a) UNCITRAL and the International Maritime Committee have drafted a document on door-to-door carriage which explores how to replace port-to-port carriage and which determines liability for such carriage on the basis of both the Hague-Visby Rules and the Hamburg Rules, extends door-to-door transport to cover multimodal transport and brings together in a single instrument the rules for carriage of goods by sea, trans-shipments, where applicable, whether by land or by rail, including auxiliary operations in the transport chain during both loading and unloading, and electronic data transmission.

This draft is concerned with simplifying documentation and unifying the whole legal regime with regard to liability for the carriage of goods, which would obviously benefit external trade and result in a significant cost reduction. However, it should be borne in mind that such an extensive and comprehensive document will give rise to great debate before it is adopted, and also after adoption in order to secure ratification or accession, because it addresses many issues. This underscores the difficulty of achieving unification in all these areas by means of an international agreement.

(b) With regard to establishing more balanced and equitable spreading of risks and responsibilities between the carrier and the shipper, the new rules for the international carriage of goods should refer exclusively to revising the Hague-Visby Rules and the Hamburg Rules.

The United Nations Convention on International Multimodal Transport of Goods should then be revised to bring it into line with the current situation in maritime transport.

(c) International multimodal transport should be considered as such and should continue to be governed by the legislation of the Andean Community, which has provided a complementary legal framework.

VENEZUELA

For the purposes of this work, account should be taken of the instruments which are currently in force in Venezuela and which apply to water transport: Decision No. 331, amended by Decision No. 393 of the Board of the Cartagena Agreement (Andean Community) on multimodal transport, which is applicable to international multimodal transport when the place of receipt or delivery of the goods is in a member State of the Andean Community. This Decision is based on the liability system set out in the Hamburg Rules, which is itself based on a presumption of fault. However, when it has been determined that the damage occurred during the sea leg or on an inland waterway, a set of grounds for exoneration similar to those in the Hague Rules is applicable, but exoneration on the grounds of nautical fault or fire is excluded.

The draft establishes a liability regime which combines the regimes of the Hague Rules and the Hamburg Rules. In fact, article 5 of the draft imposes a series of obligations on the carrier, mainly related to the loading and carriage of the goods and delivery of them to their place of destination. They also relate to the care which must be taken with the cargo during the different legs of carriage and, lastly, the action taken by the carrier ("due diligence") to provide a ship that is seaworthy.

It is noted that the obligations take an assertive form, as in the Hague Rules. The wording is similar, although perhaps a little clearer. We note that it has still not been decided whether the requirement to provide a seaworthy ship should apply only before and at the beginning of the voyage or whether the obligation continues to apply during the voyage.

We share the view that the obligation to provide a seaworthy ship should be maintained, as established in the Hague Rules; that is to say, it is an obligation that should be fulfilled before and at the beginning of the voyage. Despite the existence of the International Safety Management (ISM) Code and the safe shipping requirements, the obligation could be very difficult to enforce if it is imposed during the whole voyage by sea.

On the other hand, article 6 of the draft establishes a liability regime based on the presumption of fault of the carrier in the event of damage to, loss of or delay in delivery of the goods: the carrier is held liable unless it demonstrates that neither its own negligence nor that of the performing party caused the loss or damage (art. 6.1.1, option I (a)).

This part of the draft is based on article 5.1 of the Hamburg Rules, although the two rules are not identical.

However, the draft also sets out (art. 6.1.2) a series of circumstances which, if proved by the carrier, would establish the presumption of absence of fault on the carrier's part and would discharge the carrier from liability. This set of 11 grounds for exoneration contains some minor departures from the set contained in the Hague Rules and we have no hesitation in agreeing with it.

It should be pointed out that the regime of the Hague Rules establishes the circumstances in question as grounds for exonerating the carrier from liability, whereas in the draft instrument they are seen as creating a presumption of absence of fault on the carrier's part, as a direct exoneration.

We believe it would be appropriate to study in depth the legal implications of this change,

especially as our new Maritime Trade Act (art. 206) is based on the Hague Rules, establishing that the circumstances it sets out are grounds for exoneration. The analysis should take into account the fact that the draft establishes a number of obligations which the carrier must fulfil and a presumption of fault in the event of damage, loss or delay; and therefore the creation of a new opposite presumption in cases where the circumstances referred to in article 6.1.2 are proved seems too complex and difficult to apply in our legal system.

We would like to point out that in Venezuela, with regard to obligations of result, as covered by article 6.1.1, the carrier would be exonerated by providing proof of non-attributable extraneous cause, which is equivalent to providing proof of fulfilment of contractual obligations (art. 5 of the draft) and proof that the damage, loss or delay was due to one of the grounds for exoneration established by article 6.1.2 of the draft.

For these reasons, we believe that grounds for exoneration should not be regarded as presumptions in the carrier's favour, but as genuine cases of exoneration from liability.

The draft also contains an article in brackets (art. 6.1.2) which would establish direct exoneration (not as a presumption of absence of fault) on the grounds of nautical fault (default of the master, crew or pilot in the navigation or in the management of the ship) and the fire exception.

As indicated in the explanatory text, the proposal in brackets is a cause of major division between those in favour of one or other position.

In 1996 Venezuela, as a member of the Andean Community, opted to remove nautical fault and the fire exception as grounds for exoneration; this is set out in Decision No. 393, which takes precedence in the international sphere in cases relating to multimodal transport.

However, during consultations in the Venezuelan Association of Maritime Law, the Association expressed its support for including the nautical fault exception and the fire exception among the grounds for exonerating the carrier. In the light of this, we should consider in greater detail whether it would be appropriate to conclude an agreement which includes those exceptions; if such an agreement is adopted, Decision No. 393 should be amended to bring it into line with the agreement's provisions.

Article 6.1.4 of the draft is in brackets. It refers to cases in which damage, loss or delay is caused in part by the fault of the carrier and in part by an event for which the carrier should not be held liable, and is based on the assumption that the carrier would be liable only to the extent that its fault had contributed to the damage, loss or delay in delivery.

In our opinion, this provision should not be accepted because, in cases where the carrier fails to fulfil its obligation to carry and deliver the goods, it should be liable for all the damage caused. This is the system under our law.

It should be pointed out that this draft provision is based on article 5.7 of the Hamburg Rules, and that the inclusion of such a provision in those Rules is understandable because the liability regime which it establishes is so strict. However, that is not the case with the draft instrument, which sets out a regime that is more flexible and favourable to the carrier's position.

Electronic Commerce

At the Assembly of the International Maritime Committee in Singapore, it was agreed that the International Subcommittee should work on drafting rules which would include principles and provisions to facilitate electronic commerce. The May preliminary draft was revised by the Working Group on Electronic Commerce and the draft instrument incorporates the provisions recommended by the Group.

The draft instrument should apply to all contracts of carriage, including those which are concluded electronically. To achieve this goal, the draft is medium-neutral and technology-neutral. This means that it should be adaptable to all types of system, not only those based on a registry, such as the Bill of Lading for Europe (BOLERO). It should apply to systems operating in a closed environment (such as an intranet), as well as to those operating in an open environment (such as the Internet). Care should also be taken to ensure that the draft instrument is not limited to the technology currently in use, bearing in mind that technology evolves rapidly and that what seems impossible today is probably already being planned by computer system (software) programmers.

One of the aims of the draft instrument is to remove the "paper obstacle" to electronic transactions by adopting the relevant principles of the UNCITRAL Model Law on Electronic Commerce of 1996.

One way of achieving this aim is simply to define the word "document" in such a way as to include information recorded or archived in any medium. This would cover information kept in electronic form as if it were in writing on paper. Some people think that this is the best solution, but since there still exists a widespread feeling that "document" means paper, different terms have been used to facilitate the conclusion of contracts by electronic means or the conclusion of contracts evidenced by messages communicated electronically. The expression "electronic record" has been chosen as a relatively neutral one. "Contract particulars"[1] is regarded as an appropriate expression which can easily be applied to the special conditions set out in a transport document or an electronic record.

Chapter 2 contains general rules relating to consent. This means, firstly, consent to issue and use an electronic record and, secondly, when a transport document is issued, consent communicated or expressed electronically to exchange information and notices such as those covered by articles 6.9.1 and 6.9.2. There is also an article covering cases in which the parties wish to opt by a particular means to replace an electronic record with a paper document or vice versa. This is permitted only if there is mutual consent and under strict conditions. This problem is mentioned in the CMI Rules for Electronic Bills of Lading. Lastly, chapter 2 contains rules of procedure which must be agreed and included in the contract particulars that appear in a negotiable electronic record. On this point there is no generally established custom, uniformity or predominant system. Such rules are therefore necessary in order to ensure that there are no misunderstandings concerning either the transfer of electronic records or the action necessary in order to obtain delivery as the holder of an electronic record.

The draft instrument adopts the proposal that negotiability can be achieved and effected

[1] The term "contract particulars" has been translated as "condiciones del contrato", although it can also be translated as "clausulado del contrato", "cláusulas específicas del contrato" or "cláusulas especiales del contrato".

electronically. The concept of exclusive control of the electronic record should be consistent with the concept of negotiability. It is certainly just as consistent as the physical possession of a piece of paper. This provision would therefore put electronic records on an equal footing with transport documents, and has been introduced solely for that reason; it would also put negotiable transport documents on an equal footing with electronic records. It was appreciated that different interpretations of negotiability in different jurisdictions might make it impossible to determine whether an electronic record could currently be seen in all jurisdictions as capable of covering what should be understood as effective negotiability. However, in view of the rapid national and international advance of electronic commerce and of laws on electronic commerce which seek to introduce parity between electronic media and paper, it was considered that the rules were acceptable.

One of the arguments and ideas considered was that negotiable documents were no longer necessary, whether on paper or in the form of an electronic record, and that in any case the central focus should be on the transfer of rights (the right to obtain delivery or the right of control) in a contract of carriage without documentation. With regard to the first point, this view is based on the fact that the financing of air transport in any form is hampered by the use of air waybills. The popularity of sea waybills[2] was also mentioned. Nevertheless, there are certainly many markets where negotiable documents are used. The draft instrument must ensure that nothing prevents the use of electronic records to evidence such contracts of carriage in the future. The instrument also clearly establishes that the transfer of rights in contracts of carriage may be done electronically.

These rules are consistent with the UNCITRAL Model Laws on Electronic Commerce (1996) and Electronic Signatures (2001), which, to some extent, provided the basis for the Venezuelan Act on Data Messages and Digital Signatures. Only if the validity of documents transmitted electronically is recognized will it be possible to overcome the legal obstacles to implementing electronic commerce in countries where records are traditionally kept in writing, such as Venezuela. Venezuela therefore approves the rules on electronic commerce contained in the draft instrument.

B. ANDEAN COMMUNITY (Peru)

[Original: English]

We acknowledge receipt of the questionnaire prepared by the International Trade Law Commission of the United Nations? UNCITRAL - regarding the draft instrument that would govern the international carriage of goods.

Moreover, as the Peruvian General Direction of Aquatic Transportation we will point out our views on the matter on each of the questions.

1. Do you feel that it will be helpful to have a single liability scheme applicable to

[2] This term has been left in the original English because it is difficult to define the terms “air waybill” and “sea waybill”. They could, however, be translated respectively as “*non-negotiable* air and maritime transport documents”.

door-to-door shipments which involve an overseas leg?

Considering that door-to-door shipments are increasing fast and this will probably be the predominant form of transportation in the near future, we consider it will be desirable and helpful to have a single liability scheme. However, we believe that the project involves issues covered by several conventions which have not been yet approved by many countries. Thus, a consensus is almost an utopia.

2. If so, why?

As previously stated, we consider that the draft instrument proposed is too ambitious and too many conventions are being put in one instrument alone. This will mean that it will be almost impossible that countries will approve it.

As a matter of fact the draft covers issues regarding the responsibility of ship owners for goods carried on vessels, which are actually regulated principally by Hague, Hague-Visby and Hamburg Rules. Just on this issue there is no consensus in our country and/or within the Andean Pact.

Likewise, the draft covers new issues which were not included in the above mentioned rules, as for example electronic bills of ladings and general average.

Moreover, a liability regimes for a door-to-door transportation involves the inclusion of a regime for land transportation which is usually regulated by local law.

We will suggest to follow Professor William Tetley´s Two Track approach (http://tetley.law.mcgill.ca/unctad): A) A fast track involving a new port-to-port convention which could be a mixture between the Hague-Visby and Hamburg rules and trying to maintain the balance between shippers and carriers. This will cover the sea leg being governed by international law; and, B) A slow track, which will involve the most controversial issues and be optional to the states covering the land transportation and that is usually govern by local law.

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

Yes. A unique international law governing the entire transport of the goods is highly desirable, as this will bring certainty of law, promote commerce, judgements could be enriched by several jurisprudence, lower legal costs, etcetera.

However, as mentioned in the previous paragraphs, the draft is too ambitious and some issues like land transport of goods is usually governed by local law. Thus, convincing countries not to apply their local laws will probably make the convention unreachable. However, the possibility that claimants and/or defendants be able to choose the jurisdiction and applicable law shall remain open.

4. Should all of the participants in the door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and others, be subject to the same liability regime as the ocean carrier?

Not necessarily. There are certain risks which are inherent to sea transportation which are not applicable to land transportation and vice versa. Accordingly, liability should not be measure using the same ruler.

However, liability issues like calculation of indemnity amounts could be applicable to all of them and a consensus and these points could bring more commerce due to the certainty of law? At least on some aspects – lower legal costs, and knowledge of problems of similar or identical nature solved in other countries. This will allow that users be more confident in using the system.

5. Should the participants in door-to-door carriage such as the stevedores, terminal operators, truckers, railroads, warehouses and others be subject to direct claims by cargo interests or their underwriters under a single multi-modal regime for damage caused by the particular participant?

Yes. However, this shall remain as an option of the claimant and not be compulsory. The claimant shall have the option to choose whether to make its claim directly to the carrier and the latter claim against the subcontractor in subrogation-, to the subcontractor if the damage/loss is clearly under the period that goods were under the subcontractor's liability or to both of them.

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

It is desirable that the land carrier could be subject to same liability regime as the ocean carrier, although some of their risks may not be shared. However, as stated having all in one convention is unlikely to be approved by the majority of countries the conventions for the moment should remain independent. The two track approach suggested could help achieve this.

7. What advantages, if any, do you sea in applying a uniform liability regime to both land and sea transport in multi-modal carriage?

The main and obvious advantage would be that the regime will be simpler to understand by its many users. This will provide better understanding and developments of law, lower legal costs. As consequence this will bring confidence on the system and development of commerce in general.

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

In countries as ours mainly confusion and awareness by cargo interests of the applicable laws, liability regimes, which make it difficult for the users to collect or sue the carriers. However, this is not the only problem; local judges are not specialized in maritime and/or transportation matters and do not follow in approved international conventions. This brings

even more confusion not only to cargo interest but also to carriers, making trading and commerce more expensive due to the uncertainty.

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

Yes. This could probably reduce costs, making commerce more effective. If subcontractor could be sued for damages or loss that occurred whilst in their custody, first they will have the opportunity to find alternative dispute resolution methods to settle the claims, which could be convenient for all the parties without them having to be sued once the carrier's liability is established by a court of competent jurisdiction or an arbitration tribunal. This will evidently reduce legal costs.

Likewise, cargo interest or underwriter in some cases could consider more convenient to sue locally, rather than having to sue an overseas company. As the chain of claims will be smaller, higher indemnities which could benefit all at the end of the day could be obtained due to lower costs and fewer trials and negotiations.

However, as stated before, this shall remain as an option of the claimant.

10. Please take this opportunity to indicate if you have any further comments or observations in respect to the instrument as currently drafted by UNCITRAL.

We agree that this will be a good and desirable document. However, we believe that it will be unrealistic to consider reaching a success on it as many countries would not be able to ratify it. Taking out some difficult issues will allow achieving the success of the convention whilst more conversations are necessary to reach the desirable one. Therefore, we believe that a two-track approach shall be followed.

III. Additional statements and contributions in connection with the preparation of the draft instrument

A. From States

MALAYSIA

[Original: English]

Please note that the comments are not conclusive as Malaysia has yet to receive some of the other relevant documents.

i) Port-to-port transport operations (international carriage of goods by sea) CANNOT be equated and expanded to door-to-door transport operations. They are different and have to be dealt with separately taking into account the different status and land transport regimes and legislation of various countries, particularly the non-members. Due cognizance must be given to the possible dangers of extending maritime transport rules to land

transport, more so to those of the developing countries.

ii) In view of the rather limited numbers of countries being members, the intention of the international instrument being prepared to be possibly considered as an international treaty is rather premature and unreasonable and perhaps at best it could be proposed as an international convention by United Nations.

B. From inter-governmental organizations

Organisation for Economic Co-operation and Development (OECD)

[Original: English]

BACKGROUND

The Workshop on Cargo Liability was organised by the Maritime Transport Committee to assist in the modernisation of current regimes and to bring some additional clarity on steps that may be taken in order to bring about a new regime that may be more widely acceptable to both governments and industry. It was hoped that this effort from the OECD would not result in further proliferation of regimes, but rather that it would encourage a convergence of views to further harmonise international practices.

The approach taken in preparation for the Workshop was to commission a consultant to analyse a range of existing regimes, and identify those issues where there is still considerable disagreement amongst the various parties affected by these regimes. The consultant's document, which formed the basis of the discussion at the Workshop, is available on the Maritime Transport Committee's web site at:

http://www.oecd.org/dsti/sti/transpor/sea/index.htm

THE WORKSHOP

The MTC's Workshop was held on 25-26 January 2001, and brought together approximately 120 participants from governments and industry from OECD countries. A number of international intergovernmental agencies with an interest in cargo liability issues were also represented.

The Workshop was chaired by Mr. Alfred Popp, Senior General Counsel in the Canadian Department of Justice. Mr Popp is currently also the Chairman of the Legal Committee of the IMO.

Participants at the Workshop, while obviously representing their governments and organisations, were invited to participate and speak in a personal capacity. This was because the Workshop was simply an avenue for exchanging views on the issues identified by the consultant, in order to establish whether there might be some common ground or convergence that may offer an avenue to a future diplomatic conference to resolve some of these hitherto divisive issues.

The individual views of participants have not been recorded, and all statements were made

on a non-attributable basis. Similarly, the outputs from the Workshop do not necessarily reflect the views of either the MTC's member governments, nor of the industry representatives present.

However, the points covered in this report on the Workshop are offered to interested parties, be they governments, industry, or international organisations that may in the future consider hosting or participating in diplomatic conferences to review cargo liability, as representing the end result of deliberations between these parties.

While these outcomes are not binding on any party, they may nevertheless offer some guidance as to the policy outcome that may be necessary to maximise the formulation of a more comprehensive, and generally acceptable form of cargo liability regime. If nothing else, they may offer guidance on alternative texts that may in the end represent acceptable compromise solutions.

MATTERS WHERE THE WORKSHOP FOUND GENERAL AGREEMENT:

Issue A: Loss due to delay

It was noted that this had traditionally been a divisive issue. However, there was agreement that delays should be covered by a new regime where timing of delivery is subject to special contractual conditions. In addition, thought might be given to including provisions for delays at large.

Issue B: Application to different transport documents

Any new regime should cover not only traditional bills of lading, but also other non-negotiable contracts of carriage, but excluding charterparties.

Issue C: Application to electronic or other transactions

A new regime should be fully compatible with modern electronic commerce, including the Internet.

Issue D: Recognition of performing and contracting carriers

On balance there was support for including the notion of the performing carrier in a new regime, while at the same time not giving up the principle of making claims upon the contracting carrier, nor allowing the contracting carrier to avoid liability by virtue of having subcontracted the carriage to another carrier.

However, there were concerns that the definition of performing carrier contained in the CMI draft may be too broad, and the Hamburg Rules definition may provide a better basis.

Issue E: Application to live animals and deck cargoes

Live animals

The strong majority of speakers were against inclusion of live animals in a new regime because of the specialised nature of the cargo. However, it was recognised that there was need for further consultations with both carriers and shippers of live animals.

Deck cargo

Deck cargo should be covered without special provision in the case of containerised cargo, thus following today's business practices. Non-containerised cargo should be covered subject to the clarification of the carriers' and shippers' duties and rights along the lines of the Hamburg Rules.

Issue F: Application of regime to both inbound and outbound cargoes

There was very strong support for the proposal that goods bound for a contracting state should be covered even if the port of origin is in a non-contracting state.

Issue K: Documentation

Participants noted that this is a technical issue for consideration by experts, and that the only relevant policy issue is that information regarding vessel and cargo contained in such documentation must be totally reliable. Some comments made under Item I may be also relevant here.

Issue L: Period of notice to notify loss or damage

This was recognised as a technical issue which could only be resolved through discussion with practitioners to ensure that any limitations reflect modern business practice.

However, within the general view there was considerable support for tight limitations, although some felt that the Hague-Visby 3-day limit in cases where damage was not apparent should be extended.

Issue M: Timebar limits on initiation of legal proceedings

Again, there was considerable support for a tight limitation period as in Hague Visby, but with appropriate provisions for recourse action and consideration of provisions covering suspension and interruption of those limitations.

Issue N: Explicit provisions for arbitration or other forms of dispute settlement

A new regime should make provision for parties to agree to settle disputes by arbitration or other forms of dispute resolution.

Issue O: Forums in which proceedings can be brought

There was very strong support for a specific list of forums, or rules for selecting a forum, to be available to the claimant, along the lines of those provided for in the Hamburg Rules, although these could be relatively tightly defined in order to minimise forum shopping.

However, any list should be carefully scrutinised to ensure it was appropriate to multimodal journeys if the new convention extends coverage to them.

MATTERS WHERE THE WORKSHOP FOUND CONVERGENCE BUT NOT GENERAL AGREEMENT:

Issues G and H: Extent of coverage of regime, including multimodal legs

The most general consensus was that the new regime should take as its first priority the improvement of the regime governing the maritime leg of the journey.

However, it was also generally recognised that under modern business practice multimodal journeys are becoming more important. Therefore, how the new maritime regime could be made to fit in with other modes of transport should be further studied.

Any such extensions should fully recognise and address possible conflicts that may arise with other international conventions or national laws.

The possibility of addressing this issue by providing a "default" liability regime where there is uncertainty as to which regime should apply, ought not to be ignored.

Issue I: Allocation of responsibilities between carriers and shippers

There was substantial agreement that the criteria proposed by the consultant formed a useful basis on which to judge the allocation of responsibilities. These critieria were:

a) It must be conducive to the public policy aims of member governments (e.g. on trade facilitation, maritime safety, etc).

b) It should have the prospect of early acceptance and uniform implementation worldwide and especially by the world's main trading and shipowning nations.

c) It should be as clear and as certain in its interpretation as possible.

d) It should provide for an efficient and economical distribution of insured risk. and

e) It should make for convergence with the cargo liability regimes in force for other transport modes.

There was also substantial agreement that there should be a balanced-allocation of responsibilities which recognises the rights and obligation of both carriers and shippers.

The thrust of the discussion indicated that with this balance the removal of nautical fault and other exemptions could receive support, although some notes of strong caution were sounded about the possible effects of its removal.

There was clear recognition that a balanced allocation of rights and obligations of both carriers and shippers was important also in the light of maritime safety and sustainability, especially with respect to the prevention of accidents.

There was also substantial evidence to suggest that a more stringent allocation of responsibility along the lines of the Hamburg provisions may in the end receive support, perhaps with a listing of specific defences.

In all cases there should be counterbalancing obligations on shippers to ensure there was an adequate duty of disclosure:

a) On special features of the goods that are relevant to their handling and carriage - in particular any dangerous qualities and any special precautions appropriate; and

b) As required by the shipment's documentation in accordance with legal and administrative requirements, and as necessary for delivery of the cargo to consignee in accordance with the contract of carriage.

Shippers should be liable for any damage or expense caused to the carrier or others:

- By their failure to meet these obligations, or

- By the goods themselves, if due to the shippers' fault or neglect.

Some careful attention should also be given to the burden of proof.

Issue J: Monetary Limits

The matter of monetary limits is one that can only be resolved by a diplomatic conference.

Before considering new monetary limits it would be advisable for the sponsoring agency, as part of preparatory work for a diplomatic conference, to commission an independent study on the changes in the value of money since the limits were fixed in the Hague-Visby Rules.

During the course of discussion, a suggestion that "package" limits should be removed received little support, but it was recognised that this could be reconsidered if a new regime was extended to cover multimodal legs.

There was also strong support for the proposition that there should be a provision included in a new regime for the review of limits by "a tacit amendment procedure", perhaps by drawing from existing provisions in other related conventions.

Additional matter

During the course of the Workshop, the issue that freedom of contract should be a feature of any new convention received strong support from industry representatives. However, those government representatives that spoke tended to reflect the view that the unification of international transport law could only be effective in providing a minimum or basic standard if the provisions contained in these conventions were mandatory. Freedom of contract might however be restricted only in cases where general conditions were used.

C. From non-governmental organizations invited by the Secretariat

1. ASSOCIATION OF AMERICAN RAILROADS (AAR)

[Original: English]

COMMENTS ON BEHALF OF THE ASSOCIATION OF AMERICAN RAILROADS[1] RELATING TO THE PRELIMINARY DRAFT INSTRUMENT ON THE CARRIAGE OF GOODS BY SEA

On 16 September 2002, the Working Group on Transport Law established by the United Nations Commission on International Trade Law (UNCITRAL) will meet to review the Preliminary Draft Instrument on the Carnage of Goods by Sea (Draft Instrument). The proposed Draft Instrument would serve to make substantial changes with respect to laws involving the carriage of goods by sea: and presently contemplates, in part, that its application extend to the inland portion of transportation subject to a contract for carriage by sea.

The U.S. and Canadian railroad members of the AAR have serious concerns over the application of the Draft Instrument to rail transportation. There is already an existing and well established system in the U.S. and Canada which governs the liability of rail carriers for loss and damage to goods transported and the rights and obligations of both the rail carrier and the shipper. This system was promulgated by legislation and developed through litigation and regulatory agency action interpreting and applying the legislation.

Fundamental to the system in the U.S. and Canada as it relates to rail transportation in connection with a movement by sea is the right of each ocean carrier to enter into an agreement with the rail carrier that allows the ocean carrier to choose the level of protection it needs and desires for its cargo. (Also central to that system is that rail carriers compete with each other over the terms and conditions offered to each ocean carrier.) In that regard, the rail carrier has privity of contract only with the ocean carrier when transporting containers having a prior or subsequent movement by sea.

Original legislation setting forth the rail carriers' obligations with respect to loss and damage of cargo codified common law rules that a rail carrier was a "common carrier" and, as such, was liable for the full actual loss caused by it as a result of loss, damage or delay in the transportation of property[2]. Under the system applicable in the u.s. and Canada, as common carriers, railroads were required to transport commodities tendered to them upon

[1] The Association of American Railroads (AAR) is an association of railroads which includes among its members ail of the large freight railroads in Canada, the United Stares and Mexico as well as passenger railroads that operate the U.S. intercity passenger trains and that provide commuter rail service.

[2] Common carrier liability provisions in the U.S. (the "Carmack Amendment") are found at 49 U.S.C. § 11706 and in Canada in the Railway Traffic Liability Regulations.

reasonable demand. In addition, based upon the legislation in the U.S. and Canada, common law as well as state Jaw remedies and causes of action such as negligence, fraud, negligent misrepresentation, bailment, and deceptive trade practices, have been consistently he]d to be preempted by federal case law.

Subsequent legislation in the U.S. and Canada provided the railroads with the opportunity to enter into contractual arrangements with shippers which could alter the rail carriers' otherwise statutory common carrier obligations. Parties to a transportation contract could negotiate terms relating to liability which, for example, could provide for shorter terms for filing claims and *for* lesser liability than would otherwise be required by statute. To the extent that a rail carrier contracts to move cargo under a transportation contract, the liability of the rail carrier (which may, as an alternative, be full "common carrier" liability) is established by the contract between the railroad and the ocean carrier.

As a result, the U.S. and Canadian railroads' practice today is to have transportation contracts with ocean carriers called "circulars" that vary by carrier, but generally establish liability limitations, set forth affirmative defenses, and include provisions addressing unlocated loss and damage filing procedures, and the offering of alternative full "common carrier" liability terms. Other terms are set forth which may include those affecting liability, privity of contract, prohibited commodities and equipment, and shipper requirements. A] so customarily included in railroad circulars governing transportation of containers having a prior or subsequent movement by sea are terms incorporating limitations on liability set forth in the transportation contract or bill of lading between the ocean carrier and the shipper. Intermodal shippers (i.e., ocean carriers) currently have the ability to accept the provisions of these "circulars" or to enter into an agreement that has its own distinct rules and rate quotations to address their individual needs.

A critical feature of the contractual relationship, whether in the context of a circular or an individual contract, is that a claim for loss or damage can be brought against the railroads only by ocean carriers because the railroads do not have privity of contract with any other party in the transportation chain, including the shipper. This contractual relationship also provides for venue and jurisdiction terms which restrict suits for damage against the rail carrier in foreign jurisdictions. The end result is that the U.S. and Canada already have in place a uniform and well understood system of handling rail freight loss and damage claims which meet the needs of the parties involved[3].

The Draft Instrument would, however, significantly and adversely alter the current system affecting the U.S. and Canadian rail carriers' liability for loss and damage for goods having

[3] It should be noted that with respect to U.S. rail transponation. the *U.S.* Supreme Court has recogIJized that a prjmary purpose of the Carmack Amendment (i.e., the statute provjding the underpinning upon which the system of ljability for loss and damage to transported good~ is based) was to reljeve shippers of the burden *of* searching for the responsible carner from among those in the transponation chain. (Reider v. Thoml1son. 339 *U.S.* 113 (1950))

a prior or subsequent movement by sea. Specifically, Section 4.2.1 would extend the scope of the treaty to the inland portion of a sea movement and Section 6.3.2, which includes a railroad as a "performing party", would subject railroads to the liability terms standardized by the Draft Instrument. As a result, the U.S. and Canadian rail carriers would be required to accede to more onerous liability terms with no identifiable offsetting benefits.

Terms of the Draft Instrument would adversely modify the current system applicable to U.S. and Canadian railroads. These adverse changes would, in part, limit the rail carriers' ability and right to negotiate or offer individual contract terms including, for example, those relating to liability limitations on a per-package or per-container basis as an alternative to full common carrier liability (Section 6.7.1), weaken or eliminate requirements for privity of contract with the ocean carrier (Section 1.5), open land carriers to litigation in foreign jurisdictions (Article 17), restrict the participants' ability to govern their liability as a "performing party" (Section 6.3.1), and modify responsibility for blocking and bracing (Section 6.3.1(b)(ix)).

Accordingly, the U.S. and Canadian railroad members of the AAR strongly oppose the scope of Draft Instrument as presently written. Consistent with the concern raised by the United Nations Economic Commission for Europe and the United Nations Conference on Trade and Development in their comments on the Draft Instrument (UNCITRAL document *A/CN.9/WG.* III/WP. *21/*Add.1), expansion of the scope of the Draft Instrument beyond port-to-port transportation should not be undertaken without a thorough review and the resolution of all of the issues involved with such an expansion of scope.

It is the position of the U.S. and Canadian railroad members of the AAR that an Instrument relating to liability for goods transported by sea should take into account the issues of concern to the U.S. and Canadian railroads and be drafted to clearly and distinctly avoid adversely affecting: (1) the current contractual arrangements between ocean carriers and rail carriers with respect to the inland portion of a movement of goods also transported by sea, and (2) the rights and responsibilities of the parties to such contractual arrangements. The Draft Instrument's scope should therefore not be extended to apply to the land portion of any cargo transportation to the extent it adversely affects the current liability system applicable to U.S. and Canadian railroads.

2. INTERNATIONAL CHAMBER OF COMMERCE (ICC)

[Original: English]

Comments submitted by the Commission on Transport and Logistics of the International Chamber of Commerce on the United Nations Commission on International Trade Law (UNCITRAL) draft instrument on transport law

The International Chamber of Commerce (ICC) believes that trade by sea would be facilitated by a uniform, international ocean cargo liability regime, updated to take into account modern developments in transportation and logistics. ICC notes that a Working Group of the United Nations Commission on International Trade Law (UNCITRAL) is now considering a draft instrument on transport law, which includes provisions that comprehensively address issues relating to ocean cargo liability. ICC commends this effort, and looks forward to contributing to this initiative, which is driven by a desire for greater uniformity of ocean cargo liability regimes.

ICC's Commission on Transport and Logistics represents all segments of the international transport industry, including shippers, vessel operators, freight forwarders, carriers and insurers in over 130 countries. ICC aims to promote an open international trade and investment system and the market economy worldwide. ICC also facilitates trade by providing arbitration services and by developing voluntary rules such as the ICC Incoterms, the ICC UCP 500 and, together with UNCTAD, the UNCTAD/ICC Rules for Multimodal Transport Documents.

A variety of regimes currently govern liability for cargo loss or damage that occurs during international ocean carriage. The most prominent among those regimes are the "Hague Rules" of 1924 and the "Hague-Visby" rules, which were adopted in 1968. Other cargo liability regimes include the Hamburg rules and the Scandinavian Maritime Codes. In general, however, none of these regimes takes full account of modern developments in international trade such as containerization, multimodal transport, just-in-time delivery and e-commerce.

ICC believes efforts by UNCITRAL to develop principles for a new international cargo liability regime are desirable and commendable. Because the issue of cargo liability regimes for maritime transport is by its very nature an international issue, any new standard in the area should entail substantive consultations with all relevant industry representatives.

In developing a new, uniform international ocean transportation cargo liability regime, ICC's Transport Commission supports a regime that would:

- Contribute to the harmonization of liability regimes for door-to-door and maritime transport;

- Update and clarify the burdens of proof for all parties and defenses of a carrier or intermediary against whom a claim is made;

- Permit parties entering into customized ocean transportation contracts to agree to depart

from the requirements of the international ocean transportation cargo liability regime;

- Allow for adjustment of the Hague-Visby liability limits over time;

- Establish procedures and provide clarity of rights and obligations regarding cargo liability to minimize the burden on international trade resulting from excessive litigation; and

- Adopt modern and appropriate provisions governing other matters of importance for liability in the international transportation of goods, including forum selection, qualifying clauses by carriers, shipper obligations and others.

3. INTERNATIONAL GROUP OF PROTECTION & INDEMNITY CLUBS

[Original: English]

Submission of the International Group of P&I Clubs

1. The International Group of P&I Clubs (IG) is comprised of thirteen P&I Clubs that between them insure some 90% of the world's ocean-going tonnage. The Clubs are non-profit making mutual organisations. That is the member shipowners insure one another on an indemnity basis against a variety of third party liabilities relating to the use and operation of ships, including liability for loss of and damage to cargo.

2. Scope of Application

(a) Uncitral was established with the general mandate of furthering the harmonisation and unification of international trade law. Its initiative in seeking to develop a new convention that will govern the international carriage of goods involving carriage by sea is broadly welcomed by the maritime industry having regard to the proliferation of international conventions and domestic legislation in force in different jurisdictions, governing this mode of carriage. Lack of uniformity inevitably detracts from commercial and legal certainty, which is important to all parties engaged in the international carriage of goods.

(b) Uncitral is intending to devote a part of the 11th session of Working Group III to a discussion on the scope of the draft Instrument that is presently under consideration by the Working Group.

(c) Traditionally sea carriers contracted tackle-to-tackle, their responsibility under relevant maritime conventions being limited to the sea carriage, although they were free to assume responsibility for ancillary movements of the goods prior to loading and post discharge, normally within the confines of the loading and discharge ports. Current commercial and insurance practice as well as existing maritime conventions is generally structured to provide for this traditional type of carriage. However, although the majority of bulk and break bulk cargoes are still moved in this way and continue to predominate in tonnage terms, containerised cargo which now accounts for a very high percentage of cargo movements, is frequently carried on a door-to-door / multi-modal basis, that is carried by more than one mode of transport but under a single contract.

(d) The Rules of IG Clubs provide that liability will be excluded, should the carrier contract for sea carriage on terms less favourable than the Hague/Hague Visby Rules. However Clubs will also provide cover in respect of liabilities incurred under a door-to-door contract involving a sea leg, under which the shipowner assumes responsibility for the whole of the carriage, including that performed by some mode of transport other than the entered vessel e.g. road or rail. Such cover is however subject to the contract first being approved by the Club, which will normally only occur if the member contracts on terms no less favourable than any legislation compulsorily applicable to such other mode of transport e.g. CMR. A shipowner is required to preserve his rights of recourse against other parties involved in the performance of legs, other than the sea-leg.

(e) If door-to-door carriage were excluded any new convention would in the IG's view be of little assistance to the industry, merely resulting in a further convention of restricted application in an area of international law which is overburdened with competing legislation, creating further disharmony. In such circumstances it seems to the IG that it would be unlikely to attract widespread support from States.

(f) If the Instrument extends to door-to-door transport the question arises whether it should operate on a uniform or network basis, particularly in relation to its liability regime. (The IG is in agreement with the great majority of delegates that the liability regime should be fault based, as is provided for in the draft Instrument). In the former the Instrument's provisions on liability would operate throughout the carriage, that is during both the sea and inland leg(s) of the carriage irrespective of the mode of transport employed. In the latter the instrument would be displaced by any international convention compulsorily applicable to the inland leg(s), generally a uni-modal convention.

(g) Chapter 4.2.1 of the draft Instrument provides for the operation of what is described as a limited network system, that is restricted to the operation of mandatory provisions of any compulsorily applicable international convention, relating to the carrier's liability, limitation of liability and time limits. The IG as it has previously indicated agrees with this approach for the following reasons.

(1) As stated above containerised cargo now accounts for a very high percentage of cargo movements. Currently the great majority of carriers offering a door-to-door service (multi-modal operators (MTO)), whether shipowners, NVOCCs or freight forwarders, operate under contracts of carriage providing for a network system. In this regard it should be noted that the Unctad/ICC Rules for Multimodal Transport Documents which came into effect on the 1st January 1992 and which apply a network system, have gained wide acceptance within the industry and are in common use in relation to door-to-door carriage contracts. A recent Study carried out on behalf of the EC in relation to multi-modal transport indicated that 95% of EU shippers surveyed, reported a loss rate of less than 0.1% of cargo movements, of which less than 1% led to litigation. The IG estimates that of those matters that do lead to litigation, 80-90% settle prior to a hearing. Whilst accepting that the percentage loss rate might be marginally higher in certain other parts of the world, in the IG's opinion these statistics support the view that the network system has proved both practical and effective and is widely understood.

(2) Adopting a network rather than a uniform system would preserve the integrity of existing uni-modal conventions and by doing so reduce possible areas of conflict. This would in turn enhance the likelihood of the Instrument gaining widespread support.

(3) The costs of resolving a claim brought by cargo interests under a contract subject to a uniform liability system are likely to be greater than if brought under a contract subject to a network system. In the former case an MTO would have to settle with cargo interests on the basis of the uniform regime and then seek to recover from a sub-contractor who performed the inland leg, under a different uni-modal regime. In the latter case one regime would be applicable to both the claim and recourse action reducing the possible areas of dispute and thus costs.

(4) Existing uni-modal regimes have been shaped to meet the particular risks associated with the carriage of goods by particular modes of transport. Multi-modal transport involves carriage by different modes of transport. So far as it is both practical and achievable in the context of a single contract governing the whole movement, it would seem sensible to have each mode of transport governed to the limited extent imposed by uni-modal conventions familiar to cargo interests and carriers.

3. Allocation of Risk

The primary purpose of international carriage conventions is not only to promote international uniformity but also to ensure an acceptable and fair balance of rights and liabilities and thus allocation of risk between the parties to the carriage contract. The IG believe that it is most important that the Working Group should not lose sight of this principle in the course of this its initial deliberations on the draft Instrument. The Working Group is and has been considering the provisions of the Instrument on an article by article basis, in particular those articles relating to the carrier's rights, liabilities and responsibilities that have quite correctly been described as the heart of the Instrument. The IG believes that in considering these articles individually rather than as a whole, the Working Group is in danger of overlooking the principle and accordingly of preserving an equitable allocation of risk between carrier and cargo interests. It is worth noting that at its ninth session the Working Group agreed that it would commence its work on the Instrument 'by a broad exchange of views regarding the general policy reflected in the draft Instrument rather than focussing initially on an article by article analysis of the draft Instrument'.

Having said this we would make the following comments.

Carriage of goods contracts are essentially a matter of private law rather than public law and are not 'consumer' contracts in the accepted sense of that term. In the modern era, in virtually all cases the carriage contract is made between commercial parties of similar bargaining strength, although as has been pointed out large volume shippers today exercise considerable bargaining power.

It is perhaps worth noting that if the carrier is exposed to greater liability under the instrument when compared to the Hague / Hague-Visby Rules by reason of the elimination of defences and the imposition of greater obligations and responsibilities, his indemnity cover will prove more expensive. Such increase in cost would be passed on to cargo interests by way of higher freight rates. The IG therefore believes it unlikely that by imposing a more onerous liability system, there would be an overall saving on the total

costs of the carriage. It is more likely that the shift in allocation of risk between the parties and their respective insurers would merely be accompanied by a re-distribution between them of the costs of the carriage.

4. Obligations of the Carrier

(a) Extension of carrier's obligation to exercise due diligence

A majority of delegates to date has supported the extension of the carrier's obligation to exercise due diligence in relation to the vessel's seaworthiness, to the whole of the voyage and the elimination of the 'nautical fault' defence. As the IG has previously pointed out the adoption of the one and the elimination of the other would in the IG's view substantially affect the allocation of risk between carrier and cargo interests or more correctly their insurers, by imposing a greater risk on the carrier and thus an increased share of the overall costs of the carriage of goods.

Furthermore the attempt to impose a due diligence obligation throughout the voyage ignores the practical problems involved. It is extremely difficult for a shipowner to determine whether his ship is seaworthy when it is in the middle of the ocean. If it is decided that it is not seaworthy the shipowner will be faced with the dilemma of whether to immediately divert the ship to a port of refuge or repair port, which may be a considerable distance away thereby delaying the voyage, even though in some cases the vessel may be only a day from her destination. It is submitted that the requirement under Art. 3 Rule 2 to "properly and carefully load, handle, stow, carry, keep, care for and discharge the goods…" provides sufficient continuing responsibility.

(b) Elimination of nautical fault defence

It has been suggested by a number of delegates that the nautical fault defence is out of step with modern thought and international carriage conventions relating to other modes of transport and does not reflect the technological advances and administrative developments that have taken place in relation to ships and their equipment. We believe that it is misleading to compare sea transport with other forms of transport. Cargo quantities and values (and therefore frequently claims) are much greater, transit times are longer and the carriage is subject to many more factors over which the carrier has no control. Furthermore even though sophisticated navigational aids are now in place on most ships, the master and other senior officers are faced with a greatly increased workload, partly resulting from increased legislation and inspections. Further, a master is often called upon to make immediate and difficult decisions with limited information quite possibly in the face of competing interests, which if loss or damage occur are likely to be closely scrutinised with the benefit of hindsight.

It is perhaps worth noting that in an analysis of major claims (that is claims exceeding US$ 100,000) arising between 1987 and 1997 conducted by one of the largest Clubs in the International Group, it was found that cargo claims represented 40% of all major claims and Deck Officer Error, which in the main relates to error in the navigation or management of the ship, was the principal cause of 25% of all major claims.

5. Maintaining a balance of rights and liabilities if nautical fault defence is eliminated and due diligence is extended throughout the voyage

If nevertheless it is decided that the due diligence obligation should be extended and that the nautical fault defence should be eliminated, the IG believes in order to maintain a degree of balance between carrier and cargo interests the provisions of Article 6 should reflect the following:

(a) 6.1.2 – Nautical fault defence and fire

(i) The onus of proving loss or damage due to negligent navigation or management of the vessel should lie with cargo interests.

(ii) The nautical fault defence should be retained in relation to pilot error. The carrier in voluntary as well as compulsory pilotage areas must engage a pilot in whose selection he has no choice. Furthermore it would be a bold master who would override the navigational decisions of a pilot, when the pilot is on board precisely because of his local knowledge of the area. Pilot error was found to be the principal cause of 5% of all major claims in the analysis of major claims referred to above.

(iii) Fire should be retained as a defence unless caused by the actual fault or privity of the carrier. This is particularly relevant in the context of cargoes that are susceptible to spontaneous combustion.

(b) 6.1.4 – Apportionment of liability

If loss or damage is caused in part by an event for which the carrier is liable and in part by an event for which he is not, the burden of proof should be shared between carrier and cargo as proposed in the second alternative appearing under Chapter 6.1.4. This proposal is equitable and reflects the concept of achieving a balance between the parties.

(c) 6.4 - Delay

If a carrier is to be made liable for delay such liability should be restricted to contracts where a time for delivery has been expressly agreed between the parties. It is a purely commercial matter similar to the general requirement in other forms of commercial contract of expressly making time of the essence if imposing liability for delay. The International Group has pointed out above that sea carriage is subject to many more factors beyond the carrier's control than carriage by air, road, rail and inland waterways, all of which could have a bearing on passage time.

(d) 6.7 - Limits of liability

The IG believe that the Hague-Visby limits represent a fair measure of compensation particularly when measured against the comparative decline in freight rates since their introduction. It agrees with the suggestion that a limitation review procedure should be incorporated in the draft Instrument. It is worth noting that the NIT League and the World Shipping Council which represent between them a very substantial sector of the industry support the Hague-Visby limits subject to incorporating a review procedure.

(e) 6.8 – Loss of right to limit liability

The carrier's loss of the right to limit should be restricted to instances of the carrier's personal act or omission done with intent or done recklessly and with knowledge that such loss would probably result. as provided for in the draft Instrument and should not be expanded to include the act or omission of his servants or agents. This is the test normally found in international transport conventions.

Conclusion

In conclusion the International Group submits that it is premature to consider changes to the individual articles in the draft Instrument before establishing a framework for an equitable balance of rights and liabilities between carrier and cargo interests

4. INTERNATIONAL ROAD TRANSPORT UNION (IRU)

[Original: English, French]

DRAWING UP OF A NEW CONVENTION ON THE CARRIAGE OF GOODS BY SEA AND EXTENDING THIS CONVENTION TO DOOR-TO-DOOR TRANSPORT OPERATIONS

1. The International Road Transport Union (IRU) considers that the status of contractual liability of sea carriers is catastrophic.

The only clear provisions in this field are established by EUROTUNNEL and by shipping lines recorded on the COTIF list and operated by the railways, since those shipping lines are subject to the binding liability regime foreseen by the COTIF Convention. As for other sea carriers, their contractual liability is subject to a multitude of legal systems.

The Hague Rules or Hague-Visby Rules are not binding as long as no bill of lading has been issued. In principle, no such bill of lading is ever issued for intra-European transport operations.

Furthermore, the uniform application of these Rules is a fiction!
They are a vivid proof of failure in the process to harmonise transport law and commercial law. Indeed, if only looking at European countries and those of the Maghreb and of the Near East, one has to observe that:

- the Hague Rules are accepted by Algeria, Germany, Ireland, Israel, Monaco, Portugal, Romania, Turkey and Yugoslavia,

- the Visby Rules are accepted by Denmark, Finland, Greece, Italy, the Netherlands, Sweden and the UK (by accepting the Visby Rules, these countries have denounced the Hague Rules),

- the Hague-Visby Rules are accepted by Belgium, Croatia, Egypt, France, Lebanon, Poland, Spain and Syria,

- the Hamburg Rules are accepted by Egypt, Lebanon, Morocco, Romania and Turkey,

- Estonia, Latvia, Lithuania, Russia and the Ukraine have not subscribed to any of the above-mentioned legal instruments.

It follows therefrom that:

- sea transport operations between Algeria, Germany, Ireland, Israel, Monaco,

Portugal, Romania, Turkey and Yugoslavia on the one hand, and Denmark, Finland, Greece, Italy, the Netherlands, Sweden and the UK on the other, are not subject to any joint international legal instrument, but rather governed by the sometimes little known and dissimilar liability rules and limitations set by the national legislation of each country mentioned and, within this legal framework, by the rules set by shipping companies,

- sea transport operations between Estonia, Latvia, Lithuania, Russia and the Ukraine one the one hand, and all other countries on the other, are not subject to any joint international legal instrument, but rather governed by the little known and dissimilar liability rules and limitations set by the national legislation of each country mentioned and, within this legal framework, by the rules set by shipping companies,

- sea transport operations between Egypt, Lebanon, Romania, Turkey and Morocco are exclusively subject to the Hamburg Rules, which is positive since these Rules are better suited to the needs of shippers,

- sea transport operations between Algeria, Germany, Ireland, Israel, Monaco, Portugal, Romania, Turkey and Yugoslavia are exclusively subject to the Hague Rules (however, in its Commercial Code, Germany has altered the liability limits foreseen by the Hague Rules by replacing them with those of the Visby Rules).

Furthermore, the Hague Rules and Hague-Visby Rules do not apply:

- to the transport of containers and road vehicles on deck (a frequent occurrence). Therefore, sea carriers accept no liability for the goods loaded into such containers or onto such trucks.

- to the transport of containers and road vehicles stowed in the ship's hold, but for which a Sea Waybill was issued instead of a Bill of Lading. Indeed, bills of lading are never issued for transport operations between European countries, even at the shipper's request.

In such cases, sea carriers may deviate from or alter the Hague Rules or the Hague-Visby Rules, which they are indeed prone to do. They thus subject their own liability to haphazard rules, rejecting the full application of the Hague Rules or Hague-Visby Rules, and selecting the latter's provisions which suit their own purposes while rejecting others. In practice, a container or truck, whether loaded or unloaded, is considered as a single package and the compensation payable by the sea carrier does not exceed SDR 666.67 per container or truck, goods included.

2. Given the above, the IRU is of the opinion that one should avoid multiplying international conventions on the contract of carriage by sea. The legal chaos caused by the implementation of the Hague Rules, the Hague-Visby Rules and the Hamburg Rules cannot be solved by yet another legal instrument, whose planned provisions may lead, if not to summary dismissal, at least to intense and never-ending discussions between the 27 countries having already acceded to the Hamburg Rules, the 24 countries having accepted the Hague-Visby Rules and the 44 countries still adhering to the old Hague Rules.
This opinion seems all the more commanding in the case in point since it concerns the work carried out by a mere thirty countries represented within UNCITRAL.

3. In our opinion, UNCITRAL would do better to use its prestige to have the various

States accede to the Hamburg Rules, for which UNCITRAL claims authorship and must also ensure follow-up. The road transport industry is particularly interested in these Rules whose provisions - contrary to the Hague Rules and Hague-Visby Rules - apply to any transport document issued by sea carriers and serve to avoid the many exception clauses inserted into the various sea waybills issued by sea transport operators based on the Hague Rules and Hague-Visby Rules.

4. As for extending the future convention on the contract of carriage by sea to operations preceding or following the sea transport operation, it should be noted that such a legal instrument would merely be a multimodal convention in disguise.

There is no reason to think that such a new legal instrument would have a greater chance of being accepted than the 1980 Convention on Multimodal Transport. The major differences between legal cultures and mentalities already observed at the time, added to the irreconcilable interests of the various continents, are no cause for optimism.

Furthermore, it would be foolish to extend to non-sea transport a new liability regime foreseen for sea transport which has yet failed to prove its worth for the very mode for which it appears to have been specifically designed, and whose chances of eliminating the chaos prevailing in sea transport already appear very thin, judging from the discussions held during previous sessions of UNCITRAL.

5. The IRU takes this opportunity to inform UNCITRAL that, when trucks carrying goods or containers are transported by sea, the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road), by virtue of its article 2, also applies to the sea leg should any loss, damage or delay in delivery occur during the sea carriage, unless a bill of lading was issued. Given that such a bill of lading is virtually never drawn up for goods and containers loaded onto trucks, road transport operations including a sea leg remain subject to the CMR Convention, whose provisions foresee a liability limit of SDR 8.33 per kilo of gross weight short. In the event of a delay resulting from the sea transport operation, the road carrier shall pay compensation for such damage not exceeding the carriage charges.

The IRU is committed to extending the liability limits set by the CMR Convention to all multimodal transport operations performed by road carriers.

Annex

QUESTIONNAIRE

1. Do you feel that it would be helpful to have a single liability scheme applicable to door-to-door shipments which involve an overseas leg?

2. If so, why?

3. Should the same law be applicable to the entire transport of the goods, both on land and sea?

4. Should all of the participants in the door-to-door carriage of the cargo, including stevedores, terminal operators, truckers, railroad, warehouses and others, be subject to the same liability regime as the ocean carrier?

5. Should the participants in door-to-door carriage, such as the stevedores, terminal operators, truckers, railroads, warehouse and others be subject to direct claims by cargo interests or their underwriters under a single multi-modal regime for damage caused by the particular participant?

6. In the event that existing conventions apply to land transport, such as the Convention on the International Carriage of Goods by Road (CMR), should those conventions continue to control the liability of the land carrier when the land carrier is involved in the carriage of goods over sea and land, or could the land carrier under certain circumstances be subject to the same liability regime as the ocean carrier?

7. What advantages, if any, do you see in applying a uniform liability regime to both land and sea transport in multi-modal carriage?

8. What problems are commonly experienced today, if any, as a result of the existing system of liability regimes for door-to-door carriage of goods?

9. Do you perceive any advantages to the industry if cargo interests or their underwriters are given the opportunity to make a claim directly against the subcontractor of the carrier who issues the bill of lading for damage or loss that occurred whilst in the subcontractor's custody?

10. Please take this opportunity to indicate if you have any further comments or observations in respect to the instrument as currently drafted by UNCITRAL.