and damage" resulting from the inclusion of an invalid (or "clearly" invalid) clause in the contract of carriage.[12]

13. The approach mentioned in paragraph 7 (*d*), above, responds to the view that invalid clauses are particularly susceptible of abuse when the cargo owner is not aware of the provisions of the Convention which invalidate such clauses. It seems possible that some cargo owners, particularly cargo owners who are not a part of a large business establishment, might feel that they were bound by a provision in the contract of carriage which would appear clearly to bar their claim. To alert such persons to their rights, consideration might be given to a provision that contracts of carriage subject to the Convention must state that any provision of the contract that is inconsistent with the Convention cannot be given effect.[13]

14. Such a "requirement" would be meaningless unless failure to include the required provision in the contract of carriage is subject to a sanction. It seems that there could be little excuse for failing to include such a prescribed statement in the contract of carriage. Consequently, it might be appropriate to follow article 9 of the 1929 Warsaw (Air) Convention, which states that if the air consigment note fails to contain particulars specified in article 8 (including "a statement that the carriage is subject to the rules relating to liability established by this Convention"), "the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability".

15. A requirement that the contract of carriage alert the cargo owner to the protection afforded by the Convention (paragraph 13, above) probably would provide only modest assistance to minimize the abuse of invalid clauses. But if the Working Group should conclude that alternative measures are not feasible, this minimal approach to the problem may be worthy of attention.

[12] One attractive feature of a rule based on the CMR Convention is that the causal connexion between the invalid clause and the resulting loss would avoid the argument that sanctions would be invalid in some hypothetical or unlikely situation. The sanction of loss of limitation of liability, provided in article 9 of the Warsaw Convention, lacks this causal connexion, and may be unduly harsh in situations where the invalidity of the contract clause may be in doubt.

[13] Such a required statement probably should stress the possible invalidity of contractual provisions more clearly than does article 6 (1) (*k*) of the Road (CMR) Convention, which requires that the consignment note contain "a statement that the *carriage is subject,* notwithstanding any clause to the contrary, *to the provisions* of this Convention".

5. *Report of the Working Group on International Legislation on Shipping on the work of its fifth session (New York, 5-16 February 1973) (A/CN.9/76)* *

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* 28 February 1973.

Introduction

1. The Working Group on International Legislation on Shipping was established by the United Nations Commission on International Trade Law (UNCITRAL) at its second session, held in March 1969. The Working Group was enlarged by the Commission at its fourth session and now consists of the following 21 members of the Commission: Argentina, Australia, Belgium, Brazil, Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Zaire.

2. At its third session,[1] the Working Group decided to devote the fifth session to a consideration of those topics listed in the resolution adopted by UNCITRAL at its fourth session that had not yet received consideration by the Working Group at its fourth session.[2] These remaining topics were: (1) unit limitation of liability; (2) trans-shipment; (3) deviation; (4) the period of limitation; (5) definitions under article 1 of the convention; and (6) elimination of invalid clauses in bills of lading.

3. The Working Group held its fifth session in New York from 5 to 16 February 1973.

4. Seventeen members of the Working Group were represented at the session.[3] The session was also attended by the following members of the Commission: Guyana and Iran, and by observers from the following international, intergovernmental and non-governmental organizations: The United Nations Conference on Trade and Development (UNCTAD), the Inter-Governmental Maritime Consultative Organization (IMCO), The International Chamber of Commerce, the International Chamber of Shipping, the International Maritime Committee and the International Union of Marine Insurance.

5. The Working Group, by acclamation, elected the following officers:

Chairman: Mr. José Domingo Ray (Argentina)
Vice-Chairman: Mr. Stanislaw Suchorzewski (Poland)
Rapporteur: Mr. L. H. Khoo (Singapore).

6. The following documents were placed before the Working Group:

(1) Provisional agenda and annotations (A/CN.9/WG.III/R.2)

(2) "Memorandum concerning the structure of a possible new convention on the carriage of goods by sea", submitted by the Norwegian delegation (A/CN.9/WG.III/WP.9)

(3) Report by the Secretary-General entitled "Second report on responsibility of ocean carriers for cargo: bills of lading" (unit limitation of liability; trans-shipment; deviation; the period of limitation, definitions, invalid clauses) (A/CN.9/WG.III/WP.10, vols. I-III) *

(4) Replies of Governments and international organizations to the second questionnaire on responsibility of carriers for loss or damage to cargo in the context of bills of lading (A/CN.9/WG.III/WP.10/Add.1 and Add.2)

(5) Report by the Secretary-General entitled "Identification of problem areas in the field of ocean bills of lading for possible further study (A/CN.9/WG.III/R.1).

7. The Working Group adopted the following agenda:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda
4. Consideration of the substantive items selected by the third and fourth sessions of the Working Group to be dealt with by the fifth session
5. Future work
6. Adoption of the report.

8. The Working Group decided to use the report of the Secretary-General entitled "Second report on responsibility of ocean carriers for cargo: bills or lading" (hereinafter referred to as the second report of the Secretary-General (A/CN.9/WG.III/WP.10, vols. I-III)) as its working document. In that report the Secretary-General examined the following topics: unit limitation of liability (part one); trans-shipment (part two); deviation (part three); the period of limitation (part four); definitions under article 1 of the convention (part five); elimination of invalid clauses in bills of lading (part six). The report of the Secretary-General is annexed to the present report in an addendum (A/CN.9/76/Add.1).*

I. Unit limitation of liability

A. INTRODUCTION

9. The areas for study established by the Commission include "unit limitation of liability". This subject was considered in part one of the second report of the Secretary-General (A/CN.9/76/Add.1).* In response to suggestions made at the fourth session of the Working Group, the report was directed primarily at the structure and approach of the rules on limitation of liability, as contrasted with the monetary level of the limitations.

[1] Report of the Working Group on International Legislation on Shipping on the work of its third session, held in Geneva from 31 January to 11 February 1972 (A/CN.9/63; UNCITRAL Yearbook, vol. III: 1972, part two, IV) (herein cited as Working Group, report on third session).

[2] Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A (herein referred to as UNCITRAL, report on the fourth session (1971)), report of the Working Group on International Legislation on Shipping on the work of its fourth (special) session held in Geneva from 25 September to 6 October 1972 (A/CN.9/74, reproduced in this volume, part two, IV, I, above) (herein cited as Working Group, report on fourth session).

[3] All members of the Working Group were represented at the session with the exception of Chile, Ghana, Spain, and Zaire.

* Reproduced in this volume, part two, IV, 4, above.

10. As was noted in the report, article 4 (5) of the Brussels Convention of 1924 established an upper limit on the liability of the carrier or ship of 100 pounds sterling "per package or unit".[4] The Brussels Protocol of 1968 would replace this single standard with a double standard. Under article 2 (*a*) of the Protocol the limit on liability was either: (1) frs. 10,000 "per package or unit" or (2) frs. 30 "per kilo of gross weight of the goods lost or damaged" whichever was higher.[5] It was noted that the first of these standards was applicable to relatively light packages or units; if a package or unit weighed 334 kilos or more, the second standard produced the higher (and therefore the applicable) limitation.

11. The report (part one, paras. 12-31) discussed problems of interpretation that had been presented by the "package or unit" standard and set forth three alternative drafts addressed to these problems. Under alternative I (*id.*, para. 23), when goods were not shipped in a "package" (e.g., bulk cargo), the applicable standard would be the "freight unit". The report (*id.*, para. 24) analysed problems of interpretation that could arise under a "freight unit" standard, and in alternatives II-A and II-B set forth language whereby this standard would not be applicable: the language suggested in alternative II-A was "per package or other shipping unit" and in alternative II-B "per shipping unit".

12. The report also discussed problems presented in containerized transport under the "package or unit" standard. The basic question was whether the container constituted a single package or unit regardless of the number of items inside, or whether each item of cargo inside the container constituted a package or unit (*id.*, para. 18). Attention was drawn to the provision of article 2 (*c*) of the Brussels Protocol which states:

> "(*c*) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units ennumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned; except as aforesaid such article of transport shall be considered the package or unit."

13. In connexion with article 2 (*c*), attention was drawn in the report to the question whether the container itself, when supplied by the shipper, would constitute an additional package or unit so that the limit of liability would be increased when such a container was damaged or lost in the course of shipment. A draft amendment was presented to clarify this question (report, part one, para. 20).

14. The report also directed attention to proposals that the "package or unit" standard should not be employed for purposes of limitation of liability; under these proposals the weight ("frs.— per kilo") would provide the sole standard.

15. Attention was also directed to problems of interpretation that might arise under the provision of the Brussels Protocol prescribing a monetary limit "per kilo of gross weight of the goods lost or damaged". It was suggested that it might be useful to distinguish between (1) total and partial *loss* of the goods and (2) *damage* to goods; a draft provision to this effect, based on provisions of the International Convention concerning the Carriage of Goods by Rail (CIM Convention)[6] and the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention)[7] was set forth in the report (alternative III-B; report, part one, para. 38). It was indicated that clarification along these lines might be useful regardless of whether a standard based on the weight of the goods would be the sole standard, or would be part of a double standard.

B. DISCUSSION BY THE WORKING GROUP

(1) The basic limitation of liability rule

16. The Working Group considered the approaches that had been set forth in the alternative proposals in the report of the Secretary-General. It was generally agreed that any system for determining the upper limit of carrier liability should include a weight standard (frs.— per kilo). Several representatives favoured the adoption of weight as the sole standard for limiting the carrier's liability. One representative indicated that either a system based on weight alone or a system based on weight and packages or units such as that provided for in article 2 (*a*) of the 1968 Brussels Protocol would be acceptable.

17. Those representatives who favoured weight as the single standard for determining the limit of the carrier's liability indicated that the limitation system adopted must be simple and clear, so that it would not promote litigation. From this point of view the "package or unit" standard of the Brussels Convention of 1924 had proved to be unsatisfactory; in addition, divergent interpretations had resulted. Moreover, since intermodal transport was on the increase, limitation rules for maritime carriers should be in harmony with the weight limitation system which is used in other fields of transport. One of these representatives stated that there was no experience with the dual system, since the 1968 Brussels Protocol had not come into effect, while a weight only system had worked well in other fields of transport and had not led to a great deal of litigation; on the other hand the package or unit limitation had caused difficulties in practice, being productive of litigation. This representative also pointed to the inherent injustice of the dual system which focused on the size and form of goods rather than on their quantity or value.

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[4] International Convention for the Unification of Certain Rules Relating to Bills of Lading (League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764), reproduced in the Register of Texts of Conventions and other Instruments concerning International Trade Law, vol. II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3).

[5] Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, adopted February 1968, reproduced in the Register of Texts of Conventions and other Instruments concerning International Trade Law, vol. II, chap. II, 1.

[6] United Nations, *Treaty Series*, vol. 241, No. 3442.

[7] *Ibid.*, vol. 399, No. 3742.

It was suggested that under a single weight standard, the problem of high-value cargo with low weight could be solved by establishing a specified minimum limit on liability.

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

(2) Provision dealing with containers

19. Related to the limit of liability "per package or unit" was the question of the effect of consolidating packages within a container. There was general agreement that if the system of limitation of liability included the "package or unit" standard, such a standard would need to be supplemented by a provision on containers following the general lines of article 2 (*c*) of the 1968 Brussels Protocol (quoted at paragraph 12, above).

20. One representative proposed a provision on containers that only the weight standard would be applicable where the shipper (as contrasted with the carrier) had packed the container. Other representatives who favoured the dual system stated that such a provision would be incompatible with the dual system, and it was suggested that this proposal would discriminate against shippers who pack containers, often with the encouragement of carriers.

(3) Other issues

21. The Working Group considered whether the rules on the limitation of liability should apply to servants and agents of the carrier. There was general support by the Working Group for a rule based on article 3 (2) of the 1968 Brussels Protocol, whereby the servant or agent is entitled to avail himself of the same limits of liability as the carrier.

22. The Working Group also discussed the question whether the limitations on liability, should be removed with respect to damage caused intentionally or recklessly, or by other serious misconduct. One issue was whether serious misconduct of the carrier's agents or servants should break the limitation on liability applicable to the carrier. Several representatives considered that the carrier should be fully responsible for such conduct by his agents or servants acting within the scope of their employment; it was suggested that any other rule would be difficult to apply since modern carriers perform most of their activities through agents and servants. On the other hand, several, representatives stated that the limitation of liability applicable to the carrier should not be broken because of acts by the carrier's agents or servants. Although many types of serious misconduct (such as theft) would not be performed in the scope of the employment of the servants or agents, in the setting of serious misconduct the "scope of employment" test was difficult to apply. As regards theft, certain representatives considered that it could be committed "in the scope of employment" of a servant or agent.

23. The distinction between intentional conduct and reckless conduct was discussed by the Working Group. It was indicated by some representatives that both these types of conduct by either the carrier or his servants or agents should deprive the carrier of the protection or the provisions on limitations on liability. Other representatives favoured limiting removal of the limit to cases of intentional conduct or wilful misconduct on the ground that a rule referring to "reckless" conduct was vague and difficult to apply.

24. It was suggested that an alternative method for dealing with the question would be to raise the limitation limit and to delete any provision dealing with removal of the limit. It was pointed out that acceptance of such a proposal for an "unbreakable" limitation would depend on the sum set as the upper limit.

25. The consequences of misstatements by the shipper of the nature and value of the goods where also discussed by the Working Group in connexion with article 2 (*h*) of the 1968 Brussels Protocol which provides that the carrier shall not be responsible for loss or damage to goods if their nature of value has been knowingly misstated by the shipper in the bill of lading. It was pointed out that such a rule, if applied literally, was too harsh since it would free the carrier from liability for any fault on his part. It was suggested that a correct interpretation of the rule would be that such misstatement by the shipper would merely invalidate the shipper's declaration of the nature and value of the goods. It was further suggested that the rules of national law might be adequate for his purpose.

C. REPORT OF THE DRAFTING PARTY

26. The Working Group, after a discussion of alternative approaches to the limitation of liability of carriers, decided to constitute a Drafting Party to prepare texts on this subject as well as on the other subjects that were to be considered at the fifth session.[8] The report of the Drafting Party on the limitation of liability of carrier, with to amendments to the text of the proposed draft provisions made by the Working Group,[9] is as follows:

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[8] The Drafting Party was composed of the representatives of Argentina, France, India, Japan, Nigeria, Norway, United Republic of Tanzania, United Kingdom of Great Britain and Northern Ireland, Union of Soviet Socialist Republics and United States of America. The Drafting Party elected as Chairman Mr. E. Chr. Selvig (Norway).

[9] The amendments made by the Working Group are the following: (*a*) the provision that had originally appeared as paragraph 5 of article A became article C; consequently, paragraph 6 of article A became paragraph 5; (*b*) the brackets that had been placed around paragraph 1 of article B were removed. The earlier use of the brackets is reflected in paragraph 12 of the report of the Drafting Party. The Working Group also decided to delete the following words appearing originally as the second sentence of paragraph 3 of article B: "However, additional compensation may be recovered from the carrier or any such person according to the provision of paragraph [5 of article A]" (now article C).

PART I OF THE REPORT OF THE DRAFTING PARTY: UNIT LIMITATION OF LIABILITY

1. The draft set forth below is designed to implement the following decisions taken by the Working Group:

(*a*) The Working Group decided to maintain the dual system of limitation of liability, adopted in article 2 of the 1968 Brussels Protocol, whereby the limit of the carrier's liability is determined on the basis of a specific amount (1) per package or unit or (2) per kilo or gross weight of the goods lost or damaged, whichever is higher.

(*b*) The Working Group agreed that the Convention should take into account the use of containers and accordingly decided to maintain the principle set out in article 2 (*c*) of the 1968 Brussels Protocol which gave effect to the enumeration in the bill of lading of packages or units packed in the container. The Working Group also decided that an article of transport, such as a container, where supplied by the shipper, should be considered to be a separate package; this rule should be followed regardless of whether the packages or units were enumerated in the bill of lading.

2. The Drafting Party recommends the following text to implement these objectives:

Article A

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

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

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

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

3. A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900′.

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

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

Article B

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

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

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

Article C

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

Notes on the proposed draft provisions

3. With respect to paragraph 1 of article A, the Drafting Party has considered the drafting of a more detailed text aimed at drawing a clear distinction between liability for (1) total or partial loss and (2) damage to all or part of the goods. However, it has been decided that the present text is adequate and that a more detailed draft would not be an improvement on the language of the Brussels Protocol.

4. Paragraph 2 of article A serves as a further definition of the alternative in paragraph 1 with respect to "package or other shipping unit" and does not exclude recourse to the alternative based on gross weight. This paragraph embodies the principal aim of article 2 (*c*) of the 1968 Brussels Protocol, namely, to avoid the reduction of the carrier's liability when individual packages are consolidated in containers. This paragraph also provides that when the container itself, if not owned or otherwise supplied by the carrier, is lost or damaged, the container is counted as a separate unit.

5. The representatives of Nigeria and Norway have reserved their position with respect to paragraphs 1 and 2 of article A and have proposed replacing these paragraphs with the following provision:

> "The liability of the carrier for loss of or damage to the goods shall be limited to an amount equivalent to [ ] francs per kilo of gross weight of the goods lost or damaged."

6. Paragraph 3 of article A of the proposed draft follows the language of the first sentence or article 2 (*d*) of the 1968 Brussels Protocol.

7. Paragraph 4 of article A concerns matters dealt with in the second sentence of article 2 (*d*) of the 1968 Brussels Protocol. The drafting Party noted that the Brussels Protocol left the date of conversion of the sum awarded to the law of the court seized of the case. In the interest of uniformity the proposed draft specifies that the conversion shall take place on the date when the judgement or arbitral award is rendered. The draft also refers to conversion, into the national currency of the State of the court or arbitral tribunal seized of the case, on the basis of the official value of that currency. One representative has reserved his position with respect to the inclusion in the concept of an official value of that currency as the basis for conversion.

8. The Drafting Party has considered the inclusion of language that would specify a date for conversion into national currency in cases where the parties settle the claim without resorting to judicial litigation or arbitration. This approach has not been adopted by the Drafting Party. It is noted, in this connexion, that the approach followed by the Drafting Party, in concerning itself only with judicial or arbitral situations, follows the patern of other conventions in the field.

9. Paragraph 5 of article A specifies that the carrier and shipper may by agreement raise the limit of the carrier's liability. This paragraph picks up the substance of the first part of article 2 (*a*) and article 2 (*g*) of the Brussels Protocol. This provision is set in brackets on the ground such language may not be necessary in view of the general rule on the right of the carrier to agree to an increase of his liability which is embodied in article 5 of the Brussels Convention of 1924. However, this bracketed language is set forth at this point pending action on general provisions concerning the carrier's right to increase his liability.

10. The Drafting Party has concluded that it is not necessary to set forth a rule dealing with the evidentiary consequences of a declaration or other agreement as to the value of the goods (article 2 (*f*) of the Brussels Protocol).

11. The Drafting Party has also considered whether to retain a rule such as that set forth in article 2 (*h*) of the Brussels Protocol which provides: "Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading." It has been considered by the Drafting Party that a rule such as that of article 2 (*h*) of the Protocol might be construed to mean that where the shipper has knowingly misstated the nature or value of the goods he cannot recover any part of his loss even if the loss resulted from fault on the part of the carrier. In this connexion, the Drafting Party has concluded that this problem is dealt with by the general rules of law of each country that would deny effect to agreements for a higher value obtained by misrepresentation.

12. Paragraph 1 of article B of the draft is set out in brackets because it was not considered by the Working Group and thus examination of the rule embodied within it was not in the Drafting Party's terms of reference. This provision is an integral part of the 1968 Brussels Protocol (article 3 (1)) and it was agreed that it should be included tentatively herein to present a draft text that is as complete as possible.[10]

13. Paragraph 2 of article B of the draft is generally based on article 3 (2) of the 1968 Brussels Protocol. However, it incorporates language which is consistent with article C of this draft in that the servant or agent is entitled to avail himself of the limitation of liability only if he proves that he acted within the scope of his employment.

14. Paragraph 3 of article B takes up the substance of article 3 (3) of the 1968 Brussels Protocol.

15. Article C responds to problems regarding circumstances when the limitation of liability will not apply. This article is a departure from the articles 2 (*e*) and 3 (4) of the 1968 Brussels Protocol in that under the language of article C the carrier may not limit his liability for the acts of his servants and agents when such acts are caused by wilful misconduct on their part. The use of the concept of "wilful misconduct" has been agreed to as the most acceptable compromise for setting the standard for measuring the type of activity that would remove the limitation to liability.

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

27. The Working Group considered the above-quoted report of the Drafting Party.[11] The report of the Drafting Party, including the proposed draft provisions, was approved by a majority of the Working Group.

28. The following comments, proposals and reservations were made with respect to several paragraphs of the proposed draft provisions:

(*a*) With respect to paragraph 2 of article A one representative reserved his position and proposed the following alternative text:

> "Notwithstanding paragraph 1, where a container, pallet or similar article of transport is used to consolidate, goods the amount based upon the package or other shipping unit in paragraph 1 shall not be used as the basis for the limit of liability of the carrier or his servants, and agents, or the ship."

(*b*) With respect to paragraph 4 of article A, one representative reserved his position and stated that such a provision would create litigation since it leaves room for much dispute. This representative stated in particular that the provision does not provide for a general conversion into a national currency such as provided for in the Warsaw Convention and in other conventions.

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[10] See foot-note 9 above.

[11] See foot-note 9 above.

(*c*) With respect to article C, several representatives reserved their positions. It was indicated that this provision would cause many complications and was unfair to the carrier because of the vicarious liability of the carrier for the wilful misconduct of his servants and agents imposed therein. Some representatives stated their preference for the approach taken in articles 2 (*e*) and 3 (4) of the 1968 Brussels Protocol. Observers of international non-governmental organizations, supporting the maintenance of the provisions of the 1968 Brussels Protocol, indicated that the words "within the scope of their employment" would cause serious difficulties of interpretation, thus giving rise to much litigation. They were also of the opinion that the proposed provision was contrary to the modern trend in favour of unbreakable limits, and would result in higher insurance premiums being payable than at present. It was pointed out that this provision was the result of negotiations in the Drafting Party as reflected in paragraph 15 of the report of the Drafting Party on this subject. Two representatives thought that this article might not be necessary if a sufficiently high limit of liability was ultimately provided for in article A; however, one for these representatives disagreed with the conclusions of the said obervers as to higher insurance premiums. Another representative was of the opinion that this article should be confined to damage done with intent to cause damage. However, the Working Group was generally in favour of this article as a suitable compromise solution to the problem.

29. One representative, supported by one other representative, proposed the addition of three new paragraphs to article A of the proposed draft provisions. The additions would read as follows:

> "6. Where the value of the goods has been declared by the shipper before their receipt by the carrier and inserted in the bill of lading, the limits of liability, provided for in paragraph 1, shall not be applied and such declaration embodied in the bill of lading shall be *prima facie* evidence of the value of such goods.
>
> "7. If a value, which is remarkably higher than the actual value of the goods, has been knowingly misstated by the shipper in the bill of lading, the carrier shall not be responsible for any loss or damage to the goods.
>
> "8. Unless the exact nature (or descriptions) of the value of the goods has been furnished in writing by the shipper before they are received by the carrier, the carrier shall not be responsible for any loss or damage to the goods."

The representative who introduced this proposal stated that it would provide the necessary general principles on the declaration of value by shippers and was aimed at preventing wilful misstatements by shippers. On the other hand, all other representatives who spoke expressed their opposition to the inclusion of these proposed paragraphs. It was stated that these paragraphs would lead to more difficulties than solutions. It was also observed that the question of misrepresentations by the shipper, such as deliberate misstatements by the shipper of the value of the goods, should be left to national law. One representative declared his opposition to what were in his opinion essentially penal provisions. It was also pointed out that the Drafting Party had carefully considered the inclusion of such a provision but that it had rejected it (paragraphs 10 and 11 of part I of the report of the Drafting Party).

II. Trans-shipment

A. INTRODUCTION

30. Problems presented by trans-shipment were examined in part two of the second report of the Secretary-General.[12] In the report, the legal issues and alternative solutions were analysed in the setting of the following two situations:

(*a*) In one situation, typified by the standard "through" bill of lading, trans-shipment to a second carrier is specifically agreed upon at the time of shipment. For example, a shipper in Bombay who is sending goods to Tokyo may make a contract with a carrier whereby the contracting carrier agrees to carry the goods in his vessel to Sydney and at Sydney to trans-ship the goods to an on-carrier for the carriage from Sydney to Tokyo. Under such an arrangement the face of the bill of lading would be filled in as follows: "Port of loading: *Bombay*; port of discharge: *Sydney*; final destination: *Tokyo*". The report further noted that such a bill of lading would commonly include clauses to the effect that, with respect to carriage beyond the vessel's port of discharge (e.g., Sydney), the contracting carrier acts as forwarding agent only, and shall not be responsible for loss or damage, even though freight for the whole transport has been collected by him.

(*b*) In the second situation, the contract of carriage makes no specific arrangement for trans-shipment. For example, when goods are shipped from Bombay, with Tokyo as the final destination, the face of the bill of lading would be filled in as follows: "Port of loading: *Bombay*; port of discharge: *Tokyo*". However, the report noted that the bill of lading would commonly include general clauses that "whether expressly arranged for beforehand or otherwise, the carrier shall be at liberty to carry the goods to their port of destination by vessels belonging to the carrier or other" with the responsibility of the contracting carrier "limited to the part of the transport perfomed in his own vessel or vessels."

31. The report of the Secretary-General noted that the Brussels Convention of 1924 and the Brussels Protocol of 1968 contain no provisions dealing with the effect of such trans-shipment clauses. Where, for example, goods are shipped at port A (e.g., Bombay), trans-shipped to another carrier at port B (e.g., Sydney) and unloaded at their final destination at port C (e.g., Tokyo), the following issues were discussed: (1) Should the responsibility of the contracting carrier end at the point of trans-shipment (port B), or should it continue to the

[12] A/CN.9/76/Add.1, part two, reproduced in this volume, part two, IV, 4, above.

port of final destination (port C)? (2) What rules should govern the responsibility of the on-carrier with respect to the carriage from port B to port C? For example, if the State of port A is a party to the international convention but the State of port B is not a party, does a provision in the bill of lading that the initial carriage ends at port B lead to the conclusion that the convention is inapplicable to the carriage from port B to port C? (*b*) If the convention is applicable throughout the carriage, should the on-carrier (and more particularly the final, or delivering, carrier) be responsible to the cargo owner under the rules of the Convention for the carriage from B to C? Or should the delivering carrier be responsible for the carriage from A to C, subject to reimbursement from the contracting carrier (or an intermediate, connecting carrier) for loss caused by that carrier?

32. The report of the Secretary-General (part two, paras. 20-26) analysed statutory rules dealing with the foregoing questions which are contained in the international conventions governing carriage by air (the Warsaw Convention), by road (the CMR Convention) and by rail (*the CIM Convention*). The report (*id.*, paras. 35-40) set forth alternative draft texts related to the rules on the period of the carrier's responsibility developed by the Working Group at its third session.[13] Under one alternative (alternative A) the contracting carrier would be responsible under the convention for the carriage from the port of shipment (port A) to the port of final destination (port C) under the typical "through" bill of lading, described in paragraph 30 (*a*) above as well as after trans-shipment under a general "liberty" (or option) clause, described in paragraph 30 (*b*), above. Under a second alternative provision (alternative B), the contracting carrier would be responsible for the entire carriage only when trans-shipment occurred under a general "liberty" (or option) clause; under this draft, the responsibility of the contracting carrier ended when trans-shipment was effected pursuant to an arrangement specifically provided for in the bill of lading—as in the through bill of lading that was described in paragraph 30 (*b*). The report also set forth (*id.*, para 41) a draft provision on the responsibility of on-carriers under the convention.

B. DISCUSSION BY THE WORKING GROUP

33. The Working Group discussed the responsibility of the contracting carrier after trans-shipment under the two types of arrangments described in paragraphs 30 (*a*) and 30 (*b*), *supra*. First, attention was given to trans-shipment effected by the contracting carrier under a general "liberty" (or option) clause. (See paragraph 30 (*b*), *supra*.) It was generally agreed that while such a trans-shipment, effected under reasonable circumstances, might be authorized under the contract, the contracting carrier should remain responsible to the cargo owner, under the rules of the Convention, for the entire carriage. If goods were damaged after such trans-shipment, the cost of reimbursing the cargo owner would not remain with the contracting carrier, since the contracting carrier would normally have a right of recourse against the actual carrier (sometimes termed a "pre-carrier" or "on-carrier").

34. Where trans-shipment for a designated part of the carriage had been specifically agreed to in the contract of carriage (as under the through bill of lading described in paragraph 30 (*a*)), several representatives expressed the view that the responsibility of the contracting carrier should terminate on trans-shipment. It was noted that no rule of law required carriers to issue through bills of lading. If the contracting carrier should be made responsible for the entire carriage the carrier might decline to issue such through bills; as a consequence a document that had proved to be useful in connexion with the transfer and financing of goods in the course of shipment might not be fully available.

35. Several representatives expressed the view that these fears would not materialize. The contracting carrier would continue to find it financially and commercially advantageous to issue through bills of lading. In those cases where damaged occurred after trans-shipment, the contracting carrier, even if he must reimburse the shipper, would have a right of reimbursement from the actual carrier. In transport involving a series of carriers, it was more efficient for the carriers to handle the allocation of losses among themselves than to require the shipper to attempt to discover at which stage the damage occurred and to press a claim against an actual carrier, who may be remote from the shipper and who may claim that the goods had been damaged before trans-shipment. In this connexion, attention was drawn to the increasing use of containers, which enhanced the shipper's difficulty of ascertaining which of a series of carriers was responsible for damage to the goods.

36. In response, it was observed that the general rule on burden of proof adopted by the Working Group would assist the shipper when there was doubt as to which of a series of carriers was responsible for damage to cargo, but on the other hand doubts were expressed on the adequacy of the burden of proof in this regard.

37. The Working Group also considered the question of the responsibility of the actual carrier. It was generally agreed that in both types of trans-shipment discussed above, the actual carrier should be responsible to the cargo owner under the convention for damage or loss occurring while the goods were in his charge. Where the contracting carrier was also responsible, the cargo owner would have a choice with respect to his claim but, of course, could not recover twice for the same loss.

C. REPORT OF THE DRAFTING PARTY

38. It was generally agreed, that although differing views had been expressed with respect to some aspects of the subject, there was sufficient basis for agreement to warrant referring the subject to the Drafting Party. The Drafting Party, having considered the subject, presented the following report:

[13] Working Group, report on third session, para. 14.

PART II OF THE REPORT OF THE DRAFTING PARTY: TRANS-SHIPMENT

1. The Drafting Party had acted on the following bases: (*a*) the Working Group decided that the contracting carrier shall be responsible for the entire carriage even if, in accordance with a trans-shipment-option clause, he entrusted the performance of a part of the carriage to another person; (*b*) in the Working Group, divergent opinions were expressed as to whether the same rule should apply even if the contract of carriage provides that a designated part of the carriage covered by the contract shall be performed by another carrier. In the course of negotiations in the Drafting Party, it appeared that general consensus could be reached on the rules applicable in both these cases on the basis of the proposed draft provisions which follow.

2. The Drafting Party recommends the following provision on trans-shipment:

Article D

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

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

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

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

Article E

[1. Where the contract of carriage provides that a designated part of the carriage covered by the contract shall be performed by a person other than the carrier (through bill of lading), the responsibility of the carrier and of the actual carrier shall be determined in accordance with the provisions of article D.

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

Notes on the proposed draft provisions

3. With respect to paragraph 1 of article D, the Drafting Party recommends that the words "carrier" and "actual carrier" be specifically defined in article 1 of the Convention. "Carrier" would be defined as the person who has contracted with the shipper; "actual carrier" would be defined as any other carrier involved in the performance of the carriage.

4. Paragraph 2 of article D is meant to assure the cargo-owner the right to bring a claim against an actual carrier, as well as against the contracting carrier, provided that the loss or damage occurred while the goods were in the charge of the actual carrier.

5. Paragraphs 3 and 4 are self-explanatory.

6. Paragraph 1 of article E (subject to the exception in para. 2) makes applicable the rules of article D whereby (*inter alia*) the carrier is responsible for the entire carriage (para. 1) and the "actual" carrier is responsible for the carriage performed by him, in cases where trans-shipment is specifically agreed to in the bill of lading (through bill of lading).

7. Paragraph 2 of article E provides that the contracting carrier shall be exonerated from liability if he proves that the loss or damage (or delay) was caused by events occurring while the goods were in the charge of the actual carrier. This provision has been accepted as a part of a compromise between various views expressed in the Working Group relating to the regulation of carriers' liability in cases of carriage under through bills of lading.

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

39. The Working Group considered the above-quoted report of the Drafting Party and approved article D of the proposed draft provisions.

40. With respect to article D, one representative indicated that he understood that the term "actual carrier" meant the carrier who would substitute for the contracting carrier in the performance of all or part of the contract of carriage. This term should be defined when the study of definitions is undertaken during the next session.

41. With respect to article E of the draft text proposed by the Drafting Group, objections to paragraph 2 of that article were raised by many representatives. It was stated that this provision was not in fact a compromise, as had been stated in paragraph 7 of the Drafting Party's notes (under para. 38 above), but embodied the point of view of those representatives who favoured permitting the contracting carrier to limit his liability under a through bill of lading to only part of the carriage. It was stated that such a result would be inconsistent with the expectations of the shipper to whom the through bill of lading was issued by the contracting carrier.

42. On the other hand, it was stated by other representatives that article E provided sgnificant advantages to the cargo owner for the following reasons: (*a*) the provisions of the article would encourage the continued use of the through bill of lading rather than forcing each carrier to issue a bill of lading for his part of the carriage; consequently, the shipper would be able to obtain a negotiable bill of lading which would cover the entire carriage; (*b*) in addition, the contracting carrier would not escape from liability unless he proved that the

* The square brackets were added pursuant to a decision of the Working Group. See para. 43 below.

events causing loss occurred while the goods were in the hands of the actual carrier; (*c*) moreover, according to the provisions of article E the carrier would also be responsible for loss or damage arising during the entire terminal period in the trans-shipment port, while he would not be so responsible if he felt that he could not assume responsibility for the goods during the on-carriage and consequently issued a bill of lading covering only the carriage to the trans-shipment port. However, several other representatives were of the view that the carrier is responsible for the goods in the port of trans-shipment until they have been taken in charge by the actual carrier.

43. In view of the opposition to paragraph 2 of article E, some representatives urged its deletion and others suggested that it should be placed in brackets so that a rule on the subject could be reformulated at a future session of the Working Group. Other representatives stated that if it were decided to use brackets, such brackets should be placed around all of article E since it was understood that several members of the Drafting Party had agreed to paragraph 1 of article E only if it included paragraph 2. However, it was pointed out that since a majority of the members of the Working Group did not approve of paragraph 2 of article E in its present formulation, placing the article in brackets might give the erroneous impression of conditional approval. One representative, supported by other representatives, stated a preference for using the word "exempt" instead of "exonerate" in the first line of paragraph 2 of article E, if the whole question was to be reopened. It was decided that the report of the Drafting Party should be set forth as presented to the Working Group subject to placing brackets around the text of article E, but that it be indicated that there were more members of the Working Group opposed to paragraph 2 of article E than there were members who favoured its inclusion.

44. One representative introduced a provision to replace paragraph 2 of article E, which might be considered as a compromise when, at a future session, the Working Group completed action on the subject. The provision that was proposed by this representative reads as follows:

Article E

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

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

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

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

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

III. Deviation

A. INTRODUCTION

45. Part three of the second report of the Secretary-General, in analysing this topic, noted that article 4 (4) of the Brussels Convention of 1924 provided that the carrier "shall not be liable for any loss or damage" resulting from (1) "any reasonable deviation" or (2) "any deviation in saving or attempting to save life or property at sea".[14] It was suggested that these two provisions raised distinct issues.

46. With respect to the first of these provisions, it was noted that the rule freeing the carrier from responsibility for "any reasonable deviation" had proved to be difficult to construe and apply. One reason was that the route for the carriage was usually not specified; hence there was a basic difficulty in defining the point of departure for a "deviation". It was also noted that the most serious practical consequence of a deviation was delay in arrival of the goods; such delay could cause (*a*) physical damage to the goods (e.g., spoilage of perishable cargo) or (*b*) economic loss apart from physical damage (e.g. loss resulting from inability to use or to resell the goods). The report noted that the Brussels Convention of 1924 contained no provision on the responsibility of ocean carriers for delay, and drew attention to the suggestion that the subject of delay be given separate consideration by the Working Group.[15]

47. With respect to the provision of article 4 (4) of the Convention of 1924 freeing the carrier of liability for loss or damage resulting from "any reasonable deviation" (as contrasted with the provision on saving life and property at sea), the report of the Secretary-General drew attention to alternative solutions which included: (1) a presumption that deviation for certain specified purposes would be *prima facie* unreasonable (para. 33); (2) a provision that the carrier shall bear the burden of proving that the deviation was reasonable (para. 34); and (3) deletion of the above-quoted general provision on deviation in article 4 (4), coupled with consideration of a provision directed to the carrier's responsibility for delay (paras. 35-36).[16]

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[14] A/CN.9/76/Add.1, part III; reproduced in this volume, part two, IV, 4, above.

[15] Report of the Secretary-General on identification of problem areas in the field of ocean bills of lading for possible further study, A/CN.9/WG.III/R.1, paras. 6-8.

[16] The second report of the Secretary-General noted (part III, para. 31) that in some countries the concept of "deviation" was not confined to departure from the expected geographical route, but might be applied to various types of breach of contract which were deemed to be so serious that the carrier should be deprived of the protection of any of the provisions of the bill of lading or of the Hague Rules (e.g., limitation of the amount of liability, prescriptive limits on the time for bringing suit). The report did not consider these doctrines as within the present topic of deviation and, in the interest of uniform application of the law, suggested (foot-note 25) that the effect of serious, intentional breach of contract be dealt with specifically under the relevant portions of the convention. See, e.g., the second report of the Secretary-General: part one: limitation of liability, at section C.3 (paras. 51-55) (effect of wilful or reckless misconduct); part four: the period of limitation, at section B.4 (paras. 15-20) (claims based on tort or on wilful conduct).

48. In connexion with this third alternative, attention was directed to the general rule on responsibility and burden of proof, as approved by the Working Group at the fourth session,[17] which states as follows:

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

49. It was noted that, under this provision, the carrier would be responsible for loss of or damage to goods resulting from deviation (as well as from other causes) unless the carrier "proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or its consequences". The question was raised as to whether there was need for special provisions concerning carrier's responsibility in case of deviation and burden of proof, in addition to the general provision on carrier's responsibility noted above, and whether the subject of deviation might be treated as part of the general question of responsibility for delay.

B. DISCUSSION BY THE WORKING GROUP

50. The Working Group discussed the problems to which article 4 (4) of the Brussels Convention had given rise and which had been described in the Report of the Secretary-General (see paras. 45-49 above).

51. It was pointed out by several representatives that the provision in article 4 (4) exempting the carrier from liability for "any reasonable deviation" had given rise to many difficulties and was unsatisfactory. It was indicated by these representatives that the general rule on responsibility that had been adopted by the Working Group, and which is quoted above at paragraph 48 would solve the problems to which article 4 (4) was directed without encountering the difficulties of construction which had arisen under the present convention provision. Under this approach whether deviation should be permitted would depend on whether such deviation could meet the test established in the general rule on responsibility and burden of proof. It was further stated that a provision on delay, which could be considered by the Working Group at a later stage, would meet many of the problems raised in connexion with deviation. However, some representatives indicated their preference for including a specific provision on deviation.

52. Some representatives stated that in their national systems the term "deviation" was used to describe serious breaches of contract ouside the area of geographical deviation (see foot-note 16 above). However, it was generally agreed by the Working Group that only geographical deviation was being considered. In this connexion, it was observed that the consequences of serious breach of contract could be more appropriately dealt with by provisions, on, *inter alia*, limitation of liability and time limitation.

53. Many representatives stated that although they agreed that deviation itself should not be the subject of a separate article of the Convention, they favoured retention of a provision which would deal with carriers' responsibility in connexion with the saving of life and property at sea. The Working Group discussed alternative draft proposals on this subject as set forth in part three of the Second Report of the Secretary-General, at paragraph 40. Some representatives also expressed the view that the provision which would permit, *inter alia*, deviation to save lives and property at sea, should deal more restrictively with the latter than with the former.

C. REPORT OF THE DRAFTING PARTY

54. Following discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party is as follows:

PART THREE OF THE REPORT OF THE DRAFTING PARTY: DEVIATION

1. In response to the views expressed in the Working Group, the Drafting Party has discussed whether a separate provision on geographical deviation is necessary in view of the general rules on the carrier's liability which have been adopted by the Working Group. The Drafting Party has agreed that there is no longer any need for such a general provision on geographical deviation, but that a particular provision relating to the saving of life and property at sea should be added to the article containing the general rules on carrier's liability (preferably as a new paragraph 3) (A/CN.9/74, para. 28).*

2. Accordingly the Drafting Party recommends the following provision:

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

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

55. The Working Group adopted the above report of the Drafting Party, including the proposed draft provision.

IV. The Period of limitation

A. INTRODUCTION

56. The period of limitation applicable to legal proceedings against the carrier is discussed in part four of the Second Report of the Secretary-General. It was noted in the report that a provision on the subject

[17] Working Group, report on fourth session, reproduced in this volume, part two, IV, 1, above; paras. 28 and 36.

* Reproduced in this volume, part two, IV, 1, above.

was set forth in article 3 (6) (paragraph four) of the Brussels Convention of 1924 and that certain modifications would be effected by article 1, paragraphs 2 and 3, of the Brussels Protocol of 1968.

57. The report discussed problems presented by these provisions in the following areas: (1) Ambiguity with respect to the applicability of the limitation provisions to claims for delay, and claims based on tort (paragraphs 4-12); (2) Applicability of the period of limitation to arbitration proceedings (paragraphs 13-14); (3) Commencement of the period of limitation, with special reference to the problems that have arisen when part or all of the goods have been lost by the carrier (paragraphs 21-45); (4) The length of the period of limitation (paragraphs 46-53); (5) Agreements modifying the period (paragraphs 54-62); and (6) The period applicable to actions for indemnity brought by a carrier against a third person, such as another carrier who participates in the performance of the contract or a liability insurer (paragraphs 63-67). Draft provisions dealing with these questions were set forth, and were presented in consolidated form at paragraph 68 of the report.

B. DISCUSSION BY THE WORKING GROUP

58. The Working Group considered the approaches that had been set forth in the alternative proposals in the Second Report of the Secretary-General. The Working Group noted that there were certain issues concerning the period of limitation which were interrelated. These included: the length of the basic period of limitation, the effect of wilful or other serious misconduct on the part of the carrier, commencement of the period of limitation, and the possible suspension or interruption of the period of limitation as a result of a written claim.

59. With respect to types of claims to be covered by the rules on limitation, the majority was of the view that the scope of the Brussels Convention of 1924 (art. 3 (6), subpara. 4) as amended by article 1 (2) (3) of the Brussels Protocol of 1968 should be rephrased to make it clear that all types of claims of the shipper against the carrier, whether based on contract or tort, were included. Concerning claims arising from wilful misconduct of the carrier, some representatives noted that CIM article 46 (1) (*c*) and CMR article 32 (1) provided a longer period for such claims and suggested the adoption of this approach. This view was not accepted by the majority because of the likelihood of dispute over whether the loss resulted from wilful or other serious misconduct; such disputes would undermine the simplicity and definiteness required for the limitation rule.

60. Some representatives supported a proposal, based on CIM article 46 (3) and CMR article 32 (2), to suspend the running of the period of limitation, where a written claim was submitted to the carrier, until the carrier rejected such claim by notification in writing. In the opinion of some of those representatives, suspension of the period was necessary for the protection of the shipper, particularly where the period of limitation was relatively short. According to one representative, a provision on suspension by a written claim was particularly desirable for those States whose national laws did not contain any provision on interruption or suspension of the period. Another representative indicated that there must be some provision for cases where parties withdrew legal proceedings for the purpose of negotiation. However, the majority of the Working Group was of the view that the question of interruption or suspension should be left to national law. In this connexion, it was noted that the provision to allow suspension by a written claim may lead to litigation. It was also observed that the provision might have little value since, if the carrier was not prepared to agree to an extension, he would probably reject the claim automatically. It was also noted if a provision on suspension by a written claim were adopted, the maximum time-limit for such an extension should also be provided. It was also felt that the meaning of suspension or interruption needed further clarification.

61. With regard to the provision on extension of the period as provided in article 3 (2) of the Brussels Protocol of 1968, the Working Group agreed that the parties should be allowed to agree upon an extension of the period. It was also agreed that a declaration by the carrier to extend the period should be given the same effect. Most representatives were of the view that such a declaration or agreement must be in writing. In this connexion, some representatives indicated that the Working Group should follow more closely the terminology and approach used in the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods (A/CN.9/73).*

62. With respect to the commencement of the period of limitation, it was generally agreed that, under the present Convention, cases of total non-delivery or loss of the goods presented problems that required attention.

63. It was agreed that, while the Brussels Protocol of 1968 provided that "suit" must be brought within the period of limitation, the same rule should also be applied to arbitral proceedings.

64. With respect to the length of the period of limitation, nine representatives were in favour of a one-year period and six representatives favoured a two-year period. However, some representatives who favoured a one-year period indicated their willingness, as a compromise, to accept a two-year period if that period were supported by the majority.

C. REPORT OF THE DRAFTING PARTY

65. The Working Group conclued that the foregoing discussions indicated sufficient basis for agreement to warrant referring the subject to the Drafting Party. The Drafting Party, having considered the subject, presented the following report:

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* UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3.

PART IV OF THE REPORT OF THE DRAFTING PARTY: PERIOD OF LIMITATION

1. The Drafting Party recommends the following provision on the period of limitation:

Article F

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

(*a*) in the case of partial loss of or damage to the goods, or delay,[18] from the last day on which the carrier has delivered any of the goods covered by the contract;

(*b*) in all other cases, from the [ninetieth] day after the time the carrier has taken over the goods or, if he has not done so, the time the contract was made.

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

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

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

Notes on the proposed draft provision

2. The language of paragraph 1 "all liability whatsoever relating to carriage under the Convention" was employed to make clear the broad scope of the rules on limitation, so as to include all types of claims, whether based in contract or in tort.

3. With respect to the length of the period of limitation, members of the Drafting Party were divided as to whether the period should be one year or two years. Consequently, both periods are set forth in brackets. In the discussion among all present at the meeting, seven representatives expressed the opinion that the period of limitation should be one year. Six representatives stated that the period should be two years. In addition, two representatives, while preferring one year, stated that they could accept two years as a compromise.

4. Paragraphs 1 (*a*) and 1 (*b*) on the commencement of the period draw a distinction between (*a*) cases where some (or all) of the goods are delivered and (*b*) all other cases (such as the total loss of the goods or failure by the carrier to take over the goods).

5. It was noted that paragraph 2 was based on provisions in the CMR and CIM conventions. A suggestion that the last day of the period should not be counted has not been adopted on the ground that this view is inconsistent with the approach of many legal systems.

6. Paragraph 3, on extension of the period by a declaration of the carrier or agreement of the parties does not apply to provisions of the contract of carriage but only to a declaration or agreement made after the cause of action has arisen. The majority of the Drafting Party supported the second sentence, which provides that the declaration or agreement shall be in writing.

7. Paragraph 4 adopts the provision of article 1 (3) of the Brussels Protocol of 1968, except for substitution of "[ninety days]" for "three months".

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

66. The Working Group considered the above-quoted report of the Drafting Party, The report of the Drafting Party, including the proposed draft provision, received the approval of the majority of the Working Group.

67. The following comments and proposals were made with respect to the proposed draft provision:

(*a*) With respect to paragraph 1 of article F, one representative indicated that the scope of application of this provision required clarification with respect to the provision that the period of limitation applied only to the shipper's claims against the carrier. It was noted that the period of limitation for claims of the carrier against the shipper, such as claims for freight charges, were governed by the rules of national law. Another representative observed that the Brussels Convention of 1924 contained provision on the liability of the shipper to the carrier, and stated that it would be unfortunate to leave claims by the carrier subject to divergent periods of limitation under national laws.

(*b*) With respect to the same paragraph, one representative stated that the concept of "legal proceedings" should be clarified, taking into account the approach of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods (A/CN.9/73).*

(*c*) With respect to paragraph 3 of article F, one representative was of the view that this provision should be reformulated in line with the relevant provisions of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods (1972).[19]

(*d*) With respect to the length of the period of limitation, the observer of the International Union of Marine Insurance, supported by the observer of the International Chamber of Commerce, expressed the view that

[18] See para. 72 below.

* UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3.

[19] Article 21 (2) of the Convention provides in part: "The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor...." (A/CN.9/73; UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3).

a one-year period of limitation should be maintained on the ground that a two-year period would promote extended nogotiations on cargo claims. However, a number of representatives stated that they did not share that opinion. One representative noted that marine insurers by contract required claims by shippers to be presented promptly to them, and that in his opinion marine insurers would benefit from a longer period of limitation since, by subrogation, they stood in the position of shippers with respect to claims against the carriers.[20]

68. One representative proposed the addition of the following paragraph to article F of the proposed draft provisions:

"5. Any legal proceeding instituted in a tribunal which is competent pursuant to article (X) of this Convention shall interrupt the period of limitation in any other jurisdiction where a legal proceeding may be brought under the above article."

The representative who introduced this proposal stated that this provision would ensure added protection for the shipper when he institutes a legal proceeding before a court and could subsequently, in accordance with the Convention, institute another proceeding in another jurisdiction. In this situation the running of the period of limitation should be interrupted at the time of the institution of the first legal proceeding. This representative recognized that the proposed text would need to be modified to make it applicable to arbitral proceedings.

69. Another representative, while generally agreeing with the desirability of such a provision, proposed an alternative approach to this problem and suggested the addition to article F of the proposed draft provision:

"Legal or arbitral proceedings initiated in a court or tribunal of another State pursuant to articles (X) and (Y) of this Convention shall in any Contracting State, for the purposes of interruption of the period of limitation, be given the same effect as if the legal or arbitral proceedings has been initiated in that Contracting State."

70. Other representatives expressed their interest in these proposals but indicated that careful examination of the question was needed because these proposals entail many complicated legal problems which could not be considered within the time available at the present session of the Working Group. Some representatives saw difficulties in these proposals and were opposed to them in principle. One representative pointed out that these proposals might indefinitely prolong the limitation period applicable to bringing a new proceeding in another jurisdiction. Another representative was of the view that the use of the term "interrupt" or "interruption" was susceptible of divergent interpretations, particularly in thoses States which were not familiar with that Civil Law concept. Another representative suggested that it might be necessary to provide for cases where legal proceedings were brought before *fori* which lacked competence. It was also noted that the approach of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods, which had a comprehensive coverage of these questions (e.g. arts. 15, 16 and 29), may be useful in formulating rules on these questions.

71. It was agreed that further consideration should be given to these proposals, and that they should be taken up at a future session of the Working Group.

72. In paragraph 1 (*a*) of article F, reference is made to claims for delay on the ground that such claims should be subject to limitation rules regardless of whether the Convention lays down rules on liability for delay. However, it was agreed that this question should be reconsidered in connexion with the Working Group's examination of the rules on liability for delay.

V. Future work

73. The Working Group noted that it had taken action on four of the six substantive topics on its agenda for the present session (see para. 7 above). It was agreed that definitions under article I of the Convention and the elimination of invalid clauses would be taken up at the sixth session of the Working Group and that parts five and six of the second Report on the Responsibility of Ocean Carriers for Cargo (A/CN.9/76/Add.1) * would be used as the working document.

74. It was recalled that the Working Group had not completed its work on the topics of deck cargo and live animals which had been examined at the third session (Working Group, report on the third session, paras. 23-29 and 30-34). The Working Group decided that these topics would be placed on the agenda for the sixth session. It was expected that a study on live animals, to be submitted by the International Institute for the Unification of Private Law (UNIDROIT), would be available for use by the Working Group in considering the subject.

75. The Working Group then examined the report of the Secretary-General on the identification of problem areas in the field of ocean bills of lading for possible further study (A/CN.9/WG.III/R.1). It was decided that the sixth session should consider the following topics identified in the above report: the liability of the carrier for delay (paras. 6-8), and the scope of application of the Convention (paras. 9-11). It was decided that, with respect to the topic of delay, the Secretary-General should be requested to prepare a report setting forth proposals, indicating possible solutions; with respect to the scope of the application of the Convention, the Working Group decided to request the Secretariat to prepare a short working paper directing attention to the provisions of the Brussels Convention of 1924 and the Brussels Protocol of 1968. The Working Group requested

[20] See also para. 28 above.

* Reproduced in this volume, part two, IV, 4, above.

comments and suggestions from the members of the Working Group and from the observers at the present session on the topics to be considered at the next session and expressed the hope that such comments and suggestions could be transmitted to the Secretariat sufficiently in advance of the session so that thay may be used in the preparation of the necessary documentation.

76. The Working Group decided that the topics to be examined at the sixth session should be considered in the following order: (*a*) definitions under article I; (*b*) elimination of invalid clauses; (*c*) deck cargo and live animals; (*d*) liability of the carrier for delay; and (*e*) scope of application of the Convention.

77. For its seventh session the Working Group requested the Secretary-General to prepare a report on the required contents and legal effects of the contract of carriage (see A/CN.9/WG.III/R.1, para. 13). In this connexion, the Secretary-General was also requested to give consideration to the terms of the bill of lading, to reserve clauses, letters of guarantee given by the shipper and to the bill of lading as a negotiable instrument. The Working Group also decided that questionnaires on the subject, to be examined by the Working Group, might be circulated to the extent found necessary by the Secretary-General.

78. The Working Group decided to recommend to the United Nations Commission on International Trade Law at its sixth session that, subject to the consideration at that time of financial implications, the sixth session of the Working Group be held in Geneva from 27 August to 7 September 1973 and that the Working Group's seventh session be held in New York in February 1974.

6. *List of relevant documents not reproduced in the present volume*

Title or description	*Document reference*
Working Group on International Legislation on Shipping, fourth session	
Provisional agenda and annotations	A/CN.9/WG.III/WP.8
Memorandum concerning the structure of a possible new convention on the carriage of goods by sea, submitted by the Norwegian delegation	A/CN.9/WG.III(IV)/CRP.1
Amendment proposed by France	A/CN.9/WG.III(IV)/CRP.2
New text of Articles III and IV, proposal by the United States	A/CN.9/WG.III(IV)/CRP.3
Amendment proposed by Norway	A/CN.9/WG.III(IV)/CRP.4
Amendments proposed by Egypt	A/CN.9/WG.III(IV)/CRP.5
Action taken by the drafting party	A/CN.9/WG.III(IV)/CRP.6
Alternative texts relating to burden of proof	A/CN.9/WG.III(IV)/CRP.7
Draft report of the drafting party: carrier's responsibility	A/CN.9/WG.III(IV)/CRP.8 and Corr.1
Text proposed by the Belgian delegation	A/CN.9/WG.III(IV)/CRP.9
Texts proposed by France: Arbitration	A/CN.9/WG.III(IV)/CRP.10
Lists of participants	A/CN.9/WG.III(IV)/CRP.11
Part II of the draft report of the drafting party: Arbitration clauses	A/CN.9/WG.III(IV)/CRP.12
Draft report of the Working Group on the work of its fourth session	A/CN.9/WG.III(IV)/CRP.15 and Adds.1 to 3
Working Group on International Legislation on Shipping, fifth session	
Memorandum concerning the structure of a possible new convention on the carriage of goods by sea, submitted by the Norwegian delegation	A/CN.9/WG.III(V)/WP.9
Replies to the second questionnaire on bills of lading submitted by Governments and international organizations for consideration by the Working Group	A/CN.9/WG.III/WP.10/ Adds.1 and 2
Identification of problem areas in the field of ocean bills of lading for possible further study: report by the Secretary-General	A/CN.9/WG.III/R.1
Provisional agenda and annotations	A/CN.9/WG.III/R.2
Proposal submitted by Japan	A/CN.9/WG.III(V)/CRP.1
Paper submitted by the Norwegian delegation: principles of trans-shipment and substitution	A/CN.9/WG.III(V)/CRP.2