# The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress

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SUMMARY



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## I. INTRODUCTION

Over the years, the United Nations Commission on International Trade Law (UNCITRAL) has had some remarkable successes, such as the Vienna Sales Convention[1] and the Model Law on International Commercial Arbitration.[2] It has also had some disappointments. Twenty-five years ago, UNCITRAL completed the U.N. Convention on the Carriage of Goods by Sea[3] (commonly known as the "Hamburg Rules").[4] Although the convention entered into force in 1992 and almost thirty nations are now parties,[5] the major commercial and maritime powers have not adopted the Hamburg Rules (and do not appear likely to do so). The contracting states represent only a small proportion of international trade. Indeed, over a third of the parties to the Hamburg Rules are land-locked.[6] Despite having entered into force, this convention is one of UNCITRAL's disappointments because it has not achieved the level of uniformity that existed immediately before World War II under a 1924 convention popularly known as the "Hague Rules,"[7] nor has it displaced the "Hague-Visby Rules"—the Hague Rules as amended[8] by the 1968 "Visby Protocol"[9]—as the dominant convention for the international carriage of goods by sea.[10]

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1. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 59 (1988).

2. United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, June 21, 1985, Annex 1, art. 34, U.N. Doc. A/40/17, 24 I.L.M. 1302 (1985).

3. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1-3 (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2003) [hereinafter Hamburg Rules].

4. For a detailed discussion of the process leading to the Hamburg Rules see generally Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part I)*, 7 J. MAR. L. & COM. 69 (1975) [hereinafter Sweeney, *Part I*]; Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part II)*, 7 J. MAR. L. & COM. 327 (1976); Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part III)*, 7 J. MAR. L. & COM. 487 (1976) [hereinafter Sweeney, *Part III*]; Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part IV)*, 7 J. MAR. L. & COM. 615 (1976) [hereinafter Sweeney, *Part IV*]; Joseph C. Sweeney, *The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V)*, 8 J. MAR. L. & COM. 167 (1977).

5. For a list of countries that have ratified the Hamburg Rules see, for example, 2002 CMI YEARBOOK 404. The most current list is available on the UNCITRAL website under Status of Texts, at http://www.uncitral.org/en-index.htm (last visited Sept. 9, 2003).

6. Land-locked parties to the Hamburg Rules include Austria, Botswana, Burkina Faso, Burundi, the Czech Republic, Hungary, Lesotho, Malawi, Uganda, and Zambia. *See id.*

7. International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1-1 (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2003) [hereinafter Hague Rules]. For a history of the Hague Rules, see Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1, 18–32 (1991) [hereinafter Sturley, *History*].

8. In many countries, the 1968 Hague-Visby Rules have been further amended by the 1979 Special Drawing Right (SDR) Protocol. Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1984 Gr. Brit. T.S. No. 28 (Cmnd. 9197) (entered into force Feb.

In the meantime, the Hague-Visby Rules, despite their widespread applicability, do not satisfactorily meet the world's needs for a modern, uniform[11] law on the subject. Most obviously, they are dated.[12] The Visby Protocol itself is thirty-five years old (ten years older than the Hamburg Rules), and it amended the Hague Rules only in limited respects. The core of the Hague-Visby Rules remains the 1924 Hague Rules, which were not particularly "modern" even in the 1920s. The Hague Rules were substantially based on a 1910 Canadian statute[13] that was modeled on the 1893 Harter Act,[14] which was passed to address problems that began to arise at the beginning of the steam era.[15]

Moreover, the Hague-Visby Rules do not provide sufficient uniformity.[16] Although they offer the most popular liability regime, important parts of international trade are simply not covered. The United States, whose international trade represents close to a quarter of the world's total, continues to adhere to its Carriage of Goods by Sea Act (COGSA),[17] a 1936 enactment of the original Hague Rules.[18] China, with roughly a quarter of the world's population and a steadily increasing proportion of its trade, operates under a Maritime Code[19] that combines selected elements from the Hague-Visby and Hamburg Rules with unique Chinese provisions.[20] Even a number of Hague-Visby parties have adopted non-uniform variations of the international convention, thus further undermining international uniformity.[21]

In view of this confused international situation, which practically all observers find unsatisfactory, UNCITRAL has reentered the field in an attempt to find an acceptable solution. This new UNCITRAL project, however, seeks not simply a new convention to replace the Hague, Hague-Visby, and Hamburg Rules. Its goal is a much broader instrument that will not only unify the law on liability issues but also bring uniformity to

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14, 1984), *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1-2A (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2003). In other words, two versions of the Hague-Visby Rules are currently in force.

9. Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1977 Gr. Brit. T.S. No. 83 (Cmnd. 6944) (entered into force June 23, 1977), *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1-2 (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2003). The Hague Rules as amended by the 1968 Visby Protocol will, hereinafter, be referred to as the Hague-Visby Rules.

10. Countries that have ratified the Visby Protocol, or have adopted the Hague-Visby Rules by domestic legislation, include Canada, Japan, Singapore, Hong Kong, Australia, and most of the nations of Western Europe. For a current list of the countries that have ratified the Visby Protocol see, for example, 2002 CMI YEARBOOK 323–24.

11. *See generally* Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553, 556–59 (1995) (discussing the need for uniform law in this field) [hereinafter Sturley, *Uniformity*].

12. *See, e.g.*, G.J. van der Ziel, *The UNCITRAL/CMI Draft for a New Convention Relating to the Contract of Carriage by Sea*, 25 TRANSPORTRECHT 265, 265–66 (2002).

13. Water-Carriage of Goods Act, ch. 61, 1910 S.C. 435 (Can.).

14. Harter Act, ch. 105, 27 Stat. 445 (1893) (codified at 46 U.S.C. app. §§ 190–196 (2000)).

15. *See generally* Joseph C. Sweeney, *Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary*, 24 J. MAR. L. & COM. 1, 6–14 (1993) (explaining the history of the Harter Act).

16. Among other problems, the Hague-Visby Rules themselves exist in two versions. *See supra* note 8.

17. Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (codified as amended at 46 U.S.C. app. §§ 1300–1315 (2000)) [hereinafter COGSA]. For a history of the U.S. COGSA and its ratification, see Sturley, *History*, *supra* note 7, at 36–55.

18. As a result of domestic judicial decisions, U.S. interpretation of its COGSA is often out of step with international understandings of the Hague Rules. *See, e.g.*, Sturley, *Uniformity*, *supra* note 11, at 564–67 (discussing examples). Thus, the position in practice is even less uniform than might appear from the fact that the United States is still a party to an international convention that remains in force for a number of countries.

19. *See generally* FOREIGN LANGUAGE PRESS, MARITIME CODE OF THE PEOPLE'S REPUBLIC OF CHINA (2000).

20. *See generally* L. Li, *The Maritime Code of the People's Republic of China*, [1993] LLOYD'S MAR. & COM. L.Q. 204, 209–11; Sturley, *Uniformity*, *supra* note 11, at 561–62.

21. *See generally* Sturley, *Uniformity*, *supra* note 11, at 562–64 (discussing examples of Denmark, Finland, Norway, Sweden, Korea, New Zealand, Australia, and Canada).

aspects of transport law that have never been addressed by international agreements. It is an ambitious project, and a great deal of work still needs to be done before we will know how a number of key issues will be resolved.

This article is designed to introduce the new project, identify some of the issues that are most likely to raise questions or be controversial, discuss the context in which these issues arise, and outline some possible solutions.

## II. BACKGROUND

### *A. Rationale for the New Project*

Many factors have combined to persuade UNCITRAL of the value of embarking on this new project. Commentators have frequently noted the breakdown in uniformity of the law governing an ocean carrier's liability for cargo loss or damage[22] as different nations have adopted different international conventions, or domestic variations on these conventions.[23] In recent years, industry representatives have agreed that the lack of uniformity and the failure to modernize the law are causing commercial problems.[24]

Domestic efforts in various countries to update their laws unilaterally—and thus further widen the divisions among different countries—are also part of the story. The Chinese Maritime Code, combining elements from the Hague-Visby and Hamburg Rules with unique Chinese provisions,[25] offers one prominent example of the forces influencing UNCITRAL. Domestic efforts within the United States[26] have also been influential. Most recently, the Maritime Law Association of the United States (MLA) appointed an Ad Hoc Liability Rules Study Group that proposed detailed amendments to COGSA.[27] These

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22. There had been substantial uniformity among the world's maritime powers immediately before the outbreak of World War II. *See, e.g.*, Sturley, *History*, *supra* note 7, at 55–56.

23. *See, e.g.*, Sturley, *Uniformity*, *supra* note 11, at 560–70.

24. *See, e.g.*, *Multimodal Transport: The Feasibility of an International Legal Instrument*, United Nations Conference on Trade and Development (UNCTAD), para. 21, UNCTAD/SDTE/TLB/2003/1 (2003) (noting that 83% of the respondents to an UNCTAD questionnaire "do not consider the existing legal framework for multimodal transportation to be satisfactory" and that 76% of the respondents "do not consider the existing legal framework to be cost-effective"), *available at* http://www.uncitral.org/english/workinggroups/wg_3/unctadreport-e.pdf (last visited Aug. 26, 2003); *Preparation of a Draft Instrument on the Carriage of Goods by Sea: Compilation of Replies to a Questionnarie on Door-to-Door Transport and Additional Comments by States and International Organizations on the Scope of the Draft Instrument*, United Nations Commission on International Trade Law (UNCITRAL), at 35, U.N. Doc. A/CN.9/WG.III/WP.28 (2003) (noting, from the perspective of "all segments of the international transport industry," that "none of [the existing] regimes takes full account of modern developments in international trade such as containerization, multimodal transport, just-in-time delivery and e-commerce"), *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP-28-e.pdf (last visited Aug. 26, 2003) [hereinafter *Compilation of Replies*].

25. *See supra* notes 19–20 and accompanying text.

26. Over the years, there have been a number of serious efforts to update the U.S. law. For a summary of the most significant efforts, see Michael F. Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUS. J. INT'L L. 609, 614–15 (1996) [hereinafter Sturley, *Proposed Amendments*]. The American Bar Association's recommendation to ratify the Visby Protocol with four specific changes was particularly noteworthy. *See* A.B.A. Section of Int'l Law and Prac., *Report on Hague Rules Relating to Bills of Lading*, 1987 ANNUAL MEETING: REPORTS WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, Doc. No. 113E, *reprinted in* 22 INT'L LAW. 246, 246 (1988) [hereinafter A.B.A. Section Report].

27. For a detailed discussion of this process, see Sturley, *Proposed Amendments*, *supra* note 26, at 616–21. The MLA and other industry groups, such as the National Industrial Transportation League (NITL) and the American Institute of Marine Underwriters (AIMU), were advocating the enactment of these proposed amendments when the focus shifted to the international arena. For a discussion of this process, see Michael F. Sturley, *The Proposed Amendments to the Carriage of Goods by Sea Act: An Update*, 13 U.S.F. MAR. L.J. 1, 7–29 (2000–01) [hereinafter Sturley, *Update*]. At the moment, this domestic proposal has not been abandoned, but is very much "on hold" while U.S. interests work to achieve a new international convention that the United States will be able to ratify. For example, the agreement between the World Shipping Council (WSC) and NITL,

proposed amendments attracted considerable interest in the maritime world,[28] and the possibility that the United States might resolve the debate between the Hague-Visby and Hamburg Rules with its own unilateral solution made a return to the international bargaining table more appealing.[29]

### *B. The Role of the Comité Maritime International in the New Project*

UNCITRAL's approach to this new project has also been noteworthy. The Hague and Hague-Visby Rules were largely the product of the Comité Maritime International (CMI),[30] a non-governmental organization founded in the late nineteenth century that was the primary force in developing uniform international approaches to maritime law problems for most of the twentieth century. The Hamburg Rules, on the other hand, were a product of the U.N. organizations with little input from the CMI.[31] For much of the 1980s and 1990s, while advocates of the Hague-Visby and Hamburg Rules battled over the direction that cargo liability law should take, many observers viewed the CMI and UNCITRAL as rivals, at least on this issue. But UNCITRAL's current return to the field has been in active partnership with the CMI. For more than five years, the two organizations have been fully cooperative allies seeking to develop a new international convention that will be widely acceptable to the world community.

The seeds for this cooperation were planted in the context of UNCITRAL's Electronic Data Interchange (EDI) project. In June 1996, as part of the EDI project, the Commission discussed a proposal to

> review . . . current practices and laws in the area of the international carriage of goods by sea, with a view to establishing the need for uniform rules in the areas

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discussed *infra* notes 174–77 and accompanying text, sets forth a tight timetable for progress toward an international agreement, and leaves open the possibility that the WSC and NITL will once again pursue domestic legislation if the international process does not proceed satisfactorily. *See* World Shipping Council & National Industrial Transportation League, *Joint Statement of Common Objectives on the Development of a New International Cargo Liability Instrument*, para. C(4), *available at* http://www.worldshipping.org/jointstatement.pdf (last visited Aug. 10, 2003) [hereinafter WSC/NITL Agreement].

28. *See, e.g.*, JOHN RICHARDSON, THE HAGUE AND HAGUE-VISBY RULES 66–71, 135–50 (4th ed. 1998) (describing the proposed amendments); Regina Asariotis & Michael N. Tsimplis, *The Proposed US Carriage of Goods by Sea Act*, [1999] LLOYD'S MAR. & COM. L.Q. 126 (criticizing the proposed amendments); William Tetley, *Liability Structures in the Law of Carriage of Goods by Sea*, *in* CARGO LIABILITY IN FUTURE MARITIME CARRIAGE 95, 118–27 (1998) (same). *Cf.* van der Ziel, *supra* note 12, at 266 (noting the possibility that the United States would introduce "unilateral legislation").

29. Indeed, one of the MLA's motives in proposing the COGSA amendments was to make a new international convention more likely. *See, e.g.*, COGSA Proposal Summary, *in* MARITIME LAW ASS'N OF THE UNITED STATES, COMM. ON THE CARRIAGE OF GOODS, SPRING MEETING REPORT—MAY 3, 1996, Doc. No. 724, at 3–4.

30. *See* Sturley, *History*, *supra* note 7, at 27–28 (noting the CMI's role in preparing the Hague Rules); COMITÉ MARITIME INTERNATIONAL, LONDON CONFERENCE, OCTOBER 1922, at 313–432, 446–501 (Bulletin No. 57), *reprinted in* 2 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 323–498 (Michael F. Sturley ed., 1990) [hereinafter LONDON CONFERENCE, 2 LEGISLATIVE HISTORY].

31. *See* David C. Frederick, *Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules*, 22 J. MAR. L. & COM. 81, 103–06 (1991) (contrasting the U.N. negotiating process that produced the Hamburg Rules with the earlier processes that produced the Hague and Hague-Visby Rules).

> where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved.[32]

In conjunction with this discussion, the Commission noted:

> [E]xisting national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and seaway bills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to the legal position of the entities that provided financing to a party to the contract of carriage.[33]

The Commission accordingly authorized the Secretariat to start gathering information on these matters with a view to deciding "on the nature and scope of any future work that might usefully be undertaken by [UNCITRAL]."[34] As part of this process, the Secretariat would consult with relevant international bodies, including the CMI, the International Chamber of Commerce (ICC), the International Union of Marine Insurance (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS), and the International Association of Ports and Harbours (IAPH).[35] With this mandate, the UNCITRAL Secretariat invited the CMI to begin the preparatory work for a new convention.

Accepting UNCITRAL's invitation, the CMI attacked its assignment with unusual speed and vigor. It first set up a Steering Committee, which considered the project and issued a report (at the end of April 1998) outlining the work that should be undertaken.[36] The CMI also set up an International Working Group under the chairmanship of London solicitor Stuart N. Beare.[37] This Working Group met four times to complete the preliminary work prior to the first meeting of a new International Sub-Committee.[38] In May 1998, the Working Group held an organizational session, identified specific subjects requiring further investigation, and assigned members to write brief studies addressing each of the specific subjects.[39] In October 1998, it met to review these studies, assign further background studies, and begin developing a list of issues that would need to be addressed as part of the project. In March 1999, it met to review another paper and the list of issues that had been compiled since the last meeting, to discuss what should be included in a questionnaire for

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32. *Report of the United Nations Commission on International Trade Law on the Work of Its Twenty-Ninth Session*, U.N. GAOR, 51st Sess., Supp. No. 17, para. 210, U.N. Doc. A/51/17 (1996), *reprinted in* 1996 CMI YEARBOOK 354 [hereinafter *Twenty-Ninth Session Report*].

33. *Id.*

34. *Id.* at 355.

35. *Id.*

36. This report can be found in 1998 CMI YEARBOOK 107.

37. Other members of the Working Group, as originally constituted, were Alexander von Ziegler (CMI Secretary General, from Switzerland), Jernej Sekolec (of the UNCITRAL Secretariat), Michael F. Sturley (Rapporteur, from the United States), Lars Gorton (Sweden), Paul Koronka (United Kingdom), Gertjan van der Ziel (the Netherlands), and Stefano Zunarelli (Italy). The Working Group later expanded to include, at various times, Sean Harrington (Canada), Karl-Johan Gombrii (Norway), and Franco Ferrari (of the UNCITRAL Secretariat). Francesco Berlingieri (Italy), as chair of CMI's International Sub-Committee on Uniformity of the Law of Carriage of Goods by Sea, Francis Reynolds (United Kingdom), as an additional draftsman, and David Martin-Clark (United Kingdom), as a CMI consultant, also participated in the Working Group's deliberations at various times. The Uniformity Sub-Committee chaired by Professor Berlingieri met from 1995 to 1998. Its final report was published in 1999 CMI YEARBOOK 105.

38. This new International Sub-Committee (on Issues of Transport Law) would ultimately be related to, and overlap in its work with, the previous Uniformity Sub-Committee. *See supra* note 37. There would even be a significant overlap in the membership of the delegations attending the two International Sub-Committees. But the two International Sub-Committees were distinct, operating with different missions, chairmen, rapporteurs, and Working Groups to coordinate their work.

39. One of these studies was later published. *See* Michael F. Sturley, *Scope of Application, Duration of Coverage, and Exceptions to Coverage in International Transport Law Regimes*, *in* 1999 CMI YEARBOOK 122.

the CMI's national member associations, and to agree upon a procedure for drafting the questionnaire in time for distribution by the end of April. The finished questionnaire[40] was distributed on schedule, and the replies were due by the end of the summer. In November 1999, the Working Group held its fourth meeting to review the responses that had been received to the questionnaire,[41] to make specific plans for the first meeting of the International Sub-Committee (which had been formally announced a few days before), and to discuss general plans for the progress of the project through to the CMI's Singapore Conference in February 2001 (including CMI seminars in Toledo, Spain, and Margarita Island, Venezuela, and a colloquium co-hosted with UNCITRAL at United Nations Headquarters in New York). The original Working Group was now to become a "steering committee" for the larger group.[42]

In conjunction with the Working Group's last preliminary meeting, the CMI's Executive Council formalized the convening of a new International Sub-Committee on Issues of Transport Law. Its stated terms of reference were:

> To consider in what areas of transport law, not at present governed by international liability regimes, greater international uniformity may be achieved; to prepare the outline of an instrument designed to bring about uniformity of transport law, and thereafter to draft provisions to be incorporated in the proposed instrument including those relating to liability.[43]

UNCITRAL, in inviting the CMI's cooperation, had initially emphasized those issues of transport law that had not previously been covered by an international agreement,[44] which explains why these aspects were stressed and why liability issues were not part of the International Sub-Committee's initial agenda. But the final clause in the terms of reference clarifies the understanding, present from the very beginning, that liability issues would ultimately become a part of the project.[45]

The International Sub-Committee was required to work at a feverish pace (at least by the standards of an international organization). It met formally in January,[46] April,[47] July,[48]

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40. The final questionnaire was published in 1999 CMI YEARBOOK 132.

41. Sixteen nations' responses to the questionnaire are reprinted in 1999 CMI YEARBOOK 139–312.

42. The original Steering Committee, which had been formed when it was thought that there might be multiple International Sub-Committees simultaneously addressing various aspects of the larger work, gradually faded out of the picture when it eventually became clear that there would be only one International Sub-Committee.

43. *See* Stuart N. Beare, *Issues of Transport Law*, *in* 1999 CMI YEARBOOK 117.

44. *See Twenty-Ninth Session Report*, *supra* note 32, at 354–55.

45. The extension by UNCITRAL to include liability issues became official in July 2000. The CMI reported to UNCITRAL on its progress during the thirty-third session, which was held in New York from June–July 2000. Following this report, UNCITRAL approved the continuation of the project, including a liability component. *See Report of the United Nations Commission on International Trade Law on the Work of its Thirty-Third Session*, U.N. GAOR, 55th Sess., Supp. No. 21, para. 427, U.N. Doc. A/55/17 (2000).

46. *See Report of the First Meeting of the International Sub-Committee on Issues of Transport Law*, *in* 2000 CMI YEARBOOK 176, *available at* http://www.comitemaritime.org/singapore/issue/report1.pdf (last visited Sept. 1, 2003).

47. *See Report of the Second Meeting of the International Sub-Committee on Issues of Transport Law*, *in* 2000 CMI YEARBOOK 202, *available at* http://www.comitemaritime.org/singapore/issue/report2.pdf (last visited Sept. 1, 2003).

48. *See Report of the Third Meeting of the International Sub-Committee on Issues of Transport Law*, *in* 2000 CMI YEARBOOK 234, *available at* http://www.comitemaritime.org/singapore/issue/report3.pdf (last visited Sept. 1, 2003). On July 6, 2000, the day before this meeting started, the CMI and UNCITRAL co-sponsored a one-day colloquium, held in the United Nations Headquarters, to discuss the issues raised by the project. *See id.* at 235–36 (describing colloquium).

and October[49] 2000; met (for all practical purposes) as Committee A[50] at the CMI's thirty-seventh conference in Singapore in February 2001; and again met formally in July[51] and November[52] 2001. It began with a list of issues for discussion, had an agenda paper with more concrete proposals by the second meeting, and was discussing draft provisions at the third meeting. By the middle of December 2001, the CMI had delivered its final Draft Instrument on Transport Law to UNCITRAL.[53]

### *C. The UNCITRAL Working Group*

UNCITRAL made only minor changes to convert the CMI's final Draft Instrument into its own "Preliminary Draft Instrument," which it published as an UNCITRAL document[54] and referred to its Working Group III (Transport Law).[55] This revitalized[56] Working Group first met in April 2002,[57] at United Nations Headquarters in New York. Alternating between spring meetings in New York and fall meetings at United Nations Headquarters in Vienna, the Working Group has now devoted five weeks to the discussion of the Draft Instrument (and plans to devote two more weeks to the project in October 2003[58]).

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49. *See Draft Report of the Fourth Meeting of the International Sub-Committee on Issues of Transport Law*, *in* 2000 CMI YEARBOOK 263, *available at* http://www.comitemaritime.org/singapore/issue/report4.pdf (last visited Sept. 1, 2003). The draft report of the fourth meeting was formally approved at the International Sub-Committee's fifth meeting in July 2001. *See Report of the Fifth Meeting of the International Sub-Committee on Issues of Transport Law*, *in* 2001 CMI YEARBOOK 265, 265 n.*, 267, *available at* http://www.comitemaritime.org/singapore2/singafter/issues/report5.pdf (last visited Sept. 1, 2003) [hereinafter *Fifth Meeting Report*].

50. *See Issues of Transport Law: Report of Committee A*, *in* 2001 CMI YEARBOOK 182, *available at* http://www.comitemaritime.org/singapore2/conference37/issue/issues1.html (last visited Sept. 6, 2003).

51. *See Fifth Meeting Report*, *supra* note 49.

52. *See Draft Report of the Sixth Meeting of the International Sub-Committee on Issues of Transport Law*, *in* 2001 CMI YEARBOOK 305, *available at* http://www.comitemaritime.org/singapore2/singafter/issues/report6.pdf (last visited Sept. 1, 2003) [hereinafter *Sixth Meeting Report*]. The draft report of the sixth meeting was formally approved at the International Sub-Committee's seventh meeting in February 2003.

53. *See CMI Draft Instrument on Transport Law*, *in* 2001 CMI YEARBOOK 532, *available at* http://www.comitemaritime.org/singapore2/singafter/issues/cmidraft.pdf (last visited Sept. 1, 2003) [hereinafter *CMI Draft Instrument*].

54. See the Annex to UNCITRAL's Preliminary Draft Instrument on the Carriage of Goods by Sea, entitled Draft Instrument on Transport Law. *Preliminary Draft Instrument on the Carriage of Goods by Sea*, U.N. Doc. A/CN.9/WG.III/WP.21 (2002), *available at* http://www.uncitral.org/english/workinggroups/wg_3/wp21e.pdf (last visited Sept. 6, 2003) [hereinafter *UNCITRAL Preliminary Draft Instrument*]. Provisions of the UNCITRAL Preliminary Draft Instrument (sometimes discussed simply as the Preliminary Draft Instrument) are cited by article number. The commentary, which follows most of the articles, is cited by the paragraph number of the UNCITRAL Report. The UNCITRAL Report, including the UNCITRAL Preliminary Draft Instrument, is available, along with most UNCITRAL documents cited in this article, on the UNCITRAL web site. *See* United Nations Commission on International Trade Law (UNCITRAL), *available at* http://www.uncitral.org/en-index.htm (last visited Sept. 6, 2003).

55. *See, e.g.*, *Report of the Working Group on Transport Law on the Work of Its Ninth Session*, United Nations Commission on International Trade Law (UNCITRAL), 35th Sess., paras. 13–15, U.N. Doc. A/CN.9/510 (2002), *available at* http://www.uncitral.org/english/sessions/unc/unc-35/510e.pdf (last visited Aug. 10, 2003) [hereinafter *Ninth Session Report*].

56. Working Group III had met in the 1970s to discuss international legislation on shipping. *See, e.g.*, *Report of the Working Group on International Legislation on Shipping on the Work of Its Sixth Session*, United Nations Commission on International Trade Law (UNCITRAL), 6th Sess., U.N. Doc. A/CN.9/88 (1974), *reprinted in* V UNCITRAL YEARBOOK 113 (1974), *available at* http://www.uncitral.org/english/yearbooks/yb-1974-e/vol5-p113-140-e.pdf (last visited Aug. 27, 2003). Its work ultimately produced the Hamburg Rules. *See generally* Hamburg Rules, *supra* note 3. The current Working Group III's first meeting on the new proposal was accordingly the "ninth session" of Working Group III.

57. *Ninth Session Report*, *supra* note 55, para. 15.

58. *See Provisional Agenda*, United Nations Commission on International Trade Law (UNCITRAL), U.N. Doc. A/CN.9/WG.III/WP.31 (2003), *available at* http://www.uncitral.org/english/workinggroups/wg_3/wp-31-e.pdf (last visited Sept. 1, 2003).

The 2002 spring meeting lasted two weeks.[59] Most of the first week was devoted to a broad discussion of the Preliminary Draft Instrument in very general terms. The chair of the Working Group, Professor Rafael Illescas of Spain, suggested that the draft raised seven particularly important issues, which he summarized with the following headings:

(1) The scope of application.[60]

(2) Electronic communication.[61]

(3) The obligations of the carrier.[62]

(4) The rights and obligations of the other parties to the contract.[63]

(5) The right of control.[64]

(6) The transfer of contractual rights.[65]

(7) The judicial exercise of rights under the contract of carriage.[66]

The chair added one more topic to the list at the request of the U.S. delegation:

(8) Freedom of contract.[67]

Following the outline established by these eight headings, the Working Group discussed the Preliminary Draft Instrument in very general terms for the first three and a half days of the meeting. Perhaps the most significant discussion came near the beginning of this exercise, as the delegates expressed their views on whether the new Instrument should apply on a "door-to-door" basis (meaning that it would govern throughout the period covered by the contract of carriage, even if the transportation originated or concluded at an inland location), or whether its application should be limited to the "port-to-port" carriage (meaning that it would govern only the ocean voyage and operations in the ports).[68]

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59. *See Ninth Session Report*, *supra* note 55, para. 15.

60. The chair viewed this heading as an opportunity to discuss the issues raised by chapter 3 of the UNCITRAL Preliminary Draft Instrument. For the Working Group's introductory discussion of this material, see *id.* paras. 26–34. I discuss some of these issues *infra* notes 98–123 and accompanying text.

61. The chair viewed this heading as an opportunity to discuss the issues raised by chapter 2, and to some extent chapters 8 and 12, of the UNCITRAL Preliminary Draft Instrument. For the Working Group's introductory discussion of this material, see *Ninth Session Report*, *supra* note 55, paras. 35–38.

62. The chair viewed this heading as an opportunity to discuss the issues raised by chapters 4, 5, and 6 of the UNCITRAL Preliminary Draft Instrument. For the Working Group's introductory discussion of this material, see *id.* paras. 39–47. I discuss some of these issues *infra* notes 124–44 and accompanying text.

63. The chair viewed this heading as an opportunity to discuss the issues raised by chapters 7, 9, and 10 of the UNCITRAL Preliminary Draft Instrument. For the Working Group's introductory discussion of this material, see *Ninth Session Report*, *supra* note 55, paras. 48–54. I discuss some of these issues *infra* notes 281–84 and accompanying text.

64. The chair viewed this heading as an opportunity to discuss the issues raised by chapter 11 of the UNCITRAL Preliminary Draft Instrument. For the Working Group's introductory discussion of this material, see *Ninth Session Report*, *supra* note 55, paras. 55–56.

65. The chair viewed this heading as an opportunity to discuss the issues raised by chapter 12, and to some extent chapters 2 and 8, of the UNCITRAL Preliminary Draft Instrument. For the Working Group's introductory discussion of this material, see *id.* para. 57.

66. The chair viewed this heading as an opportunity to discuss the issues raised by chapters 13 and 14 of the UNCITRAL Preliminary Draft Instrument. For the Working Group's introductory discussion of this material, see *id.* paras. 58–61. I discuss some of these issues *infra* notes 311–43 and accompanying text.

67. The U.S. delegation viewed this heading as an opportunity to discuss the issues raised by chapter 17, and to some extent chapter 3, of the UNCITRAL Preliminary Draft Instrument. For the Working Group's introductory discussion of this material, see *Ninth Session Report*, *supra* note 55, paras. 62–70. I discuss some of these issues *infra* notes 346–51 and accompanying text.

68. I discuss this issue *infra* notes 98–123 and accompanying text.

When the general discussion had been completed, the Working Group began its "first reading" of the Preliminary Draft Instrument—an article-by-article discussion, sometimes in great detail, of each provision. In the time available during the first session, the Working Group discussed all of chapter 1 (definitions),[69] chapter 5 (obligations of the carrier),[70] and chapter 7 (obligations of the shipper),[71] and began its discussion of chapter 9 (freight).[72]

The 2002 fall meeting in Vienna lasted one week.[73] Half of the first day was devoted to a very general discussion of the scope of application issue,[74] and most of the final day was devoted to an "off-the-record" discussion with industry representatives,[75] primarily on the scope of application issue.[76] The remaining time was devoted to a continuation of the first reading of the Preliminary Draft Instrument. The Working Group spent three days on the highly-controversial chapter 6 (liability of the carrier),[77] and half a day completing the unfinished discussion of chapter 9 (freight).[78]

The Working Group's most recent session was held in New York from March 24th to April 4th, 2003.[79] During this two-week session, the first week was devoted to completing the first reading of the Preliminary Draft Instrument.[80] Although the first reading had ultimately been a more time-consuming process than initially anticipated, stretching over three sessions, it gave all of the delegates an opportunity to express their initial views on virtually all of the Instrument's provisions.[81] Based on the tentative views expressed during the first reading, the UNCITRAL Secretariat was thereafter able to prepare a new draft of the Instrument for discussion at the fall 2003 meeting in Vienna next October.[82] The Secretariat made few substantive changes,[83] but the drafting was revised to reflect the typical United Nations style[84] and a number of policy choices are highlighted.[85]

The second week of the spring session was devoted to a discussion of the Draft Instrument's scope of application.[86] This had been a central topic for discussion at each of

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69. *See Ninth Session Report, supra* note 55, paras. 71–110.

70. *See id.* paras. 111–43.

71. *See id.* paras. 144–70.

72. *See id.* paras. 171–90.

73. *See Report of Working Group III (Transport Law) on the Work of Its Tenth Session*, United Nations Commission on International Trade Law (UNCITRAL), 36th Sess., para. 18, U.N. Doc. A/CN.9/525 (2002), *available at* http://www.uncitral.org/english/workinggroups/wg_3/acn9-525e.pdf (last visited Aug. 11, 2003) [hereinafter *Tenth Session Report*].

74. *See id.* paras. 25–28.

75. *See id.* para. 124. The Working Group also discussed the report at the close of the session. *Id.*

76. *See, e.g.*, *id.* annexes I & II.

77. *See id.* paras. 29–105.

78. *See Tenth Session Report*, *supra* note 73, paras. 106–24.

79. *See Report of Working Group III (Transport Law) on the Work of Its Eleventh Session*, United Nations Commission on International Trade Law (UNCITRAL), 36th Sess., para. 17, U.N. Doc. A/CN.9/526 (2003), *available at* http://www.uncitral.org/english/sessions/unc/unc-36/acn9-526-e.pdf (last visited Aug. 11, 2003) [hereinafter *Eleventh Session Report*].

80. *See id.* paras. 24–218.

81. The chairman decided to postpone the discussion of chapter 2 (electronic communication) for the time being. *See id.* para. 23.

82. *See Draft Instrument on the Carriage of Goods by Sea*, United Nations Commission on International Trade Law (UNCITRAL), U.N. Doc. A/CN.9/WG.3/WP.32 (2003), *available at* http://www.uncitral.org/english/workinggroups/wg_3/wp-32-26%20August.pdf (last visited Sept. 1, 2003) [hereinafter *Revised Draft Instrument*].

83. One of the Working Group's few substantive decisions was the deletion of the navigational fault defense. *See infra* note 96 and accompanying text. More typically, the Working Group decided to retain the existing text as a basis for further discussion, perhaps with the addition or deletion of square brackets. *See, e.g.*, *Eleventh Session Report*, *supra* note 79, para. 163.

84. Perhaps the most visible change is the renumbering of the articles. The Revised Draft Instrument now has 89 articles, arranged in 19 chapters, with fewer subdivisions within the articles.

85. *See, e.g.*, *Revised Draft Instrument*, *supra* note 82, at 5 n.3 (highlighting the scope issue in the "contract of carriage" definition).

86. *See Eleventh Session Report*, *supra* note 79, paras. 219–67; *Provisional Agenda*, United Nations Commission on International Trade Law (UNCITRAL), para. 24, U.N. Doc. A/CN.9/WG.III/WP.24 (2002),

the previous meetings,[87] but the subject was so important that the Working Group decided it was worth the effort to reach some tentative conclusions before the work proceeded any further.[88]

During next fall's meeting in Vienna, the Working Group will presumably begin its detailed review of the second draft of the Instrument.[89] This "second reading" should be more efficient than the first, for the delegates should now be more familiar with the issues and the various views of how the issues should be resolved. It is still likely to be a slow process, however, for the Working Group is likely to be making more decisions on this round, which means that the discussions will need to be more serious. Moreover, it will be particularly important in this round to recognize the interrelationship among provisions that have until now been discussed only in isolation. For this project to succeed, the Working Group must produce a final instrument that represents a fair balance among the affected commercial interests, and this can be accomplished only by recognizing the need for compromise and identifying the provisions that need to be included in a compromise package. The work will only become more difficult as it proceeds.

## III. SIGNIFICANT PROVISIONS OF THE DRAFT INSTRUMENT

Perhaps the most striking aspect of the UNCITRAL Draft Instrument[90] is the range of issues addressed. Whereas the Hague, Hague-Visby, and Hamburg Rules all focus on liability issues, this Instrument covers a range of other subjects under the broad heading of Transport Law. Chapters 3–6 still cover the familiar liability issues that international conventions have addressed for three-quarters of a century, but other parts of the Draft Instrument break entirely new ground. Chapter 2, for example, addresses electronic communication. Chapter 7 details the obligations of the shipper.[91] Chapter 8 covers a number of issues that were addressed in the United States with the Pomerene Bill of Lading Act.[92] Chapter 9 provides specific rules on the obligation to pay freight, a subject that has

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*available at* http://www.uncitral.org/english/workinggroups/wg_3/wp24.pdf (last visited Aug. 11, 2003) [hereinafter *Eleventh Session Provisional Agenda*].

87. *See supra* notes 57–68, 73–78 and accompanying text.

88. I describe the substance of this discussion below, in my analysis of the scope of application issue. *See infra* Part III.A.

89. *See Provisional Agenda*, United Nations Commission on International Trade Law (UNCITRAL), U.N. Doc. A/CN.9/WG.III/WP.31 (2003), *available at* http://www.uncitral.org/english/workinggroups/wg_3/wp-31-e.pdf (last visited Sept. 1, 2003).

90. References to the "UNCITRAL Draft Instrument" are equally applicable to the Preliminary and Revised Draft Instruments. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54; *Revised Draft Instrument*, *supra* note 82.

91. Article 4(3) & (6) of the Hague and Hague-Visby Rules (enacted in the United States as COGSA § 4(3) & (6), 46 U.S.C. app. § 1304(3) & (6) (2000)) briefly addresses shipper's liability. This issue is becoming increasingly important. *See, e.g.*, Senator Linie GmbH & Co. v. Sunway Line, Inc., 291 F.3d 145 (2d Cir. 2002) (holding the U.S. COGSA establishes strict liability for shippers of inherently dangerous goods even if the shipper or the carrier did not know of the dangerous nature of the goods); Effort Shipping Co. v. Linden Management S.A., [1998] A.C. 605 (H.L.) (holding shippers liable under the Hague-Visby Rules as enacted in the United Kingdom for damages to cargo caused by beetle infestation). Chapter 7 of the UNCITRAL Draft Instrument imposes more extensive obligations upon shippers. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 7.1–7.8; *Revised Draft Instrument*, *supra* note 82, arts. 25–32.

92. 49 U.S.C. §§ 80101–80116 (2000) (recodifying 49 U.S.C. §§ 81–124 (1988)). Some of the provisions in chapter 8 cover issues addressed by article 3 of the Hague and Hague-Visby Rules. *Compare, e.g.*, *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.2.1(b), *and Revised Draft Instrument*, *supra* note 82, art. 34(1)(b), *with* Hague Rules, *supra* note 7, art. 3(3)(a) *and* Hague-Visby Rules, *supra* note 9, art. 3(3)(a). Article 3 of the Hague and Hague-Visby Rules has been enacted in the United States as COGSA § 3, 46 U.S.C. app. § 1303 (2000).

never been covered by international agreement and is rarely covered by domestic legislation.[93]

In this part of the article, I highlight over twenty specific aspects of the Draft Instrument that I think are most likely to be of general interest. Some provisions that I discuss in this part are likely to be very controversial,[94] while others are just particularly likely to be misunderstood.[95] But of course the Instrument remains a work in progress, and when yesterday's controversies are resolved new issues move to the center and generate new controversies.[96] The list here may ultimately prove to be both under and over-inclusive. For ease of reference, I address each of the specific aspects—to the extent possible[97]—in the order in which it arises in the Draft Instrument.

### *A. Scope of Coverage*[98]

Although the "most striking" aspect of the Draft Instrument may be its coverage of issues outside the scope of the traditional liability regimes,[99] its most controversial aspect has been the coverage of the entire contract of carriage—including land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel.[100]

In sharp contrast with the previous international maritime transport conventions,[101] the coverage is *contractual*: It is defined by the contract of carriage itself.[102] If the contract

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93. Other largely new chapters in the UNCITRAL Draft Instrument include chapter 10 (Delivery to the Consignee), chapter 11 (Right of Control), chapter 12 (Transfer of Rights), and chapter 13 (Rights of Suit). *See generally* van der Ziel, *supra* note 12, at 273–77.

94. *See, e.g.*, *infra* notes 124–44 and accompanying text (discussing performing parties).

95. *See, e.g.*, *infra* notes 198–99 and accompanying text (discussing mixed contracts of carriage and forwarding).

96. In Part III.G, for example, I discuss the navigational fault exception. *See infra* notes 212–22 and accompanying text. This exception was included in the original Hague Rules with little debate. *See, e.g.*, *Report of the Thirtieth Conference Held at the Peace Palace, The Hague, Holland*, 2 PROCEEDINGS OF THE MARITIME LAW COMMITTEE 142–52 (1922), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 248–58 (Michael F. Sturley ed., 1990) [hereinafter *Hague Conferece Report*, 1 LEGISLATIVE HISTORY]. The subject was simply not controversial in the 1920s and 1930s, but the issue was highly controversial for at least the last three decades of the twentieth century. *See, e.g.*, John O. Honnold, *Ocean Carriers and Cargo; Clarity and Fairness—Hague or Hamburg?*, 24 J. MAR. L. & COM. 75, 104–06 (1993); Cargo Liability and the Carriage of Goods by Sea Act (COGSA): Oversight Hearing Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 102d Cong., 2d Sess., at 78, 99 (1992) (statements of James E. Curtis, Chairman of the National Industrial Transportation League, and William J. Augello, Executive Director and General Counsel of the Transportation Claims and Prevention Council, respectively); A.B.A. Section Report, *supra* note 26, at 249. It now appears to be generally accepted that the exception will not be included in any future Instrument. *See, e.g.*, *Tenth Session Report*, *supra* note 73, paras. 35–36. The controversy is at least waning.

97. Some issues arise in several provisions throughout the UNCITRAL Draft Instrument. For these issues, I have arranged my discussion according to when the issue first arises in a significant way. *See infra* notes 98–123 and accompanying text (discussing scope of coverage). The Revised Draft Instrument has also altered the order in which a few of the provisions appeared in the Preliminary Draft Instrument. *See, e.g.*, *Revised Draft Instrument*, *supra* note 82, art. 2 (moving provisions that had been in chapter 3 of the Preliminary Draft Instrument to chapter 1 in the Revised Draft Instrument).

98. This issue arises throughout the UNCITRAL Draft Instrument, but it first appears in the definition of "contract of carriage" as "a contract under which a carrier . . . undertakes to carry goods wholly or partly by sea from one place to another." *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 1.5; *Revised Draft Instrument*, *supra* note 82, art. 1(a).

99. *See supra* text accompanying note 90.

100. *See, e.g.*, Patrick J.S. Griggs, *International Maritime Law—A Busy Schedule*, CMI NEWS LETTER, Jan.–Apr. 2003, at 7, 8 (describing door-to-door coverage as "[p]erhaps the most controversial aspect" of the Draft Instrument), *available at* http://www.comitemaritime.org/news/pdfiles/2003-1.pdf (last visited Aug. 27, 2003).

101. The Hamburg Rules are "port-to-port." *See* Hamburg Rules, *supra* note 3, art. 4(1). The Hague and Hague-Visby Rules, however, are "tackle-to-tackle." *See* Hague Rules, *supra* note 7, art. 1(e); Hague-Visby Rules, *supra* note 9, art. 1(e).

covers land carriage preceding the loading of the vessel and land carriage subsequent to the unloading of the vessel, then the Draft Instrument does too. But if the contract covers only the maritime leg of a multimodal movement, then that is all that the Draft Instrument covers. In other words, if a contract of carriage provides for a shipment from one port to another port, then the Draft Instrument's coverage is simply "port-to-port." But if a contract of carriage provides for a shipment from the shipper's manufacturing plant to the consignee's warehouse, then the Draft Instrument's coverage is "door-to-door."[103]

This door-to-door coverage is somewhat narrower than full multimodal coverage. In a true multimodal regime, the contract of carriage could provide for *any* two (or more) modes of carriage.[104] Thus a multimodal regime would govern a shipment involving road and rail transport. The Draft Instrument, in contrast, requires a maritime leg.[105] Thus, it could be described as a "maritime plus" convention.[106] Because the existing liability regimes are port-to-port or narrower,[107] "maritime plus" was already controversial. Many feared that the new regime would conflict with existing unimodal regimes, particularly CMR[108] and CIM-COTIF[109] (the European road and rail conventions). Thus during the UNCITRAL Working Group's opening discussion of the Draft Instrument, a number of delegates spoke in general terms against the concept of door-to-door coverage and instead favored restricting the application of the Instrument to a port-to-port basis.[110]

The Draft Instrument attempts to deal with these concerns by establishing a "network" system. Under article 4.2.1 of the Preliminary Draft Instrument (which corresponds to article 8 of the Revised Draft Instrument), liability is based on the relevant unimodal regime when it can be shown that the damage occurred during land transport that would otherwise have been subject to a mandatorily-applicable international convention.[111] In practical

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102. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 3.1, 4.1; *Revised Draft Instrument*, *supra* note 82, arts. 2(1), 7; *see also Position Paper on Multimodality of the Draft Instrument*, paras. 2(1)–2(2), U.N. Doc. A/CN.9/WG.III/WP.33 (2003) [hereinafter *Netherlands' Position Paper*].

103. Similarly, the UNCITRAL Draft Instrument's coverage may be "door-to-port" or "port-to-door," depending on the scope of the contract. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 4.1; *Revised Draft Instrument*, *supra* note 82, art. 7.

104. *See, e.g.*, United Nations Convention on International Multimodal Transport of Goods, May 24, 1980, art. 1(1), U.N. Doc. TD/MT/CONF/16 (1980), *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 1-4 (Frank L. Wiswall, Jr. ed., 7th rev. ed. 2003) (defining "international multimodal transport" as "the carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country at which the goods are taken in charge by the multimodal transport operator to a place designated for delivery situated in a different country") [hereinafter Multimodal Convention].

105. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 1.5 (defining "contract of carriage" to require the goods to be carried "wholly or partly by sea"); *Revised Draft Instrument*, *supra* note 82, art. 1(a) (same).

106. *See, e.g.*, *Netherlands' Position Paper*, *supra* note 102, para. 1(c).

107. *See supra* note 92.

108. Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 [hereinafter CMR].

109. Article 3(1) of the Convention Concerning International Carriage by Rail (COTIF), May 9, 1980, 1987 Gr. Brit. T.S. No. 1 (Cm. 41), provides that "international through traffic" is subject to the "Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM)," which forms Appendix B to COTIF. These rules will be cited herein as CIM-COTIF. A new version of CIM-COTIF was promulgated in 1999, but is not yet in force.

110. *See Ninth Session Report*, *supra* note 55, paras. 27–29.

111. The UNCITRAL Preliminary Draft Instrument covers only mandatorily applicable international conventions because it creates its network exception only for the

> provisions of an international convention that
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> > (i) according to their terms apply to all or any of the carrier's activities under the contract of carriage during that period, [irrespective of whether the issuance of any particular document is needed in order to make such international convention applicable], and

terms, this means that European[112] road carriage, which is subject to the regional convention known as CMR,[113] and European[114] rail carriage, which is subject to the regional convention known as CIM-COTIF,[115] will be subject to the special network rules.[116] The non-European delegations at the CMI's International Sub-Committee generally did not advocate the network principle, but it was universally recognized that the adoption of a network system was almost certainly a political necessity to achieve a compromise that could be ratified in Europe.

The scope of coverage issue was the single most important topic on the agenda at last spring's UNCITRAL session.[117] Indeed, the second week of the session was devoted to a discussion of the subject.[118] The Working Group recognized that the choice between a door-to-door convention and a port-to-port convention would have implications throughout the Instrument, and it was therefore important to address the issue in a detailed and systematic fashion. Moreover, the preliminary discussion of the issue at the spring 2002 meeting in New York suggested that this would be a highly controversial debate with strongly-held views on both sides.[119] To assist the discussion, the UNCITRAL Secretariat

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(ii) make specific provisions for carrier's liability, limitation of liability, or time for suit, and
(iii) *cannot be departed from by private contract* either at all or to the detriment of the shipper . . . .

*UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 4.2.1 (emphasis added). The bracketed language in clause (i) is designed to address a particular problem under the 1980 version of CIM-COTIF. *See supra* note 109. The language is bracketed because the problem does not arise under the 1999 version. *See infra* note 215 (explaining use of brackets). Thus, the bracketed language will be unnecessary if the new convention takes effect after the 1999 version of CIM-COTIF is in force. For further discussion of this provision, see van der Ziel, *supra* note 12, at 267–68.

The Revised Draft Instrument suggests a possible revision that would expand the network exception if it were adopted. Specifically, it adds the bracketed phrase "or national law" after "international convention." See Revised Draft Instrument, supra note 82, art. 8. This addition reflects proposals from Canada, see infra notes 148–51 and accompanying text, and Sweden, see infra note 149, but it has been highly controversial and has not been accepted by the Working Group.

112. Morocco and some of the successor states to the former Soviet Union are the only parties to CMR that are not at least partially within Europe. *See, e.g.*, United Nations Treaty Collection, Chapter XI–B: Road Traffic, *at* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXI/subchapB/treaty13.asp (last visited Sept. 9, 2003) (listing parties to the CMR). The Inter-American Convention on Contracts for the International Carriage of Goods by Road, July 15, 1989, OAS T.S. No. 72, 29 I.L.M. 81, is of no practical significance. According to the OAS web site, no nation has yet ratified it. *See* Organization of American States, Inter-American Convention on Contracts for the International Carriage of Goods by Road, *available at* http://www.oas.org/juridico/english/sigs/b-55.html (last visited Aug. 12, 2003). The signatories are Bolivia, Colombia, Ecuador, Guatemala, Haiti, Paraguay, Peru, Uruguay, and Venezuela. *Id.*

113. *See* CMR, *supra* note 108.

114. COTIF applies primarily in Europe and the Middle East. *See, e.g.*, United Nations Economic Commission for Europe, *at* http://www.unece.org/trade/cotif/ (last visited Sept. 9, 2003) (listing parties to COTIF).

115. CIM-COTIF, *supra* note 109.

116. The Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, would also come within the narrow network exception. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 4.2.1. The combination of sea and air carriage, however, is sufficiently unusual that this is not a major practical concern.

The Convention on the Contract for the Carriage of Goods by Inland Waterways (CMN), Feb. 6, 1959, 1961 UNIDROIT 399, *translated in* 1 INT'L TRANSPORT TREATIES II–1 (1986), was never ratified by any nation. If the 2000 Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI), enters into force, then European river and canal carriage would also be within the narrow network exception. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 4.2.1.

117. *See Eleventh Session Provisional Agenda*, *supra* note 86, para. 24.

118. *See Eleventh Session Report*, *supra* note 79, paras. 219–67; *see also supra* note 86 and accompanying text.

119. A somewhat tangential discussion of the issue at the beginning of the fall 2002 meeting in Vienna reinforced this prediction. *See Tenth Session Report*, *supra* note 73, paras. 25–28.

(with help from the CMI) prepared a forty-two-page background paper titled "General Remarks on the Sphere of Application of the Draft Instrument."[120]

In view of this background, it is remarkable how non-contentious the scope discussion turned out to be. There seemed to be widespread agreement—perhaps even a consensus among the national delegations speaking on the issue—that the world had little need for another port-to-port convention,[121] and that some sort of door-to-door (or even multimodal) convention was therefore appropriate.[122]

Furthermore, there seemed to be broad agreement that the Draft Instrument needed to address the potential problems created by its door-to-door application, and that the appropriate treatment of performing parties[123] was the primary way to do this. Although many views were expressed on how to treat performing parties, the divergence of opinion on the fundamental issues was less than many had anticipated.

### *B. Performing Parties*[124]

The Hague and Hague-Visby Rules on their face regulate the relationship between the "shipper" and the "carrier." In modern commercial shipping practice, however, the "carrier"[125] never performs all of its duties under the contract of carriage itself. Quite apart from the fact that most carriers are corporations, which can act only through their agents, virtually every carrier today subcontracts with separate companies to perform specialized aspects of the carriage.[126] For decades, shipowners have contracted with independent stevedores to load and unload their vessels,[127] and with independent terminal operators to

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120. *Preparation of a Draft Instrument on the Carriage of Goods by Sea: General Remarks on the Sphere of Application of the Draft Instrument*, U.N. Doc. A/CN.9/WG.III/WP.29 (2003), *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP-29-e.pdf (last visited Aug. 17, 2003) [hereinafter *General Remarks*].

121. The FIATA observer spoke in favor of a port-to-port convention, but even he described his own position as a "lonely" one. *See Compilation of Replies*, *supra* note 24, at 3–5.

122. *See Eleventh Session Report*, *supra* note 79, para. 239 ("[W]ide support was expressed in the Working Group that the scope of application of the draft instrument should be door-to-door rather than port-to-port."). The head of the U.S. delegation was struck by the extent to which views had developed over the course of one year: "Last year, delegates seemed evenly divided between those who wanted a door-to-door scope instead of a port-to-port scope . . . . This year, there was overwhelming support for some kind of a door-to-door approach." Robert Mottley, *UNCITRAL Moves Forward*, AMERICAN SHIPPER, June 2003, at 46 (quoting Mary Helen Carlson, head of the U.S. delegation to UNCITRAL's Working Group III).

123. Various proposals for the appropriate treatment of performing parties are discussed below. *See infra* note 124 and accompanying text.

124. The substantive provisions applicable to performing parties are found in the chapter addressing the carrier's liability. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.3; *Revised Draft Instrument*, *supra* note 82, art. 15. But the controversy begins with the "performing party" definition in the first chapter. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 1.17; *Revised Draft Instrument*, *supra* note 82, art. 1(e).

125. "Carrier" is defined in the Draft Instrument as the "person that enters into a contract of carriage with a shipper." *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 1.1; *Revised Draft Instrument*, *supra* note 82, art. 1(b). The "carrier" is thus the party that *promises* to perform the carriage, not necessarily the party that does perform the carriage. The Hague and Hague-Visby Rules do not fully define "carrier," but the focus was on the *promise* to perform the carriage. Article 1(a) declares that "'[c]arrier' includes the owner of the vessel or the charterer who enters into a contract of carriage with a shipper." Hague Rules, *supra* note 7, art. 1(a).

126. *See, e.g.*, van der Ziel, *supra* note 12, at 269 ("In modern marine transport, the carriage of goods is mainly a process during which the actual handling of the goods is often done by machines operated by (personnel of) intermediaries.").

127. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 278 (2d ed. 1975) ("Under the customary employment pattern the harbor worker is hired by a master stevedore or other independent contractor and not by the shipowner."); *see also* Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 263–64 (1979) (contrasting "recurring situation" in which longshoreman is "employed by a stevedoring concern"

store cargo prior to loading or after discharge. With the explosion of door-to-door shipments, few (if any) carriers would even have the physical capacity to perform all of their duties under a typical contract of carriage. Indeed, some carriers perform *none* of their duties under the contract of carriage themselves. Many non-vessel-operating carriers, or NVOCs,[128] contract with the shipper to carry the cargo but then subcontract every aspect of the transportation.[129] Although the carrier is ordinarily liable for the loss or damage caused by its subcontractors, the early liability regimes made no effort to address the responsibility of those parties that actually performed the contract.

The Hamburg Rules made some effort to deal with this problem by introducing the concept of an "actual carrier," which article 1(2) defines as

> any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted.[130]

This broad definition[131] thus starts with the carrier's employees, agents, and subcontractors to whom the carrier itself has delegated the performance of the contract of carriage. The final clause, covering "any other person . . . ," then covers sub-subcontractors, and so on down the line.

The early drafts of the CMI Instrument introduced a very broad concept of "performing carrier,"[132] but this proved to be one of the most controversial aspects of the project. Even the term "performing carrier" was criticized, on the ground that many independent parties performing the carrier's obligations under the contract of carriage do not literally "carry" the goods. Thus, the new term "performing party" was introduced.[133]

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with the "less familiar arrangement where the . . . longshoreman loading or unloading the ship is employed by the vessel itself").

128. In the United States, the statutory term is "non-vessel-operating common carrier" or "NVOCC." *See, e.g.*, 46 U.S.C. app. § 1702(17)(B) (2000) (defining an NVOCC as "a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.").

129. *See, e.g.*, James N. Kirby, Pty Ltd. v. Norfolk S. Ry. Co., 300 F.3d 1300, 1302–03 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3476 (U.S. Jan. 6, 2003) (No. 02–1028).

130. Hamburg Rules, *supra* note 3, art. 1(2).

131. It is unclear just how broadly the "actual carrier" definition should be read. At the very least, it contemplates vessel owners or operators in the transshipment context. (The definition would undoubtedly cover land carriers in a door-to-door shipment, too, except that the Hamburg Rules apply on a port-to-port basis.) The language is broad enough to cover "any person" that performs any aspect "of the carriage of the goods." The key question is whether "the carriage of the goods, or . . . part of the carriage" includes every necessary aspect of moving the cargo from the place of receipt to the place of delivery (such as loading and unloading the vessel), or whether it includes only those aspects of the overall carriage of the goods that could themselves be described as a carriage of the goods (such as the carriage on a feeder vessel from the place of receipt to a transshipment port). A logical interpretation of the language suggests the broad reading. The phrase "the carriage of the goods" must refer to the carrier's obligation to carry the cargo from the place of receipt to the place of delivery, and it would be utterly nonsensical to say that loading and unloading the vessel, for example, were not "part" of that overall obligation (assuming that the place of receipt is prior to loading and the place of delivery is subsequent to unloading). It is less certain whether the Hamburg Conference intended such a broad definition. *See* Sweeney, *Part IV*, *supra* note 4, at 629–31 (discussing the definitions of, and distinction between, contracting carrier and actual carrier).

132. *See, e.g.*, *Issues of Transport Law: Draft Outline Instrument*, art. 1.4, *in* 2000 CMI YEARBOOK 122–23, *available at* http://www.comitemaritime.org/singapore/issue/draft/issue_draft_01.html (last visited Aug. 14, 2003) (discussed at the Singapore Conference in February 2001); *see also Issues of Transport Law: Draft Outline Instrument*, art. 1.3, *in* 2001 CMI YEARBOOK 357, *available at* http://www.comitemaritime.org/singapore2/singafter/issues/draft.pdf (last visited Aug. 14, 2003) (discussed at the Fifth Meeting of the International Sub-Committee on Issues of Transport Law in July 2001) [hereinafter *May 2001 Draft*].

133. Despite the differences in terminology (and some significant differences in detail), the Hamburg Rules' "actual carrier," the early CMI drafts' "performing carrier," and the UNCITRAL Draft Instrument's "performing party" all express essentially the same concept. The change from "carrier" to "party" was made because the word "carrier" is often counter-intuitive, particularly in the door-to-door context. Many of the carrier's duties under the

More fundamentally, the performing party definition (found in article 1.17 of the Preliminary Draft Instrument and article 1(e) of the Revised Draft Instrument) proved highly controversial.[134] Some delegations to the CMI's International Sub-Committee supported a broad definition in order to ensure that all litigation for cargo damage would be subject to a uniform liability regime, regardless of a defendant's role in the transaction. If all of the potential defendants were subject to the same rules, there would also be less of an incentive to pursue multiple lawsuits against different defendants. FIATA, in contrast, was particularly anxious to ensure that its own members would not be covered by the definition when they undertook to carry goods but had no intention of performing the obligation themselves.[135] In Madrid in November 2001, during the International Sub-Committee's last meeting before submitting its final draft, the performing party definition was significantly narrowed (on FIATA's motion),[136] with the result that far fewer parties are governed by the substantive liability provisions.[137]

The substantive liability provisions[138] also generated some controversy. During the International Sub-Committee's deliberations, FIATA proposed that the Draft Instrument should not impose any liability on performing parties, and some other delegations supported this view. Within the United States, the World Shipping Council (WSC), an organization representing the major liner carriers serving the U.S. market, and the National Industrial Transportation League (NITL) negotiated an agreement that established their joint negotiating position on the MLA's proposed COGSA amendments and the CMI/UNCITRAL project.[139] As part of this compromise package, the WSC and NITL took the position that the contracting carrier alone should be liable for any cargo loss or damage.[140] This WSC/NITL position went well beyond the FIATA proposal. Not only would the new convention refrain from imposing any new liability on performing parties, but it would also affirmatively preempt any liability that performing parties might have under current law. In other words, the WSC/NITL Agreement would call for the preemption of existing tort law.[141] The practical effect of this proposal would be to leave

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contract of carriage are performed by entities, such as stevedores or terminal operators, that would not ordinarily be called "carriers," even though their work is an indispensable part of the carriage of goods. The CMI draftsmen also found the word "actual" to be confusing because it suggested that the "carrier," meaning the contracting carrier, was not "actually" a carrier after all (despite being called the "carrier" throughout the convention). It is noteworthy that Professor van der Ziel, recognizing the substantial similarity of the terms, summarizes the UNCITRAL Preliminary Draft Instrument's treatment of performing parties by describing them as "actual carriers." *See* van der Ziel, *supra* note 12, at 272.

134. The controversy is discussed in the UNCITRAL Preliminary Draft Instrument's commentary, *supra* note 54, paras. 14–18; *see also* van der Ziel, *supra* note 12, at 269.

135. At the time, it appeared that the Instrument would impose liability on performing parties. *See, e.g.*, *May 2001 Draft*, *supra* note 132, art 6.3. If the Instrument does not impose liability on non-maritime performing parties, see, for example, *infra* note 158 and accompanying text, FIATA's objections to the broad definition would be weaker.

136. *See Sixth Meeting Report*, *supra* note 52, at 341–42.

137. *See id.* at 342. The last-minute narrowing of the definition is also likely to have unintended consequences on other parts of the Draft Instrument. Other provisions that talk about "performing party" were all drafted with a broader definition in mind. *See, e.g.*, *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 1.9, 1.11, 1.20, 6.1.3, 6.9.1, 6.9.3, 6.10, 7.3, 8.1, 8.2, 8.3.1, 10.1, 10.4.1, 10.4.3, 11.3, 13.1, 17.2; *Revised Draft Instrument*, *supra* note 82, arts. 1(j), 1(k), 1(o), 14(2), 20(1), 20(3), 21, 27, 33, 34, 37, 46, 50, 52, 55, 63, 89.

138. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.3; *Revised Draft Instrument*, *supra* note 82, art. 15.

139. *See* WSC/NITL Agreement, *supra* note 27, paras. A, C.

140. *Id.* para. B(6).

141. In *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 (1959), for example, the Supreme Court recognized that a negligent stevedore was liable for the damage that it caused when loading cargo. Moreover, in the absence of a Himalaya clause the negligent stevedore was fully liable—without the benefit of the carrier's limitations on liability. *See infra* notes 156–59 and accompanying text. The WSC/NITL Agreement would overrule this result.

the cargo interests without any remedy against the parties that are in fact most likely to be responsible for cargo damage and without any effective remedy against anyone whenever the contracting carrier (which might well be an overseas NVOC) was insolvent or otherwise not amenable to suit.[142]

At last spring's UNCITRAL session, the performing party issue became bound up with the scope of coverage issue.[143] As a result, a number of proposals are under consideration for how the Instrument should treat performing parties. At this point, it is too early to predict with any confidence which view (or, more likely, which compromise among various views) will emerge in the final Instrument. I will therefore summarize the various proposals that were advanced at the meeting.

For each proposal, it will be helpful to consider how it would work in actual transactions. I therefore ask readers to keep two hypothetical shipments in mind. In the first shipment, a German manufacturer wishes to send a container of goods from Berlin to Chicago. It therefore enters into a contract of carriage with a German freight forwarder—a non-vessel-operating carrier (NVOC)—that undertakes to deliver the goods in Chicago. The NVOC, which is thus the "carrier" for the door-to-door shipment from Berlin to Chicago, then subcontracts with the three performing parties that will in fact move the goods: a European trucker that will carry the goods by road from Berlin to Antwerp, an ocean carrier that will carry the goods by sea from Antwerp to New York, and a U.S. railroad that will carry the goods by rail from New York to Chicago.[144] The second hypothetical shipment is similar, except that in this alternative the goods are carried from Berlin to Calgary, via Antwerp and Montreal, with a European railroad, an ocean carrier, and a Canadian trucker.

### 1. A Uniform Liability Regime

Although support was expressed for a uniform liability regime (at least in theory), it was generally recognized that it would probably be impossible to achieve a truly uniform regime in practice.[145] It is nevertheless helpful to recognize how a uniform liability regime would operate. If nothing else, it serves as a useful point of reference. Moreover, many delegates agreed that the ultimate convention should provide a liability regime that is "as uniform as possible."

Under a uniform liability regime, the same rules would apply for *any* cargo loss or damage, regardless of where the loss or damage occurred and regardless of the role played by the particular defendant. Thus, if the European trucker damaged the goods in the first hypothetical, the cargo claimant could sue either the trucker (as the party that damaged the goods) or the German NVOC (as the contracting carrier) under the Draft Instrument, which would displace CMR (the regional convention that might otherwise apply at least to the trucker's liability). Similarly, if the ocean carrier damaged the goods, the cargo claimant

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142. There appears to be no support for this extreme position in the WSC/NITL Agreement. The existence of the position has nevertheless made the entire issue more controversial.

143. *See supra* notes 60–77 and accompanying text.

144. The hypothetical described in the text is adequate to illustrate the differences among the various proposals. The transaction could well have been structured more complexly. For example, the NVOC might have contracted directly with the European trucker to carry the goods from Berlin to Antwerp, and with the ocean carrier to transport the goods from Antwerp to Chicago. The ocean carrier would then perform the Antwerp to New York leg itself and subcontract with the railroad for the New York to Chicago leg. *Cf. Kirby*, 300 F.3d at 1302. The NVOC might even subcontract with another NVOC, which would then make the necessary arrangements. *Cf.* Yang Ming Marine Trans. Corp. v. Okamoto Freighters Ltd., 259 F.3d 1086, 1088–89 (9th Cir. 2001).

145. *Eleventh Session Report*, *supra* note 79, para. 239.

could sue either the ocean carrier or the German NVOC under the Draft Instrument. Finally, if the U.S. railroad damaged the goods, the cargo claimant could sue either the railroad or the German NVOC under the Draft Instrument, which would displace the U.S. law that might otherwise apply. The results would be similar under the second hypothetical, with the German NVOC, the European railroad, the ocean carrier, and the Canadian trucker all being liable under the Draft Instrument.

A uniform liability regime would have obvious benefits of uniformity and predictability, at least from the perspective of those that regularly deal in international multimodal shipments. Complicated questions as to when and how the damage occurred would be minimized, with the result that disputes could be settled more easily. Because every defendant would be liable on the same basis, there would be no artificial effort to sue defendants who were subject to higher limits on liability.

Of course, from the perspective of an inland carrier that deals regularly in unimodal shipments and is rarely involved in an international multimodal shipment, the uniform liability regime would decrease uniformity and predictability. Some inland carriers might even be unaware whether a particular container was moving under a unimodal or multimodal contract.

More significantly, from a political perspective it is widely recognized that at least some important countries will be unwilling to preempt their existing rules governing unimodal transport to apply a new international "maritime plus" convention. In particular, the European countries are unwilling to abandon CMR and CIM-COTIF, and some nations appear unwilling to abandon their domestic law regimes. Thus, no serious support was expressed for adopting a fully uniform liability regime, even by those delegations that would have preferred this solution if it were attainable.

### 2. The UNCITRAL Preliminary Draft Instrument

The UNCITRAL Preliminary Draft Instrument seeks to establish a system that is as uniform as possible by creating a "network exception" that is as narrow as possible.[146] Under a full network system, the liability rules for each leg would be determined by the rules that would otherwise be applicable to that leg, and the same rules would apply for both the performing party (the unimodal carrier that is generally subject to the relevant rules) and the contracting carrier. Under a full network system, therefore, both the German NVOC and the European inland carrier in our two hypotheticals would be liable for damage between Berlin and Antwerp on the terms of the relevant inland convention (CMR or CIM-COTIF). The NVOC and the ocean carrier would be liable for damage on the ocean voyage under the Draft Instrument. Finally, the NVOC and the U.S. or Canadian inland carrier would be liable for damage on the inland journey under the U.S. law governing railroads or the Canadian law governing truckers.

The Preliminary Draft Instrument does not adopt a full network system. To maximize uniformity, article 4.2.1 adopts a network system that is as narrow as possible. Only mandatory laws are respected on the theory that an international convention should have the power to override any regime that the parties themselves could contractually avoid. Thus, the U.S. Carmack Amendment is preempted, and the U.S. railroad would be subject to the terms of the Preliminary Draft Instrument. Moreover, article 4.2.1 respects only

146. The Revised Draft Instrument raises the possibility, proposed by Canada and Sweden, that this narrow network exception should be significantly broadened. *See supra* note 111.

international conventions on the theory that a nation ratifying a new international convention must be prepared to give up some of its preexisting domestic law, even if that domestic law had been mandatory. Thus the mandatory Canadian law governing the liability of truckers is preempted, and the Canadian trucker would also be subject to the terms of the Preliminary Draft Instrument.

The bottom line is that for damage between Berlin and Antwerp the Preliminary Draft Instrument would subject both the German NVOC and the European inland carrier to liability on CMR or CIM-COTIF terms, but for any subsequent damage the Preliminary Draft Instrument itself would apply. Only CMR and CIM-COTIF would be mandatory international conventions as required by article 4.2.1. The Canadian law, although mandatory, is merely domestic, and would thus be preempted. Not only is the Carmack Amendment domestic, it is not even mandatory, and thus it would be even more readily preempted.[147]

### 3. Canada's "Option 2"[148]

As one of the options in its proposal, Canada advocated a simple modification of the Preliminary Draft Instrument's network system to give effect not only to other mandatory international conventions but also to mandatory national law.[149] This change would have no impact on our first hypothetical. The European inland leg would be subject to CMR, a mandatory international convention, and thus it would already be within the Preliminary Draft Instrument's narrow network exception. The U.S. rail leg would not be subject to any mandatory national law, and thus it would not be within the broader Canadian network exception. As a result, the analysis of our first hypothetical would be the same under this Canadian proposal as under the Preliminary Draft Instrument.

For our second hypothetical, this Canadian proposal would change the analysis. Because a mandatory national law[150] applies to the road journey from Montreal to Calgary, the broader network exception would mean that the cargo claimant could recover from either the NVOC or the Canadian trucker only to the extent permitted by the mandatory Canadian law.[151]

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147. Because the Carmack Amendment is not mandatory, it would be preempted even if the bracketed "or national law" were included in article 8 of the Revised Draft Instrument. *Cf. supra* note 111.

148. Canada made a formal proposal, raising three options, that was circulated to the Working Group in *Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by Canada*, United Nations Commission on International Trade Law (UNCITRAL), para. 9, U.N. Doc. A/CN.9/WG.III/WP.23 (2002), *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP-23-e.pdf (last visited Aug. 17, 2003) [hereinafter *Canadian Proposal*].

149. *Canadian Proposal*, *supra* note 148, para. 9. A subsequent proposal by Sweden agreed with Canadian option 2, and made additional suggestions as well. *See generally Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by Sweden*, United Nations Commission on International Trade Law (UNCITRAL), U.N. Doc. A/CN.9/WG.III/WP.26 (2002), *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP-26-e.pdf (last visited Aug. 17, 2003) [hereinafter *Swedish Proposal*].

An earlier draft of the CMI Instrument had included precisely the language that the Canadian delegation proposes to add in option 2. *See May 2001 Draft*, *supra* note 132, art. 4.4(a). This language had been deleted from the draft in preparation for the November 2001 meeting of the CMI's International Sub-Committee, see *Sixth Meeting Report*, *supra* note 52, at 318, on the basis of a full discussion of the issue at the July 2001 meeting, see *Fifth Meeting Report*, *supra* note 49, at 265, 291–93. The Canadian delegation at the CMI meeting spoke in favor of deleting the language that the Canadian delegation to the UNCITRAL Working Group now wishes to restore. *See Fifth Meeting Report*, *supra* note 49, at 291 (comments of Prof. Tetley).

150. The relevant mandatory national law in Canada is not federal legislation, but uniform provincial legislation. *See, e.g.*, Valmet Paper Mach., Inc. v. Hapag-Lloyd AG, [2002] B.C.S.C. 868 (citing three uniform provincial statutes).

151. As it happens, the liability limit under the mandatory Canadian law governing truckers is roughly the same as the Hague-Visby weight limit, but it is entirely possible that a mandatory national law would provide for

4. The Italian Proposal[152]

Italy argued that the Preliminary Draft Instrument's network system is both too broad and too narrow. It is too broad in demanding the application of the underlying unimodal regime to the door-to-door carrier.[153] In Italy's view, there is no need to apply CMR or CIM-COTIF to the German NVOC in our hypothetical cases, even if the damage occurs on the inland carriage between Berlin and Antwerp. The NVOC is not a road carrier that would expect to be governed by CMR or a rail carrier that would expect to be governed by CIM-COTIF. It did not contract to carry the goods by road or rail from one European state to another European state; it contracted to carry the goods by three different modes of transportation from Berlin to a country in North America that is not a party to CMR or CIM-COTIF. The NVOC is a CMR or CIM-COTIF shipper (under its contract with the European trucker), not a CMR or CIM-COTIF carrier. Thus, there should be no conflict between either CMR or CIM-COTIF and the Preliminary Draft Instrument with respect to the NVOC, even if the Preliminary Draft Instrument were to apply for damages on an inland European leg.[154]

Italy also argues that the Preliminary Draft Instrument is too narrow in failing to respect the interests of non-European inland carriers. A Canadian trucker has just as strong an expectation that the mandatory Canadian law will apply to it as the European trucker's expectation to be governed by CMR.

The Italian solution is to apply the Instrument to all suits against the contracting carrier regardless of where the loss or damage occurs. Moreover, the Instrument would apply to all suits against maritime performing parties. The new convention will be not only a multimodal instrument in the "maritime plus" context but also the unimodal instrument for the maritime mode. Thus, maritime performing parties should expect it to apply. Non-maritime performing parties, on the other hand, would expect to be liable on the terms applicable to their own contracts with the contracting carrier. To protect this expectation, the Italian proposal would permit cargo interests to sue inland performing parties only on a subrogation-like basis.[155] In essence, a cargo claimant could recover from an inland

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much lower limits. The Canadian delegation informed us that until fairly recently it had mandatory law limiting a railroad's liability to 20,000 Canadian dollars for a forty-foot container, or 10,000 Canadian dollars for a twenty-foot container. For a heavy container, or a container with a large number of individual packages, this would represent a small fraction of the liability limit under the Hague-Visby or Hamburg Rules.

When the Swedish delegate realized the implications of the similar Swedish proposal to include mandatory national law within the network system (a proposal that had been drafted with a focus on the much higher limits of the mandatory Swedish law governing domestic road carriage), he suggested giving the cargo claimant the option of recovering *either* the limits established by the UNCITRAL Draft Instrument *or* the mandatory national law, *whichever is higher*. *See Swedish Proposal*, *supra* note 149.

152. *Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by Italy*, United Nations Commission on International Trade Law (UNCITRAL), U.N. Doc. A/CN.9/WG.III/WP.25 (2002), *available at* http://www.uncitral.org/english/workinggroups/wg_3/WP-25-e.pdf (last visited Aug. 17, 2003) [hereinafter *Italian Proposal*].

153. Consistent with this position, Italy also strongly opposes the inclusion of the bracketed "or national law" language in article 8 of the Revised Draft Instrument. *See supra* note 111.

154. The Italian view of the relationship between CMR Draft Instrument and the UNCITRAL Draft Instrument is not universally shared. For an argument rejecting the Italian view, see generally Malcolm Clarke, *A Conflict of Conventions: The UNCITRAL/CMI Draft Transport Instrument on Your Doorstep*, 9 J. INT'L MAR. L. 28 (2003).

155. At this preliminary stage, Italy has not yet fully developed the proposal. Thus, there are no details now as to how the subrogation-like action would work in practice. But at the very least, the same legal regime would govern the shipper's action against the subcontracting performing party as would have governed in an action by the door-to-door carrier against its subcontractor, the performing party.

performing party on the same basis as the door-to-door contracting carrier could have recovered.

In the context of our two hypotheticals, therefore, the cargo claimant can recover from the German NVOC for any damage, regardless of the leg on which it occurs, on the Draft Instrument's terms. It can recover from the European trucker for damages on the European road leg on CMR terms because that is the basis on which the NVOC could have recovered from the trucker. It can recover from the European railroad for damages on the European rail leg on CIM-COTIF terms, under the same analysis. It can recover from the ocean carrier for damages on the ocean leg on the Draft Instrument's terms both because the Instrument would apply to maritime performing parties and because the Instrument would be the maritime convention regulating the NVOC's action against the ocean carrier. Finally, the cargo claimant could recover from the relevant North American railroad or trucker under U.S. or Canadian law. If the NVOC had negotiated a very low limit with the U.S. railroad under the Carmack Amendment, the cargo claimant presumably would be bound by that agreement (because that is what the Carmack Amendment allows). For the Canadian trucker, it would be bound by mandatory Canadian law—just as the NVOC would have been.

5. The U.S. Proposal

The United States did not submit a formal proposal until July, but it has now circulated a position paper that addresses ten different issues as part of an overall commercial compromise.[156] Under the new U.S. proposal, the contracting carrier's liability would be determined by the narrow network principle found in article 4.2.1 of the Preliminary Draft Instrument.[157] This is itself a compromise suggestion, based on the desire to achieve as uniform a system as possible and the belief that it will be necessary to extend at least this much deference to CMR to achieve a convention that will be widely ratified.

For inland performing parties, the U.S. proposal would neither create a new cause of action nor preempt an existing cause of action.[158] Cargo claimants would be free to sue inland performing parties on exactly the same terms as they do today under existing law. For maritime performing parties, the Draft Instrument would recognize a direct cause of action on its own terms.

For damage between Berlin and Antwerp in our two hypotheticals, the cargo claimant could recover from the German NVOC or the European inland carrier on CMR or CIM-

156. *Preliminary Draft Instrument on the Carriage of Goods by Sea: Proposal by the United States of America*, United Nations Commission on International Trade Law (UNCITRAL), U.N. Doc. A/CN.9/WG.III/WP.34 (2002), *available at* http://www.uncitral.org/english/workinggroups/wg_3/wp-34-e.pdf (last visited Aug. 27, 2003) [hereinafter *U.S. Proposal*].

157. *Id.* para. 5. The United States accordingly opposes the inclusion of the bracketed "or national law" language in article 8 of the Revised Draft Instrument. *See supra* note 111. The support of even the narrow network principle distinguishes the U.S. proposal from the Italian proposal. *See also infra* note 161.

158. This aspect of the proposal satisfies the request of the U.S. railroads that the new Instrument not apply to them. *See, e.g.*, Comments on Behalf of the Association of American Railroads Relating to the Preliminary Draft Instrument on the Carriage of Goods by Sea, Doc. No. MARAD-2001-11135-12, at 3 (filed Sept. 13, 2002) (expressing the Association's opposition to extending the scope of the Preliminary Draft Instrument to cover inland carriers "to the extent that it adversely affects the current liability system applicable to U.S. . . . railroads"), *available at* http://dmses.dot.gov/docimages/pdf1a/187803_web.pdf (last visited Sept. 9, 2003); *Compilation of Replies*, *supra* note 24, at 34 (substantially identical comments filed with UNCITRAL). It also distinguishes the U.S. proposal from the Italian proposal. *See also infra* note 161.

COTIF terms, as appropriate.[159] For any damage on the ocean voyage, the Draft Instrument would apply in an action against either the NVOC or the ocean carrier. For any damage on the North American inland journey, the cargo claimant could recover from the NVOC under the Instrument, and its rights against the relevant inland carrier would be whatever they are today. For the New York to Chicago leg, this would mean a tort action in which the railroad would be free to claim whatever benefits it could under the NVOC's Himalaya clause.[160] For the Montreal to Calgary leg, this would presumably mean an action under the mandatory Canadian law.[161]

### 6. WP.29 Paragraph 166

The UNCITRAL Secretariat's background paper addressing the sphere of application of the Draft Instrument[162] describes a number of possible approaches, including the proposals of Canada,[163] Sweden,[164] and Italy.[165] It also discusses three "options based on the treatment of performing parties."[166] I discuss the first of these options here.[167]

This proposal—like the Italian proposal—would hold the contracting carrier liable on the Draft Instrument's terms for any loss or damage, regardless of where it occurred or what other law might otherwise govern in that context. The Draft Instrument would also govern actions against maritime performing parties. For non-maritime performing parties, the Draft Instrument would be the default rule, but each contracting state would have the option of deciding whether the new convention would apply to inland carriage within its territory. We can assume that the European states would opt out of the Draft Instrument to the extent necessary to preserve the application of CMR and CIM-COTIF. Presumably Canada and

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159. This assumes that a cargo owner has a direct cause of action against a subcontracting trucker under the CMR. *See* CMR, *supra* note 108. If no cause of action exists under current law, the U.S. suggestion would not create one.

160. *See, e.g.*, *Kirby*, 300 F.3d at 1307–11 (resolving, in a cargo owner's tort action against a railroad, the railroad's claim that it was entitled to the benefit of the Himalaya clause in an NVOC's bill of lading).

161. The U.S. proposal is very similar to the Italian proposal, see *Italian Proposal*, *supra* notes 152–55 and accompanying text, and several delegations commented on the similarity. But the proposals differ in two significant ways: (1) For claims against the contracting carrier, the U.S. proposal adopts the narrow network principle of the UNCITRAL Preliminary Draft Instrument, whereas the Italian proposal would apply the new convention on a uniform basis. Outside of Europe, this difference has no practical significance. Within Europe, however, this difference may be of great political importance. The U.S. delegation is less optimistic than Italy's that European countries would be willing to ratify a liability convention without a network exception. (2) For claims against inland performing parties, the U.S. proposal leaves the parties' rights under current law unchanged, whereas the Italian proposal would introduce a subrogation-like concept. To the extent that mandatory law governs performing parties, as it does for inland carriers in Europe, the two approaches would likely yield the same results. But to the extent that the contracting carrier and its subcontractors have contractual freedom to negotiate their own liability terms, the differences could be dramatic. In the United States, for example, the U.S. proposal would continue to permit tort suits against performing parties, which would have only the uncertain protection they can obtain under Himalaya clauses, whereas the Italian proposal would put claimants in the same position as the contracting carriers, which may have accepted miniscule liability limits in return for lower freight rates.

162. *See General Remarks*, *supra* note 120.

163. *See id.* paras. 138–49.

164. *See id.* paras. 150–53; *see also supra* note 149.

165. *See id.* paras. 154–58.

166. *See id.* paras. 159–85. Although WP.29 was circulated as a Secretariat paper, it was openly admitted that the Secretariat had included these three options in its paper at the request of the U.S. delegation, which was then (January 2003) considering the possible adoption of one of the three options as the U.S. position. In late February, however, the U.S. delegation moved away from these three options and began thinking along the lines summarized in Part III.B.5. *See supra* notes 156–61 and accompanying text. The three options are still on the table, though, and may yet be considered by the Working Group.

167. *See id.* para. 166.

Sweden would similarly opt out to the extent their mandatory national laws apply. The United States would decide whether to opt out for domestic road and rail carriage at the time it ratified the convention. As things now stand, the government would almost certainly opt out because that is what the truckers and railroads currently prefer,[168] but if these industry groups see a benefit to joining the new regime, when the time comes, that would be possible instead.

If these assumptions are correct, then the German NVOC in our hypotheticals would be liable on the Draft Instrument's terms throughout, the European inland carriers would be liable on CMR or CIM-COTIF terms, the ocean carrier would be liable on the Draft Instrument's terms, the U.S. railroad would be liable under U.S. tort law, and the Canadian trucker would be liable under the mandatory Canadian law.

7. Summary of Proposals

For ease of reference, the governing rules under the six proposals discussed in this part can be conveniently summarized on the following two tables. Table 1 shows the outcomes under the first hypothetical, with the final leg from New York to Chicago. Table 2 shows the outcomes under the second hypothetical, with the final leg from Montreal to Calgary.

**Table 1**

| **Location of the Loss:** | **During Road Carriage (Berlin–Antwerp)** | | **During Sea Carriage (Antwerp–New York)** | | **During Rail Carriage (New York–Chicago)** | |
|---|---|---|---|---|---|---|
| **Defendant Being Sued:** | **German NVOC** | **European Trucker** | **German NVOC** | **Ocean Carrier** | **German NVOC** | **U.S. Railroad** |
| **Uniform Liability Regime** | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument |
| **UNCITRAL Preliminary Draft Instrument** | CMR | CMR | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument |
| **Canada's "Option 2"** | CMR | CMR | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument |
| **Italian Proposal** | Draft Instrument | CMR | Draft Instrument | Draft Instrument | Draft Instrument | Carmack/ Contract |
| **U.S. Proposal** | CMR | CMR | Draft Instrument | Draft Instrument | Draft Instrument | Tort Law |
| **WP.29 ¶ 166** | Draft Instrument | CMR | Draft Instrument | Draft Instrument | Draft Instrument | Tort Law |

168. *See supra* note 158.

## Table 2

| Location of the Loss: | During Road Carriage (Berlin–Antwerp) | | During Sea Carriage (Antwerp–Montreal) | | During Rail Carriage (Montreal–Calgary) | |
|---|---|---|---|---|---|---|
| **Defendant Being Sued:** | **German NVOC** | **European Railroad** | **German NVOC** | **Ocean Carrier** | **German NVOC** | **Canadian Trucker** |
| **Uniform Liability Regime** | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument |
| **UNCITRAL Preliminary Draft Instrument** | CIM-COTIF | CIM-COTIF | Draft Instrument | Draft Instrument | Draft Instrument | Draft Instrument |
| **Canada's "Option 2"** | CIM-COTIF | CIM-COTIF | Draft Instrument | Draft Instrument | Mandatory Local Law | Mandatory Local Law |
| **Italian Proposal** | Draft Instrument | CIM-COTIF | Draft Instrument | Draft Instrument | Draft Instrument | Mandatory Local Law |
| **U.S. Proposal** | CIM-COTIF | CIM-COTIF | Draft Instrument | Draft Instrument | Draft Instrument | Mandatory Local Law |
| **WP.29 ¶ 166** | Draft Instrument | CIM-COTIF | Draft Instrument | Draft Instrument | Draft Instrument | Mandatory Local Law |

### *C. Charter Party Substitutes*[169]

The Hague, Hague-Visby, and Hamburg Rules all exclude charter parties from their scope,[170] and there is a general consensus for continuing this exclusion.[171] Widespread support also exists for excluding other contracts that are similar to charter parties in some relevant ways, such as towage contracts, contracts of affreightment, volume contracts, and service contracts. Like charter parties, these contracts tend to be concluded between sophisticated parties with comparable bargaining power. As this was the original justification for excluding charter parties from the Hague Rules,[172] a strong case can be made that the parties to these contracts do not need the protection of a mandatory convention. Bracketed language in article 3.3.1 of the Preliminary Draft Instrument (article

169. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 3.3.1; *Revised Draft Instrument*, *supra* note 82, art. 2(3).

170. *See* Hague Rules, *supra* note 7, art. 5; Hague-Visby Rules, *supra* note 9, art. 5; Hamburg Rules, *supra* note 3, art. 2(3).

171. *See, e.g.*, *Ninth Session Report*, *supra* note 55, para. 62 (noting the Working Group's "strong view" that "the exclusion of charter parties was appropriate").

172. *See, e.g.*, *Hague Conference Report*, 1 LEGISLATIVE HISTORY, *supra* note 96, at 135, 138, 161–64, 183–84, 199–200 (statements of J.S. McConechy, J.P. Rudolf, Léopold Dor, J.M. Cleminson, and Robert Temperley, respectively); *see also* GILMORE & BLACK, *supra* note 127, at 145–47.

2(3) of the Revised Draft Instrument) thus raises the possibility that some of the modern-day equivalents of charter parties should also be excluded from the coverage of the Draft Instrument, just as charter parties are. But the rigorous definition of a "charter party" is notoriously difficult,[173] and no satisfactory definition has yet been proposed. Trying to define a modern-day equivalent is even more difficult.

The WSC/NITL Agreement[174] takes a somewhat different approach for "service contracts." Under the Shipping Act of 1984, a service contract is an agreement "in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier . . . commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features."[175] Although there is nothing in the Shipping Act definition to ensure that the parties to a service contract either are sophisticated or possess comparable bargaining power, that has been the norm in practice. The WSC/NITL Agreement calls for service contracts to be subject to the Instrument as a default rule, but gives the parties the freedom to contract out of the Instrument's terms if they choose to do so.[176] Except for a forum selection clause,[177] any agreement to derogate from the Instrument's terms would be binding only on the immediate parties to the service contract.

Although the theoretical approach would be very different, the practical effect of the WSC/NITL proposal would be to subject charter parties and service contracts to very similar treatment (except in the case of a forum selection clause). As between the immediate parties, both charter parties and service contracts would generally be governed by the Instrument's substantive provisions—but only to the extent that the parties wished the Instrument to apply. Under current practice, charter parties typically incorporate the Hague or Hague-Visby Rules as a matter of contract,[178] and they would presumably continue to incorporate the new international convention. The parties to a service contract would be governed by the Instrument unless they opted out of coverage, and they would presumably do so rarely (to the extent that current charter party practice provides a useful guide). The only difference would be in the default rule: Under the charter party exception, it is necessary to opt into coverage. Under the WSC/NITL Agreement, it would be necessary to opt out of coverage for service contracts. For third parties, the treatment would be identical. Notwithstanding the charter party exception, a third party who takes a bill of lading issued under a charter party is still entitled to the protection of the Hague Rules, COGSA, the Hague-Visby Rules, or the Hamburg Rules, as the case might be.[179] Similarly, a third-party consignee or other claimant under a shipment governed by a service contract would also be entitled to the protection of the new Instrument because the derogation agreement would be binding only as between the immediate parties to the service contract, unless a non-party consents to be bound by the agreement.[180]

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173. *See, e.g.*, van der Ziel, *supra* note 12, at 268. Moreover, this is not a new problem. Efforts to define "charter party" during the Hague Rules negotiations were also unsuccessful. *See, e.g.*, CONFÉRENCE INTERNATIONALE DE DROIT MARITIME, RÉUNION DE LA SOUS-COMMISSION, BRUXELLES 1923, at 43, 82, *translated in* 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 435, 486 (Michael F. Sturley ed., 1990).

174. *See generally* WSC/NITL Agreement, *supra* note 27.

175. 46 U.S.C. app. § 1702(19) (2000).

176. *See* WSC/NITL Agreement, *supra* note 27, para. B(11).

177. *Id.* para. B(9).

178. *See* Michael F. Sturley, *The Application of COGSA as a Matter of Contract*, *in* 2A BENEDICT ON ADMIRALTY 5-7 & n.6 (7th rev. ed. 2003) (collecting cases) [hereinafter Sturley, *COGSA Application*].

179. *See* Hague Rules, *supra* note 7, arts. 1(b), 5; Hague-Visby Rules, *supra* note 9, arts. 1(b), 5; COGSA §§ 1(b), 5, 46 U.S.C. app. §§ 1301(b), 1305 (2000); Hamburg Rules, *supra* note 3, art. 2(3).

180. WSC/NITL Agreement, *supra* note 27, para. B(9).

Although the practical consequences would generally be the same whichever default rule is adopted, there is an important advantage in addressing this issue as part of the chapter on contractual freedom[181] rather than as part of the charter party exclusion.[182] If the default rule is coverage under the Draft Instrument, then the uniform regime would apply as a matter of law except to the extent that the parties agreed to alter it. But if these contracts are excluded completely, as charter parties are, then the parties' decision to apply the uniform regime would presumably[183] take effect only as a matter of contract.[184] To the extent that otherwise applicable law is inconsistent with the Draft Instrument, the parties may not have the power to preempt it by contractual agreement. The contractual freedom approach would therefore maximize the uniform application of the new rules. Under the charter party approach, New Jersey tort law[185] might interfere with the uniformity and predictability that would otherwise be possible.

This aspect of the WSC/NITL Agreement (except to the extent that it concerned forum selection clauses[186]) was generally acceptable to most of the U.S. interests.[187] The MLA's proposed COGSA amendments had already included a similar provision giving freedom of contract to the parties to a service contract,[188] and it had not been controversial during the MLA process.[189] While the MLA proposal was before Congress, however, the non-vessel-operating common carriers (NVOCCs) objected that allowing this freedom of contract put them at a competitive disadvantage because only vessel-operating common carriers (VOCCs) are permitted to enter into service contracts as carriers.[190] Thus the Transportation Intermediaries Association (TIA), the U.S. industry organization representing NVOCCs (and the U.S. affiliate of FIATA), strenuously opposes the WSC/NITL suggestion—at least to the extent that it relies on either the "service contract" definition or any similar option that is not equally available to NVOCCs.[191]

The international community has been skeptical of the idea on other grounds, as well. Several European delegates to the CMI's International Sub-Committee viewed the WSC/NITL Agreement as an attempt to circumvent the mandatory nature of the Draft

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181. Contractual freedom is addressed in chapter 17 of the UNCITRAL Preliminary Draft Instrument, see *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 17.1–17.2, and in chapter 19 of the Revised Draft Instrument, see *Revised Draft Instrument*, *supra* note 82, arts. 88–89.

182. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 3.3.1; *Revised Draft Instrument*, *supra* note 82, art. 2(3).

183. The COGSA "coastwise exception" suggests a method whereby the parties' choice could be given the force of law. *See* COGSA § 13, 46 U.S.C. app. § 1312 (2000); *see generally* Michael F. Sturley, *Bills of Lading in Domestic Trade that Incorporate COGSA*, *in* 2A BENEDICT ON ADMIRALTY § 42 (7th rev. ed. 2003).

184. *See generally* Sturley, *COGSA Application*, *supra* note 178, at 5-7 to 5-8 & nn.7–9.

185. *Cf.* Colgate Palmolive v. S/S Dart Canada, 724 F.2d 313, 315–16 (2d Cir. 1983) (holding that New Jersey law rather than COGSA governed the claim).

186. For a discussion of forum selection clauses, see *infra* note 311 and accompanying text.

187. *But see infra* notes 190–91 and accompanying text (discussing TIA objections).

188. *See generally* Sturley, *Proposed Amendments*, *supra* note 26, at 655–56 (discussing service contracts).

189. At the time of the MLA's proposal, the use of service contracts had not been so widespread. Perhaps the service contract provision would be more controversial today if the MLA were to consider the matter again.

190. NVOCCs, as shippers, can enter into service contracts with VOCCs in order to arrange for the VOCCs to carry the NVOCCs' customers' cargo. But under the statutory definition of "service contract," an NVOCC cannot enter into a service contract with one of its own customers. Although people disagree on the rationale, it seems clear that the statute deliberately puts NVOCCs at a disadvantage in this regard. The National Customs Brokers and Forwarders Association of America is currently petitioning the Federal Maritime Commission to exempt NVOCCs from the tariff requirements that do not apply to VOCCs, which would give NVOCCs some of the benefits of entering into service contracts. *See* Angela Greiling Keane, *Seeking Fair Seas*, TRAFFIC WORLD, Aug. 18, 2003, at 11.

191. FIATA has made the same arguments in the international forums. *See, e.g.*, *Eleventh Session Report*, *supra* note 79, paras. 208–11.

Instrument,[192] and similar objections have been raised in the UNCITRAL Working Group.[193] But much of this opposition has been based on the unsatisfactory nature of the "service contract" definition in the Shipping Act, and it may be possible to meet these objections with a new definition of the relevant agreements.

Despite the TIA-FIATA opposition, the new U.S. proposal advocates a position very similar to the WSC/NITL suggestion.[194] This proposal abandons the "service contract" language and all of its accumulated baggage. It instead introduces a new concept—the "Ocean Liner Service Agreement" (OLSA)—that seeks to respond to earlier criticisms by ensuring that the parties claiming the freedom of contract are likely to be sophisticated and to possess comparable bargaining power.[195] Under the proposal, an OLSA exhibits five characteristics:

> (1) [it is] agreed to by the parties in writing (or comparable electronic means), other than by a bill of lading or transport document issued at the time that the carrier or a performing party receives the goods; (2) [it is] used for liner services; (3) [it] involve[s] a carrier service commitment not otherwise required of carriers under the Instrument (e.g. the obligation of the carrier to properly receive, load, stow, carry and deliver the cargo); (4) the shipper agrees to tender a volume of cargo that will be transported in a series of shipments (i.e., the contract covers more than a single shipment); and (5) the shipper and carrier negotiate rates and charges based on the volume and service commitments.[196]

In addition to including provisions to ensure sophistication and equality of bargaining power, the new proposal specifies (for the first time) that OLSAs are confined to liner services. This excludes bulk, tanker, neo-bulk, and other non-liner cargo services, and distinguishes OLSAs from charter parties and volume contracts,[197] which are used for non-liner services.

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192. *See, e.g.*, *Sixth Meeting Report*, *supra* note 52, at 346 (statements of Professor van der Ziel); *see also* van der Ziel, *supra* note 12, at 268.

193. *See, e.g.*, *Ninth Session Report*, *supra* note 55, para. 69.

194. *See U.S. Proposal*, *supra* note 156, para. 18.

195. At last spring's UNCITRAL Working Group meeting, the U.S. delegation explicitly undertook to propose a new definition in time for consideration at next fall's meeting in Vienna. *See Eleventh Session Report*, *supra* note 79, para. 212. Part 4 of the U.S. proposal fulfills that promise.

196. *U.S. Proposal*, *supra* note 156, para. 22. Tracking this explanation, the U.S. proposal also suggested draft language that could be incorporated into the Draft Instrument:

> (a) An "Ocean Liner Service Agreement" is a contract in writing (or electronic format), other than a bill of lading or other transport document issued at the time that the carrier or a performing party receives the goods, between one or more shippers and one or more carriers in which the carrier or carriers agree to provide a meaningful service commitment for the transportation by sea (which may also include inland transport and related services) of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agree to pay a negotiated rate and tender a minimum volume of cargo.
>
> (b) For purposes of paragraph (a), a "meaningful service commitment" is a service commitment or obligation not otherwise mandatorily required of a carrier under this Instrument.
>
> (c) For purposes of paragraph (a), a "liner service" is an advertised maritime freight transport service using vessels for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports.
>
> (d) An Ocean Liner Service Agreement does not include the charter of a vessel or the charter of vessel space or capacity on a liner vessel.

*Id.* para. 29.

197. Volume contracts are mentioned in the scope of application provisions of the Draft Instrument. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 3.3.1; *Revised Draft Instrument*, *supra* note 82, art. 2(3).

### *D. Mixed Contracts of Carriage and Forwarding*[198]

Article 4.3 of the Preliminary Draft Instrument (article 9 of the Revised Draft Instrument) has been the source of considerable confusion. This provision gives a carrier considerable leeway when issuing a single transport document that relates to a carriage involving two or more legs. Depending on its terms, the document might be a through bill of lading (or comparable document) under which the issuer assumes the obligation to deliver the cargo at the ultimate destination. Alternatively, article 4.3.1 of the Preliminary Draft Instrument (article 9(1) of the Revised Draft Instrument) permits the carrier to issue a single transport document that is a "mixed contract of carriage and forwarding." It is first a contract of carriage by which the issuer assumes the obligation to deliver the cargo at a port of discharge. At that point it becomes a contract of forwarding under which the issuer assumes the obligation to act as the shipper's agent in arranging carriage to the ultimate destination.

Suppose, for example, that the shipper wishes to have a container carried from New York to Moscow. Because Moscow is an inland destination, the container would be transshipped at a port such as Kotka, Finland. If the carrier issues a through bill of lading, it will be responsible for making delivery in Moscow. If something happens to the goods during the inland transit between Kotka and Moscow, the carrier will be liable on the Instrument's terms (even if the subcontracting inland carrier is solely at fault).[199] If the carrier is not willing to assume this risk, it might agree to perform two separate tasks: (1) transporting the container to Kotka, and (2) arranging carriage between Kotka and Moscow on the shipper's behalf. Under this alternative scenario, it would be liable on the Instrument's terms for the carriage from New York to Kotka. But if something happens to the goods during the inland transit between Kotka and Moscow, it would be liable only for its own negligence (perhaps in failing to exercise due diligence in the selection of the inland carrier). The Kotka-to-Moscow contract of carriage would be between the original shipper (acting through its agent) and the inland carrier.

There should be no controversy to permitting this type of business arrangement in principle. The parties could undoubtedly structure the transaction in this way by the use of two documents rather than one. Confusion has arisen primarily because people have misunderstood the purpose and effect of this provision. It is not a mechanism for a carrier to escape its liability for the agreed carriage of the goods. The entire point is that the carrier never does agree to carry the goods to the ultimate destination. The Draft Instrument instead provides legitimate protection, which the carrier can already obtain under current law if it structures the transaction appropriately, and at the same time enables the carrier to accommodate the commercial needs of the cargo interests.

The primary controversy should concern how much notice must be given that this is the business arrangement, lest innocent third parties suffer from having relied on what they might reasonably have believed was a through transport document. The first part of the provision[200] requires an express agreement, and paragraph 56 of the commentary to the Preliminary Draft Instrument explains that this must be something more than "a preprinted clause in the standard terms and conditions in the fine print on the back of a transport

198. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 4.3; *Revised Draft Instrument*, *supra* note 82, art. 9; *see generally* van der Ziel, *supra* note 12, at 270.

199. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.3.2 (establishing carrier's liability for the fault of its subcontractors).

200. *Id.* art. 4.3.1; *Revised Draft Instrument*, *supra* note 82, art. 9(1).

document." The focus of the discussion should be on whether this is enough protection for third-party consignees.

A secondary controversy might involve the duty of care imposed on the issuer of the transport document in its capacity as the shipper's agent to arrange connecting carriage. The second part of the provision imposes three affirmative obligations: (1) to "exercise due diligence in selecting the [connecting] carrier," (2) to "conclude a contract with [the connecting] carrier on usual and normal terms," and (3) to "do everything that is reasonably required to enable [the connecting] carrier to perform duly under its contract."[201] To some extent, these proposed new duties are controversial simply because they are novel, and delegates are unsure of the requirements. The duty to "conclude a contract with [the connecting] carrier on usual and normal terms" is similar (if not identical) to the CIF seller's duty to "make such a contract for [the] transportation [of the goods] as may be reasonable having regard to the nature of the goods and other circumstances of the case."[202] But even this requirement has raised questions.[203] The U.S. delegation has proposed that the second part of the provision be retained only as a default rule, leaving the parties free to agree on the level of the carrier's duties if they choose to do so.[204]

### *E. FIOS and Similar Clauses*[205]

Article 5.2.2 of the Preliminary Draft Instrument (article 11(2) of the Revised Draft Instrument) permits "[t]he parties [to] agree that certain of the [carrier's] functions [i.e., loading, handling, stowing, carrying, keeping, caring for, and discharging the goods] shall be performed by or on behalf of the [cargo interests]." Paragraph 63 of the commentary to the Preliminary Draft Instrument explains that this provision is designed to permit "FIO(S) clauses and the like." Under a FIO (Free In and Out), FIOS (Free In and Out Stowed), or similar clause, the shipper assumes responsibility for activities such as loading, stowing, and discharging. This provision, however, appears to give the carrier greater freedom to shift even its core responsibilities to the shipper. As this is contrary to article 3(8) of the Hague and Hague-Visby Rules[206] and article 23(1) of the Hamburg Rules,[207] it represents a major change from current jurisprudence. It has thus been controversial.[208]

### *F. Warranty of Seaworthiness*[209]

Under current law, the duty to exercise due diligence to furnish a seaworthy vessel applies "before and at the beginning of the voyage."[210] Article 5.4 of the Preliminary Draft

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201. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 4.3.2; *Revised Draft Instrument*, *supra* note 82, art. 9(2).

202. U.C.C. § 2-504(a) (2002). The obligation has been expressed in substantially the same terms in other legal systems. *See, e.g.*, Sale of Goods Act, 1979, ch. 54, § 32(2) (Eng.) ("[T]he seller must make such contract with the carrier . . . as may be reasonable having regard to the nature of the goods and the other circumstances of the case.").

203. *Cf.* Jeremy Mark Davies, *What Is a Reasonable Contract?*, SHIPPING & TRADE LAW, Jul./Aug. 2003, at 1 (noting that little authority exists under English law to determine whether a contract of carriage is "reasonable").

204. *See U.S. Proposal*, *supra* note 156, para. 41.

205. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 5.2.2; *Revised Draft Instrument*, *supra* note 82, art. 11(2); *see generally* van der Ziel, *supra* note 12, at 270–71.

206. Hague Rules, *supra* note 7, art. 3(8); Hague-Visby Rules, *supra* note 9, art. 3(8).

207. Hamburg Rules, *supra* note 3, art. 23(1).

208. *See, e.g.*, *Ninth Session Report*, *supra* note 55, paras. 120–27.

209. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 5.4; *Revised Draft Instrument*, *supra* note 82, art. 13(1); *see generally* van der Ziel, *supra* note 12, at 270–71.

Instrument (article 13(1) of the Revised Draft Instrument) suggests extending the current rule on the warranty of seaworthiness to make the obligation continuous. In view of the Draft Instrument's other changes to current law, this extension may have very little practical impact.[211] But it appears to have at least a symbolic value, and thus some carrier interests have objected to the suggestion. Some delegates have also expressed concern that the courts might fail to recognize that the level of diligence that is due when a vessel is at sea is much lower than the level of diligence that is due when a vessel is in port, where the owner has greater access to the resources necessary for repairing and maintaining the vessel.

### *G. Navigational Fault and Fire*[212]

Under the Hague and Hague-Visby Rules, a carrier is not responsible for loss or damage due to the "[a]ct, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship."[213] The Hamburg Rules, in contrast, eliminate the navigational fault exception.[214] Article 6.1.2(a) of the Preliminary Draft Instrument retained the exception in brackets,[215] but it has long been recognized that it will not be included in the final convention. Indeed, the elimination of the navigational fault exception was one of the few substantive decisions taken by the UNCITRAL Working Group during the first three meetings.[216] Even this decision has generated some controversy, however, for the carrier interests felt that the elimination of the exception was still premature. Although they recognized that they would ultimately lose its protection, they did not feel it should be deleted except as part of a compromise under which carriers received some other benefit.[217] The United States has consistently supported the elimination of the navigational fault defense,[218] but has also argued that this change should be made in conjunction with a reexamination of the current burdens of proof.[219]

The Preliminary Draft Instrument grouped "fire"[220] and "navigational fault" together, so the fire exception[221] may also become controversial. U.S. interests have been satisfied to

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210. Hague Rules, *supra* note 7, art. 3(1); Hague-Visby Rules, *supra* note 9, art. 3(1); COGSA § 3(1), 46 U.S.C. app. § 1303(1) (2000).

211. In the situations thought most likely to arise, a failure to exercise due diligence to maintain a seaworthy vessel during the voyage will also be negligence in the management of the vessel. If the navigational fault exception is deleted from the UNCITRAL Draft Instrument, as now seems likely, see *infra* note 216 and accompanying text, then making the obligation continuous would be redundant.

212. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.1.2. The Revised Draft Instrument does not contain a provision corresponding to Preliminary Draft Instrument article 6.1.2(a) (the navigational fault provision). *See Revised Draft Instrument*, *supra* note 82, at 30 n.99; *infra* note 216 and accompanying text. Revised Draft Instrument article 22(c) corresponds to Preliminary Draft Instrument article 6.1.2(b) (the fire provision).

213. Hague Rules, *supra* note 7, art. 4(2)(a); Hague-Visby Rules, *supra* note 9, art. 4(2)(a).

214. The MLA's proposed COGSA amendments also eliminated the navigational fault exception. *See generally* Sturley, *Proposed Amendments*, *supra* note 26, at 629–32.

215. The UNCITRAL Draft Instrument generally uses brackets to indicate material that may well not be included in the final convention. Bracketed language typically signals a controversial point, or an issue on which the Working Group must make a policy decision, as is the case here. *See, e.g.*, *infra* notes 305, 348 and accompanying text. But sometimes the rationale is more mundane. *See, e.g.*, *supra* notes 83, 111.

216. *See Tenth Session Report*, *supra* note 73, para. 36.

217. *Cf. infra* notes 238–57 and accompanying text (discussing burden of proof issue).

218. *See U.S. Proposal*, *supra* note 156, para. 15. Previously, the MLA had proposed the elimination of the navigational fault defense. *See generally* Sturley, *Proposed Amendments*, *supra* note 26, at 629–31 (discussing this aspect of the MLA's proposal). The WSC and NITL had supported this position as well. *See* WSC/NITL Agreement, *supra* note 27, para. B(1).

219. *See infra* notes 238–57 and accompanying text.

220. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.1.2(b). *Cf. Revised Draft Instrument*, *supra* note 82, art. 22(c); *see supra* note 212.

retain the fire defense for vessel fires,[222] and the new U.S. proposal advocates this position.[223] Some delegations have called for the elimination of the fire exception.

### *H. Retaining the Traditional "Catalogue of Defenses"*[224]

Article 4(2) of the Hague and Hague-Visby Rules lists a "catalogue" of seventeen defenses on which the carrier can rely to avoid liability.[225] Even when the Hague Rules were negotiated, there was a debate (broadly speaking between common law and civil law jurisdictions) about whether there should be a catalogue or whether it was more appropriate to include a general clause indicating when a carrier could escape liability.[226] The Hamburg Rules largely abandon the catalogue, instead saying that the carrier is not liable if it "proves that [it], [its] servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences."[227] This debate still continues.[228] As a general rule, the civil law countries argue that the enumerated list is unnecessary and risks confusion.[229] The common law countries (including the United States[230]) argue that the catalogue may be unnecessary in civil law countries but that it does no real harm, whereas it continues to serve a useful purpose in the common-law world. For some of the exceptions, more than a century of precedents assist courts and parties in the resolution and settlement of disputes. Moreover, some judges might interpret the catalogue's elimination as an attempt to change the substantive law.[231]

### *I. Presumptions Versus Exonerations*[232]

Article 6.1.3 of the Preliminary Draft Instrument (which corresponds to articles 14(2) and 22(2) of the Revised Draft Instrument) presents the traditional catalogue of defenses[233] in terms of "presumptions" rather than "exonerations." For the most part, this innovation seems to be nothing more than a drafting exercise. Under existing law, the "exonerations" are already subject to rebuttal.[234] When the carrier establishes its right to rely on one of the

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221. *See* Hague Rules, *supra* note 7, art. 4(2)(b); Hague-Visby Rules, *supra* note 9, art. 4(2)(b); COGSA § 4(2)(b), 46 U.S.C. app. § 1304(2)(b) (2000); Hamburg Rules, *supra* note 3, art. 5(4).

222. *See* Sturley, *Proposed Amendments*, *supra* note 26, at 632–34.

223. *U.S. Proposal*, *supra* note 156, para. 16.

224. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.1.3; *Revised Draft Instrument*, *supra* note 82, arts. 14(2), 22(2).

225. *See* Hague Rules, *supra* note 7, art. 4(2)(a)–(q); Hague-Visby Rules, *supra* note 9, art. 4(2)(a)–(q).

226. *See, e.g.*, *Hague Conference Report*, 1 LEGISLATIVE HISTORY, *supra* note 96, at 249–53.

227. Hamburg Rules, *supra* note 3, art. 5(1). This rule was supplemented by the infamous "Common Understanding" that the carrier's liability "is based on the principle of presumed fault or neglect." *See Common Understanding Adopted by the United Nations Conference on the Carriage of Goods by Sea*, *in* Hamburg Rules, *supra* note 3.

228. *See, e.g.*, *Tenth Session Report*, *supra* note 73, para. 39.

229. The Nordic countries have gone so far as to eliminate most of the catalogue in their domestic Hague-Visby legislation. *See generally* Jan Ramberg, *New Scandinavian Maritime Codes*, 1994 IL DIRITTO MARITTIMO 1222, 1223 (explaining that this was not a change in substance, as all of the omitted defenses would be included within the law in any event).

230. *See U.S. Proposal*, *supra* note 156, para. 14.

231. Thus far, what might be described as the "common law" view has prevailed, with substantial support from civil law countries that are represented by experienced and knowledgeable maritime specialists.

232. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.1.3; *Revised Draft Instrument*, *supra* note 82, arts. 14(2), 22(2).

233. Hague Rules, *supra* note 7, art. 4(2)(a)–(q); Hague-Visby Rules, *supra* note 9, art. 4(2)(a)–(q). *See supra* notes 224–31 and accompanying text.

234. If it can be shown that some legal systems do not permit a cargo claimant to overcome the carrier's defense by proving the carrier's fault, then it might be appropriate to adopt a compromise solution that incorporates aspects of the presumption approach (to clarify the claimant's right to recover by proving the carrier's

defenses in the traditional catalogue, then the burden shifts to the cargo claimant "to show that the carrier's negligence contributed to the damage or loss."[235] In practice, the system would work the same way under article 6.1.3's presumptions. When "the carrier proves that loss of or damage to the goods . . . has been caused by one of the [listed] events," then the burden would shift to the cargo claimant to provide "proof to the contrary." Although the change should not be controversial, it generated some controversy during the CMI process and differing views were expressed at the Vienna meeting of the UNCITRAL Working Group.[236] The United States has advocated the retention of the so-called "exoneration" approach "in order to achieve greater predictability and uniformity in the application of the defenses, given the substantial case law that has already developed under existing cargo liability treaties that consider the defenses to exonerate the carrier from liability."[237]

### *J. Burdens of Proof in Multiple Causation Cases*[238]

The CMI put forward two approaches in article 6.1.4 of its final Draft Instrument to dealing with the burden of proof in cases in which loss or damage is the result of more than one cause.[239] The first approach is based on article 5(7) of the Hamburg Rules,[240] and is consistent with existing law in many countries[241] (including the United States[242]). The second is essentially the same as the corresponding provision in the MLA's proposed COGSA amendments.[243] These two alternatives were carried forward in the UNCITRAL Preliminary Draft Instrument.[244]

Under the first alternative,[245] the burden is on the carrier in cases of concurrent causation to prove the extent to which each of the concurrent causes is responsible for the loss. If it fails to carry this near-impossible burden,[246] it is liable for the entire loss. A simple hypothetical illustrates the impact that this approach might have in conjunction with the elimination of the navigational fault defense. Suppose that cargo is lost through some combination of perils of the sea and the carrier's negligent navigation. Under the Hague and Hague-Visby Rules, the carrier need not allocate the loss because it is excused from liability for losses due to either cause.[247] But if the navigational fault defense were eliminated, the carrier would bear the burden of proving the extent to which the perils of the sea (rather than its negligent navigation) caused the loss. Carriers fear (with considerable justification) that they would rarely if ever carry this burden. In every case in which a

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fault) and the exoneration approach (to preserve the benefits of the jurisprudence established under the Hague and Hague-Visby Rules).

235. Nitram, Inc. v. Cretan Life, 599 F.2d 1359, 1373 (5th Cir. 1979); *see also* DAVID W. ROBERTSON ET AL., ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 337–38 n.2 (2001).

236. *See Tenth Session Report*, *supra* note 73, para. 41.

237. *See U.S. Proposal*, *supra* note 156, para. 14.

238. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.1.4; *Revised Draft Instrument*, *supra* note 82, art. 14(3).

239. *CMI Draft Instrument*, *supra* note 53, art. 6.1.4.

240. Hamburg Rules, *supra* note 3, art. 5(7).

241. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, para. 89.

242. *See, e.g.*, Schnell v. Vallescura, 293 U.S. 296, 303–05 (1934).

243. *See* Sturley, *Proposed Amendments*, *supra* note 26, at 630–32.

244. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.1.4.

245. *Id.* art. 6.1.4 (first alternative).

246. *See id.* para. 90; *see also* Sturley, *Proposed Amendments*, *supra* note 26, at 630 n.118 (citing cases).

247. *See supra* note 213 and accompanying text (noting navigational fault defense). The carrier is excused from liability for losses due to "perils of the sea" under article 4(2)(c) of the Hague and Hague-Visby Rules. *See* Hague Rules, *supra* note 7, art. 4(2)(c); Hague-Visby Rules, *supra* note 9, art. 4(2)(c).

claimant could plausibly argue that the carrier's negligent navigation contributed to some extent to the loss, they would lose the practical benefit of every defense that they theoretically retain.[248]

The second alternative[249] proposes a shared burden of proof, in which each side would bear the burden of proving the extent to which the other side was responsible for the loss.[250] In our simple hypothetical, therefore, the carrier would bear the burden of proving the extent to which the perils of the sea caused the loss and the cargo claimant would bear the burden of proving the extent to which the carrier's negligent navigation caused the loss. In the rare case that neither side could carry its burden, the loss would be divided between them.[251]

When the issue was discussed during last fall's meeting in Vienna, the first alternative (the traditional rule) received broad support.[252] The second alternative, in contrast, received very little support in Vienna.[253] When the UNCITRAL Secretariat revised the Draft Instrument, it therefore retained the first alternative in the text (as article 14(3))[254] and moved the second alternative from the text to a footnote.[255] The United States, taking the view that "the second alternative offers a more balanced and workable approach,"[256] nevertheless continues to support the second alternative, and urges the Working Group to rethink the burden of proof issue in conjunction with the inevitable elimination of the navigational fault defense.[257]

### *K. Automatic Himalaya Protection*[258]

If negligent performing parties are to be directly liable for the damages that they cause, either in tort actions or under the terms of the Instrument, it becomes necessary to consider the familiar "Himalaya" question.[259] The issue first arose under the Hague Rules, which do not explicitly address the problem.[260] Some courts have held under the Hague Rules that when negligent subcontractors are sued in tort, they are entitled to the benefit of the carrier's defenses and limits of liability.[261] Others have held in the same context that negligent subcontractors are not entitled to the benefit of the carrier's defenses and limits of liability unless the contract of carriage explicitly extends the benefit to third parties (which now is generally done in a provision known as a Himalaya clause).[262]

The Hague-Visby Rules (in article 4 *bis*) attempted to extend "Himalaya" protection automatically to at least the carrier's servants and agents, although apparently not to

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248. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, para. 90; *see also* Sturley, *Proposed Amendments*, *supra* note 26, at 630–31 (discussing this hypothetical).

249. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.1.4 (second alternative).

250. *See id.* paras. 90–91 (describing second alternative).

251. *See* Sturley, *Proposed Amendments*, *supra* note 26, at 631–32 (discussing the MLA's similar proposal on this issue).

252. *See Tenth Session Report*, *supra* note 73, para. 48.

253. *See id.* paras. 50–56.

254. *Revised Draft Instrument*, *supra* note 82, art. 14(3).

255. *Id.* at 26 n.79.

256. *See U.S. Proposal*, *supra* note 156, para. 15.

257. *See id.*

258. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.3.3; *Revised Draft Instrument*, *supra* note 82, art. 15(5).

259. *See generally* Michael F. Sturley, *Third Party Rights and the Himalaya Clause*, *in* 2A BENEDICT ON ADMIRALTY § 169 (7th rev. ed. 2003).

260. *See, e.g.*, Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 301–02 (1959).

261. *See, e.g.*, Michael F. Sturley, *International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation*, 27 VA. J. INT'L L. 729, 771–73 (1987) (discussing German cases).

262. *See, e.g.*, *Herd*, 359 U.S. at 308; Scruttons Ltd. v. Midland Silicones Ltd., [1962] A.C. 446 (H.L. 1961).

independent contractors. The provision was ambiguous, however, and there has been disagreement as to how broadly it extends.[263] Article 7(2) of the Hamburg Rules also extends Himalaya protection automatically to the carrier's servants and agents, and article 10(2) effectively extends the protection to "actual carriers," thus picking up subcontractors.

During the CMI process, there was widespread support for the proposition that every potential defendant should have automatic "Himalaya" protection. Although this approach would not provide completely predictable treatment on uniform terms to all actions for cargo loss or damage, it would at least ensure that some of the Instrument's core provisions (those governing the carrier's defenses and limits of liability) would apply to all actions. It would also reduce the incentive to sue subcontractors that might otherwise be subject to higher liability under current non-uniform laws.

One significant caveat was expressed to the suggestion in favor of universal Himalaya clause protection. Some of those favoring a broad definition of "performing party"[264] felt that all performing parties should be entitled to the benefit of the carrier's defenses and limits of liability because they would assume the carrier's responsibilities and liabilities under the Instrument. Performing parties would take the bitter with the sweet. If the narrow definition is adopted,[265] however, or if performing parties do not assume any liability under the Instrument,[266] then this rationale no longer applies. Many feel that it would be unfair to give subcontractors all of the benefits of the Instrument if they assume no responsibility under it.

### *L. Delay*[267]

Article 6.4.1 of the Preliminary Draft Instrument (article 16(1) of the Revised Draft Instrument) offers two alternatives for determining whether a carrier is liable for a delay in delivery. No one disagrees that a carrier should be liable for delay if it fails to deliver the goods within the time that was "expressly agreed upon" in the contract of carriage. It is far more controversial whether a carrier should be liable for delay if it fails to deliver the goods "within the time it would be reasonable to expect of a diligent carrier" under the circumstances. Not surprisingly, carrier interests object strongly to this second possibility.[268] The United States has argued that delay is "a commercial matter that should be negotiated between the parties."[269] Thus, a carrier should be liable for delay only to the extent that the parties have agreed on the liability.

### *M. Limits of Liability*[270]

The limits of liability are traditionally set at the end of the diplomatic process. Thus, the Draft Instrument proposes a package-based and weight-based limitation system,[271] as

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263. *See, e.g.*, Daniel E. Murray, *The Extension of Damage and Time Limitations of the Hague, Warsaw, and Lausanne Conventions to Agents and Independent Contractors of Ship Lines and Air Lines*, 25 TRANS. L.J. 1, 12–23 (1997).

264. *See supra* note 133.

265. *See supra* notes 134–36 and accompanying text.

266. *See supra* notes 137–42 and accompanying text.

267. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.4; *Revised Draft Instrument*, *supra* note 82, art. 16.

268. *See, e.g.*, *Tenth Session Report*, *supra* note 73, para. 67.

269. *See U.S. Proposal*, *supra* note 156, para. 39.

270. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.7; *Revised Draft Instrument*, *supra* note 82, art. 18.

under the Hague-Visby and Hamburg Rules,[272] but leaves the limitation amounts blank. Early indications suggest that when the discussion comes, this subject is likely to generate some controversy. Most U.S. interests seem prepared to accept the Hague-Visby limitation amounts,[273] and the United States has now formally proposed the adoption of the Hague-Visby limits.[274] Not surprisingly, carrier interests have supported this position.[275] A number of delegates have expressed the view that the discussion should start with the limitation amounts in the Hamburg Rules (which are 25% higher than the Hague-Visby limits) or the Multimodal Convention (which are another 10% higher than the Hamburg limits),[276] perhaps adjusting for the inflation of the last quarter-century.[277] A few delegates have suggested that the door-to-door nature of the Draft Instrument requires that the limitation amounts be comparable to the much higher levels found in the European road and rail conventions.[278]

The WSC/NITL Agreement calls for limitation amounts at the Hague-Visby levels, but also provides for a "fast-track" adjustment procedure (subject to limits).[279] The U.S. proposal includes this adjustment procedure as part of its position.[280]

### *N. Obligations of the Shipper*[281]

The principal obligation on the shipper under the Hague and Hague-Visby Rules relates to the shipment of dangerous goods.[282] Chapter 7 of the Draft Instrument imposes a

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271. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 6.7; *Revised Draft Instrument*, *supra* note 82, art. 18.

272. *See* Hague-Visby Rules, *supra* note 9, art. 4(5)(a) (666.67 SDRs per package or 2 SDRs per kilogram); Hamburg Rules, *supra* note 3, art. 6(1)(a) (835 SDRs per package or 2.5 SDRs per kilogram). The Hague Rules, in contrast, provide only a package limitation. *See* Hague Rules, *supra* note 7, art. 4(5). In the United States, the limitation amount is $500 per package. *See* COGSA § 4(5), 46 U.S.C. app. § 1304(5) (2000).

273. *See generally* Sturley, *Proposed Amendments*, *supra* note 26, at 634–36 (discussing the rationale for the MLA's proposal to adopt the Hague-Visby limitations).

274. *See U.S. Proposal*, *supra* note 156, para. 10.

275. *See, e.g.*, *Compilation of Replies*, *supra* note 24, at 40.

276. *See* Multimodal Convention, *supra* note 104, art. 18(1) (920 SDRs per package or 2.75 SDRs per kilogram).

277. Since 1978, when the Hamburg Rules were completed, the U.S. consumer price index has increased by approximately 280%. *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *Consumer Price Index* (Aug. 15, 2003), *available at* ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (last visited Sept. 3, 2003). Whether a consumer price index should be relevant is itself a controversial question. Critics observe that if any popular index is relevant, it should at least be a wholesale price index. Critics also argue that the average value of a container's contents has in fact remained fairly stable since the Hague-Visby limits were established. This is due primarily to changes in commercial practices, with the result that a much higher proportion of low value cargo is now containerized.

278. The European road convention, CMR, provides for a weight-based limitation that is more than four times as high as the Hague-Visby limit, but there is no package-based limitation. *See* CMR, *supra* note 108, art. 23(3) (8.33 SDRs per kilogram). For relatively light packaged cargo, therefore, even the COGSA $500 per package limitation, see *supra* note 272, can produce a higher recovery than CMR. *See, e.g.*, Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 553–54 (2d Cir. 2000) (permitting the carrier to limit liability to less than $188 per package of bicycles and framesets under CMR's weight-based limitation). The European rail convention, CIM-COTIF, provides for a weight-based limitation that is more than twice as high as the CMR limitation for road carriage, but again there is no package-based limitation. *See* CIM-COTIF, *supra* note 109, art. 40(2) (17 SDRs per kilogram). Thus if *Hartford Fire Insurance* had been governed by CIM-COTIF, the weight-based limitation amount would still have been less than COGSA's $500 per package.

279. *See* WSC/NITL Agreement, *supra* note 27, para. B(2).

280. *See U.S. Proposal*, *supra* note 156, para. 11.

281. This issue is addressed primarily in chapter 7 of the UNCITRAL Draft Instrument. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 7.1–7.8; *Revised Draft Instrument*, *supra* note 82, arts. 25–32. Some other provisions also impose duties on the shipper. *See, e.g.*, *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 9.3, 10.3.2(b); *Revised Draft Instrument*, *supra* note 82, arts. 43, 49(b); *see generally* van der Ziel, *supra* note 12, at 272–73.

wider range of obligations on the shipper, including obligations with respect to the delivery of the goods to the carrier[283] and obligations regarding the furnishing of information, instructions, and documents.[284]

### *O. Person Entitled to Negotiable Transport Document*[285]

Current law requires the carrier to issue a bill of lading to the shipper if the shipper demands one.[286] In some situations, two parties—the shipper (the carrier's contractual counterpart) and the consignor (the person that in fact dealt with the carrier)—may both claim a right to receive a negotiable transport document. Under an FOB shipment in which the consignor pays the freight on the consignee's account, the consignee would qualify as the "shipper." If the relationship between the consignor and the consignee-shipper breaks down, both may demand a transport document. On the one hand, it seems logical to give the contracting shipper the right to control entitlements under the contract of carriage. On the other hand, giving a negotiable transport document to the consignee-shipper may undermine the consignor's ability to receive payment for the goods that have been shipped.

Article 8.1(ii) of the Preliminary Draft Instrument (article 33(b) of the Revised Draft Instrument), in an effort to resolve the problem, adopts the former argument, but further thought may be necessary. Some have suggested, for example, that the carrier should not issue a negotiable transport document under this provision except on surrender of the receipt issued to the consignor under article 8.1(i) of the Preliminary Draft Instrument (article 33(a) of the Revised Draft Instrument). Others have observed that this solution would not solve the underlying problem; it would simply shift it forward (and elevate the importance of the consignor's receipt.[287]

### *P. Qualifying Clauses*[288]

Under current law, the carrier must issue a bill of lading if the shipper demands one.[289] Moreover, this document must show (among other things) "[e]ither the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper."[290] A proviso to the relevant section of the Hague and Hague-Visby Rules excuses the carrier from including this information when it "has reasonable ground for suspecting" that the information does "not accurately . . . represent the goods actually received," or if it

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282. *See* Hague Rules, *supra* note 7, art. 4(6); Hague-Visby Rules, *supra* note 9, art. 4(6). Of course, liability for the shipment of dangerous goods can be an important issue. *See, e.g.*, *Senator Linie*, 291 F.3d at 168–69.

283. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 7.1; *Revised Draft Instrument*, *supra* note 82, art. 25.

284. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 7.3–7.5; *Revised Draft Instrument*, *supra* note 82, arts. 27–29.

285. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.1; *Revised Draft Instrument*, *supra* note 82, art. 33.

286. *See* Hague Rules, *supra* note 7, art. 3(3); Hague-Visby Rules, *supra* note 9, art. 3(3); COGSA § 3(3), 46 U.S.C. app. § 1303(3) (2000); Hamburg Rules, *supra* note 3, art. 14(1).

287. *See, e.g.*, *Sixth Meeting Report*, *supra* note 52, at 348.

288. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.3; *Revised Draft Instrument*, *supra* note 82, arts. 37–40.

289. *See* Hague Rules, *supra* note 7, art. 3(3); Hague-Visby Rules, *supra* note 9, art. 3(3); Hamburg Rules, *supra* note 3, art. 14(1).

290. Hague Rules, *supra* note 7, art. 3(3)(b); Hague-Visby Rules, *supra* note 9, art. 3(3)(b); *see also* Hamburg Rules, *supra* note 3, art. 15(1)(a) (requiring the bill of lading to include "the number of packages or pieces, and the weight of the goods or their quantity otherwise expressed").

"has had no reasonable means of checking" the information.[291] But the carrier's right to omit the unverified information is rarely a realistic option in practice. The shipper needs documentation showing this information for independent commercial reasons. Thus a carrier often includes the information with a qualifying clause (such as "shipper's load and count" or "weight unknown") to indicate that it does not assume responsibility for the accuracy of the information. Whether a carrier will be permitted to rely on these qualifying clauses has been a contentious issue.[292]

The U.S. MLA addressed this problem with a carefully balanced commercial compromise solution under which a carrier's right to qualify unverified information was confirmed but limited.[293] In essence, a carrier would be allowed to qualify the shipper's description of the goods and rely on the qualifying clause as long as it otherwise appeared to fulfill its contractual obligations. For example, if a carrier both received and delivered an undamaged, sealed container, then it could rely on a qualifying clause. But if a carrier received an undamaged, sealed container, and delivered a container from which the doors had been removed, then it could not rely on any qualifying clause. The burden would be on the carrier to explain what had gone wrong. Achieving wide-spread support for this compromise was one of the most difficult aspects of the MLA process.[294]

In earlier drafts of the CMI Instrument, the provision on qualifying clauses[295] corresponded more closely to the MLA's proposed COGSA amendments. The final CMI Draft Instrument and the UNCITRAL Draft Instrument significantly alter this original compromise, and thus this issue may be controversial in the United States. For example, the carrier's rights arise under the Draft Instrument when it receives the goods in a *closed* container, not necessarily a *sealed* container (as under the MLA's proposal).[296] (It is also worth noting that the "container" definition[297] is now so broad that this rule would apply to many shipments that we would not ordinarily describe as containerized.) Even more significantly, under the Draft Instrument the carrier can rely on its qualifying clause without regard for whether it delivered the container in the same condition in which it received the container.[298]

The U.S. delegation has argued that "cargo claimants legitimately expect greater protection for containerized cargo than the Draft Instrument currently provides."[299] It supports a restoration of the approach taken in the CMI's earlier drafts, before the last-minute amendments at the end of the Madrid meeting.[300] Other delegations (particularly those that supported the Madrid amendments) have challenged the logic of the U.S. proposal on this point, saying that the carrier's entitlement to rely on a qualifying clause should be judged on the facts as they existed when the transport document was issued. In

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291. Hague Rules, *supra* note 7, art. 3(3); Hague-Visby Rules, *supra* note 9, art. 3(3). *Cf.* Hamburg Rules, *supra* note 3, art. 16(1) (authorizing a "reservation" with respect to unverified information).

292. *See, e.g.*, Westway Coffee Corp. v. M.V. Netuno, 675 F.2d 30, 33 & n.5 (2d Cir. 1982).

293. *See* Sturley, *Proposed Amendments*, *supra* note 26, at 645–53.

294. *See id.* at 648–49.

295. *See, e.g.*, *May 2001 Draft*, *supra* note 132, art. 8.3. Most significantly, article 8.3.5(b) was deleted from the CMI Draft Instrument during the course of the Madrid meeting. *See Sixth Meeting Report*, *supra* note 52, at 351.

296. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.3.1(b)–(c); *Revised Draft Instrument*, *supra* note 82, art. 37(b)–(c).

297. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 1.4; *Revised Draft Instrument*, *supra* note 82, art. 1(s).

298. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.3.4; *Revised Draft Instrument*, *supra* note 82, art. 40. This controversy is discussed in more detail in paragraphs 151–54 of the commentary in the Preliminary Draft Instrument.

299. *See U.S. Proposal*, *supra* note 156, para. 36.

300. *Cf. supra* notes 136–37 and accompanying text (discussing the last-minute amendments to the "performing party" definition at the end of the Madrid meeting).

their view, the failure to make proper delivery of a container is irrelevant to the validity of a qualifying clause that had been included in a transport document some weeks before. This argument misses the practical significance of qualifying clauses. The validity of a qualifying clause determines who has the burden of proof. If the clause is invalid, the carrier must overcome the claimant's prima facie case with evidence that it was not responsible for the cargo loss or damage. If the clause is valid, the claimant must establish its prima facie case with evidence other than the transport document. On balance, the U.S. delegation feels that the carrier should bear the burden when something has clearly gone wrong, but the claimant should bear the burden when it appears that the carrier has performed properly.

### *Q. Conclusive Evidence for Non-Negotiable Transport Documents*[301]

Article 3(4) of the Hague Rules[302] provides that the bill of lading issued to the shipper under article 3(3) "shall be prima facie evidence of the receipt by the carrier of the goods as therein described." This was a problematic provision for various reasons in a number of countries, and thus article 3(4) was one of the few sections amended by the Visby Protocol.[303] Article 3(4) of the Hague-Visby Rules continues with the rule that "proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith."

Article 8.3.3 of the Preliminary Draft Instrument (article 39 of the Revised Draft Instrument) generally corresponds to article 3(4) of the Hague-Visby Rules. Paragraph (a) corresponds to the first sentence, which is the original article 3(4) of the Hague Rules. It provides when a transport document is prima facie evidence. Paragraph (b) corresponds to the second sentence, which is the part added by the Visby Protocol. It provides when a transport document is conclusive evidence.

Paragraph (b)(i) covers negotiable transport documents, and has been completely non-controversial. Paragraph (b)(ii), however, permits even a non-negotiable transport document to be conclusive evidence "if a person acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods."[304] In the United States, where the law has long recognized non-negotiable bills of lading as "bills of lading," this provision has also been non-controversial. But in countries that require a bill of lading to be negotiable, there is considerable opposition to paragraph (b)(ii).[305]

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301. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.3.3(b)(ii); *Revised Draft Instrument*, *supra* note 82, art. 39(b)(ii).

302. Article 3(4) of the Hague Rules corresponds to § 3(4) of COGSA, except for the proviso preserving the Pomerene Bills of Lading Act from implied repeal. *Compare* Hague Rules, *supra* note 7, art. 3(4), *with* COGSA § 3(4), 46 U.S.C. app. § 1303(4) (2000). This proviso was one of Congress' last-minute additions to the Hague Rules text. *See generally* Sturley, *History*, *supra* note 7, at 50, 55.

303. *See* Hague-Visby Rules, *supra* note 9, art. 1(1) and accompanying text.

304. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.3.3(b)(ii); *Revised Draft Instrument*, *supra* note 82, art. 39(b)(ii) (variant A). Article 39(b)(ii) of the Revised Draft Instrument has two versions. Variant A is identical to Preliminary Draft Instrument 8.3.3(b)(ii) and is quoted in the text. Variant B applies "if no negotiable transport document or no negotiable electronic record has been issued and the consignee has purchased and paid for the goods in reliance on the description of the goods in the contract particulars." *Revised Draft Instrument*, *supra* note 82, art. 39(b) (variant B).

305. This controversy is discussed in paragraph 149 of the commentary in the Preliminary Draft Instrument. During last spring's meeting of the UNCITRAL Working Group, the Netherlands strongly opposed the inclusion of paragraph (b)(ii). Denmark and Sweden agreed with the Netherlands. The United States strongly supported the inclusion of paragraph (b)(ii). Spain, Japan, and Brazil also supported the inclusion of paragraph (b)(ii), but recognized that the provision should be bracketed to reflect the strong opposition. *See Eleventh Session Report*, *supra* note 79, paras. 44–48. In an effort to advance the discussion, the Secretariat has proposed two versions of

### *R. Failure to Identify the Carrier*[306]

The Draft Instrument establishes a presumption that the registered owner of the vessel identified in the bill of lading or other transport document is the "carrier," and thus the responsible party under the contract of carriage, if the transport document does not adequately identify the carrier.[307] This provision has been highly controversial internationally,[308] but the provision is much less important in the United States (because U.S. *in rem* procedures often have the same effect in practice). At last spring's meeting of the UNCITRAL Working Group, views were closely divided.[309]

### *S. Delivery*[310]

Chapter 10 contains a number of provisions that could be controversial. For example, article 10.1 of the Preliminary Draft Instrument (article 46 of the Revised Draft Instrument) requires "the consignee that exercises any of its rights under the contract of carriage" (with little agreement on what constitutes exercising a right under the contract of carriage) to "accept delivery of the goods." If the consignee fails to do so, the carrier has broad powers to deal with the goods with little possibility of any liability if the goods are lost or damaged. Under article 10.3.2 of the Preliminary Draft Instrument (article 49 of the Revised Draft Instrument), the carrier has similarly broad rights if the holder of a negotiable transport document fails to claim delivery, and these rights are subject to very few controls to prevent abuse.

### *T. Forum Selection Clauses*[311]

Prior to the Supreme Court's *Sky Reefer* decision,[312] the U.S. courts uniformly held that COGSA section 3(8)[313] prohibits foreign forum selection clauses in a bill of lading governed by COGSA.[314] In *Sky Reefer*, however, the Court overruled these cases and

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the provision in the Revised Draft Instrument. *See Revised Draft Instrument*, *supra* note 82, art. 39(b)(ii); *supra* note 304.

306. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.4.2; *Revised Draft Instrument*, *supra* note 82, art. 36(3).

307. *UNCITRAL Preliminary Draft Instrument*, *supra* note 54, art. 8.4.2; *Revised Draft Instrument*, *supra* note 82, art. 36(3).

308. *See, e.g.*, van der Ziel, *supra* note 12, at 269 (criticizing the UNCITRAL Draft Instrument's treatment of the issue).

309. France, Spain, Germany, Austria, India, Brazil, and UNCTAD spoke in favor of the provision. Denmark, Switzerland, Japan, China, the International Chamber of Shipping (ICS), and the Baltic and International Maritime Council (BIMCO) spoke against it. Sweden, the Netherlands, and FIATA recognized the existence of the problem that article 8.4.2 is designed to address, but had no firm position on the provision. The United States did not speak on this article. *See Eleventh Session Report*, *supra* note 79, paras. 56–60.

310. This issue is most directly addressed in chapter 10 of the UNCITRAL Draft Instrument. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 10.1–10.4; *Revised Draft Instrument*, *supra* note 82, arts. 46–52; *see generally* van der Ziel, *supra* note 12, at 273–75.

311. This issue was not addressed in the UNCITRAL Preliminary Draft Instrument, but it was discussed in conjunction with chapter 13 during last spring's meeting of the UNCITRAL Working Group. *See Eleventh Session Report*, *supra* note 79, paras. 158–59. In the Revised Draft Instrument, the Secretariat has proposed provisions addressing jurisdiction and arbitration. *See Revised Draft Instrument*, *supra* note 82, arts. 72–75 *bis* (jurisdication); *id.* arts. 76–80 *bis* (arbitration).

312. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995).

313. COGSA § 3(8), 46 U.S.C. app. § 1303(8) (2000).

314. The leading case was Judge Friendly's opinion for the en banc Second Circuit in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 204 (2d Cir. 1967). *See also* Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441, 1442–44 (5th Cir. 1987); Union Ins. Soc'y of Canton, Ltd. v. S.S. Elikon, 642 F.2d 721, 722–26 (4th Cir. 1981).

applied the general rule[315] that forum selection clauses are presumptively enforceable. This result surprised many U.S. cargo interests, and thus they made reversing *Sky Reefer* one of their primary objectives. For many industry groups, including the American Institute of Marine Underwriters (AIMU), the forum selection provision in the MLA's proposed COGSA amendments was perhaps the most important aspect of the proposal.[316] In contrast, the WSC/NITL Agreement calls for the enforcement of forum selection clauses in service contracts, even against third parties.[317] Thus the treatment of forum selection clauses is controversial, even within the United States.

The Hague and Hague-Visby Rules do not address this subject,[318] although some countries passed domestic legislation prohibiting forum selection clauses as part of their enactment of the Hague or Hague-Visby Rules.[319] The Hamburg Rules contain detailed provisions regulating both forum selection[320] and arbitration[321] clauses.

The CMI and UNCITRAL Preliminary Draft Instruments did not address forum selection or arbitration clauses,[322] but the universal assumption had long been that the final Instrument would do so. During last spring's meeting of the UNCITRAL Working Group, this assumption was confirmed and a majority appeared to favor further discussions to proceed based on the model of the Hamburg Rules.[323] In response to these discussions, the Secretariat included new provisions in the Revised Draft Instrument to address jurisdiction and arbitration.[324]

The U.S. proposal presents a modified version of the position advocated in the WSC/NITL Agreement. As a "general rule," the proposal accepts the idea (included in the Hamburg Rules[325] twenty-five years ago) "that the Instrument should limit the permissible forum for litigating or arbitrating claims to certain reasonable places."[326] In practice, this approach protects carriers (by ensuring that they will not be subject to suit in jurisdictions

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315. *See* Carnival Cruise Lines v. Shute, 499 U.S. 585, 596 (1991); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

316. The original forum selection provision is discussed in Sturley, *Proposed Amendments*, *supra* note 26, at 656–59. The provision was significantly revised during the negotiations under the auspices of the Senate Commerce Committee, and these changes are discussed in Sturley, *Update*, *supra* note 27, at 14–17.

317. *See* WSC/NITL Agreement, *supra* note 27, para. B(9). The MLA's proposed COGSA amendments permit the enforcement of forum selection clauses in service contracts, but only as between the immediate parties to the service contract. *See id.*

318. It is clear the Hague and Hague-Visby Rules do not explicitly address forum selection clauses. The *Sky Reefer* Court held that they do not implicitly address forum selection clauses either. *Sky Reefer*, 515 U.S. at 536–37. This holding is confirmed by the travaux préparatoires. *See, e.g.*, LONDON CONFERENCE, 2 LEGISLATIVE HISTORY, *supra* note 30, at 415–17, 421 (statements of James Petrie and Louis Franck). For a thorough discussion of the subject, see Michael F. Sturley, *Forum Selection and Arbitration Clauses Under Section 3(8) of the U.S. Carriage of Goods by Sea Act: Statutory Intent and Judicial Interpretation*, *in* EKMETALLEYSE TOY PLOIOY KAI SYMBATIKE ELEYTHERIA: 2o DIETHNES SYNEDRIO NAYTIKOY DIKAIOY [SHIP'S OPERATION AND FREEDOM OF CONTRACT: SECOND INTERNATIONAL CONFERENCE ON MARITIME LAW] 141 (2000).

319. *See, e.g.*, Sea-Carriage of Goods Act, 1924, No. 22, § 9(2) (Austl.).

320. *See* Hamburg Rules, *supra* note 3, art. 21. The forum selection clause provision in the MLA's proposed COGSA amendments is based on this provision.

321. *See* Hamburg Rules, *supra* note 3, art. 22.

322. *See, e.g.*, 2001 CMI YEARBOOK 535 (explaining why the CMI Draft Instrument did not include forum selection and arbitration provisions).

323. *See Eleventh Session Report*, *supra* note 79, para. 158. The discussion was somewhat complicated by the fact that individual members of the European Union may lack competence to negotiate on this issue. The European Commission, which would have competence if the individual states do not, was unrepresented at last spring's meeting. The European Commission had been represented at the fall 2002 meeting in Vienna. *See Tenth Session Report*, *supra* note 73, para. 20(b).

324. *See supra* note 311.

325. *See* Hamburg Rules, *supra* note 3, arts. 21–22.

326. *U.S. Proposal*, *supra* note 156, para. 30.

having no connection with the case[327]) and cargo claimants (by ensuring that they will have a choice of reasonable places in which to sue, and will not be bound by forum selection clauses in bills of lading[328]).

Although the United States' "general rule" is broadly similar to the Hamburg Rules' approach, it differs in two principal respects. First, the U.S. proposal argues that the cargo claimant should have the choice from among the specified list of reasonable forums.[329] The Hamburg Rules instead give the choice to "the plaintiff." In all probability, the drafters of the Hamburg Rules assumed that the cargo claimant would always be the plaintiff, but this is not necessarily true. A carrier (the potential defendant in a cargo case) can bring a declaratory judgment action, thus becoming the "plaintiff" and perhaps preempting the injured claimant's choice of forum.

Second, the U.S. proposal argues that the list of reasonable forums should be broadened (to recognize the new Instrument's door-to-door approach) and narrowed (to recognize certain modern business practices). More specifically, the United States has proposed that the list of reasonable forums should be defined as:

> (i) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel;
>
> (ii) the place where the goods are delivered by the carrier or a performing party pursuant to article 4.1.3 or 4.1.4 [of the Preliminary Draft Instrument; article 7(3)-(4) of the Revised Draft Instrument], or the port where the goods are finally discharged from an ocean vessel;
>
> (iii) the principal place of business or habitual residence of the defendant; or
>
> (iv) the place specified in the contract of carriage or other agreement.[330]

This proposal broadens the Hamburg Rules list by including the places of receipt and delivery in addition to the ports of loading and discharge. This simply recognizes that the new Instrument may apply on a door-to-door basis (whereas the Hamburg Rules are limited to port-to-port coverage). It also preserves the "port" options in recognition of the requirement that there must be a maritime shipment for the new Instrument to apply (and thus there will always be ports, even on a door-to-door shipment), and that it will often be in the claimant's interest to bring suit in a port (particularly if it is possible to obtain *in rem* jurisdiction or security due to the presence of a ship). Furthermore, including the ports on the list of reasonable forums would often make it easier to consolidate related cases in a single forum. If a large number of containers on a ship are lost or damaged during a

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327. Under current law, U.S. courts will take jurisdiction over a cargo case that has no connection with the United States if the claimant is able to obtain jurisdiction over the defendant. *See, e.g.*, Fireman's Fund Ins. Cos. v. The OOCL Challenge, 1992 AMC 518 (C.D. Cal. 1991) (deciding a U.S. action arising out of a shipment from Canada to England). Courts in other nations have similarly assumed jurisdiction over cargo cases having no apparent connection with the forum state. *See, e.g.*, Katagum Wholesale Commodities Co. v. The MV Paz, 1984 (3) SALR 261, 263 (Natal Provincial Div.) (involving a Nigerian consignee seeking security in South Africa for a Hong Kong suit against a Panamanian vessel carrying cargo from Belgium); The Ntama, [1980] 1 Cyprus L.R. 386, 389 (concerning a suit in Cyprus on a shipment from England to Greece); The Vishva Prabha, [1979] 2 Lloyd's Rep. 286, 287 (Q.B.) (concerning an English action involving a shipment from India to the Netherlands).

328. Since the Supreme Court's *Sky Reefer* decision, cargo claimants suing in the United States have been presumptively subject to forum selection clauses in bills of lading. *See, e.g.*, Silgan Plastics Corp. v. M/V Nedlloyd Holland, 1998 AMC 2163 (S.D.N.Y. 1998) (finding, pursuant to *Sky Reefer*, a forum selection clause in a standard bill of lading valid against the cargo holder and not violative of COGSA). Many other nations follow similar rules. *See, e.g.*, The El Amria, [1981] 2 Lloyd's Rep. 119, 123 (C.A.) (ruling that an English court will enforce a choice of forum clause "unless strong cause for not doing so is shown").

329. *U.S. Proposal*, *supra* note 156, para. 30.

330. *Id.*

voyage, they will often be travelling between the same ports but they will typically have many different places of receipt and delivery.[331]

The U.S. proposal narrows the Hamburg Rules list by omitting the place of contracting. With electronic commerce, the place of contracting is often difficult to determine. Even when it can be determined, it is generally irrelevant to the transaction. Moreover, it can easily be manipulated if there is any advantage to doing so.[332]

In most cases, the proposed general rule would be all that is necessary to resolve a forum issue. But the U.S. proposal also advocates two exceptions for cases involving a forum selection clause in an "Ocean Liner Service Agreement" (OLSA).[333] First, in keeping with the general principle that the parties to an OLSA should have broad freedom of contract (including the freedom to derogate from otherwise mandatory terms),[334] the U.S. proposal would give the OLSA parties the freedom to agree on any forum for litigation between themselves.[335] Second, in contrast with the general principle that the OLSA parties' "decision to derogate from the Instrument . . . would be binding only on the parties to the OLSA,"[336] the U.S. proposal would give the OLSA parties the power to bind third parties (for example, the consignee or a subsequent holder of a bill of lading) to a specified forum under certain conditions.[337] Specifically, the following four requirements must be satisfied before a third party would be bound:

> (i) the parties to the OLSA must expressly agree in the OLSA to extend the forum selected to a subsequent party;
>
> (ii) the subsequent party to be bound must be provided written or electronic notice of the place where the action can be brought (e.g. in the bill of lading or otherwise);
>
> (iii) the place or places chosen by the OLSA parties must be
>
> > (a) the place where the goods are initially received by the carrier or a performing party from the consignor, or the port where the goods are initially loaded on an ocean vessel, or
> >
> > (b) the place where the goods are delivered by the carrier or a performing party pursuant to article 4.1.3 or 4.1.4 [of the Preliminary Draft Instrument; article 7(3)-(4) of the Revised Draft Instrument], or the port where the goods are finally discharged from an ocean vessel, or
> >
> > (c) the principal place of business or habitual residence of the defendant, with regard to one or more shipments moving under the relevant OLSA; and

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331. For example, a ship sailing from Rotterdam to New York will typically carry containers that were received at inland locations throughout Europe for delivery to inland destinations throughout the United States. By including the final port of discharge in clause (ii) of the U.S. proposal, see *supra* text accompanying note 330, all of the consignees' actions could be consolidated in New York.

332. *See U.S. Proposal*, *supra* note 156, para. 31.

333. The U.S. Proposal introduced the concept of an OLSA. *See id.* para. 18; *see generally supra* notes 195–97 and accompanying text (discussing the OLSA concept).

334. *See U.S. Proposal*, *supra* note 156, para. 18 ("[T]he U.S. view is that the parties to an OLSA should be able to depart from any of the Instrument's terms.").

335. *See U.S. Proposal*, *supra* note 156, para. 34.

336. *Id.* para. 18.

337. *See id.* para. 35.

(iv) the place selected in the OLSA must be located in a country that has ratified the Instrument.[338]

These requirements are designed to balance the carrier's interest in having a predictable forum for resolving all claims with the third parties' interest in not being caught by surprise with an unreasonable forum that they neither anticipated nor accepted. The first requirement ensures that a third party is not bound by the chosen forum unless the OLSA parties (including the shipper whose rights ultimately pass to the third party in question) in fact agreed that the third party should be bound. The second requirement ensures that the third party have an opportunity to learn of the chosen forum. The third requirement ensures that the chosen forum will have at least some connection with the overall transaction. And the fourth requirement ensures that the selection of a forum in an OLSA can not become a ploy for avoiding the application of the Instrument by requiring suits to be resolved in courts that will not apply the Instrument.

Whether this proposal will be acceptable as a compromise solution between those who favor the Hamburg Rules' approach,[339] which generally gives the cargo claimant the choice of forum, and the *Sky Reefer* approach,[340] which generally enforces the forum selected in the carrier's bill of lading, will depend on whether the international community considers the specified conditions to be reasonable. The issue was extensively debated within the United States. Ultimately, even those holding the most extreme positions agreed to accept the compromise. The WSC recognized that this proposal would considerably reduce the rights that carriers obtained under *Sky Reefer*, but felt that it adequately protected the carriers' essential interests. The AIMU was unhappy with the prospect of third-party consignees' being bound by a forum that they neither selected nor accepted with no more notice than that given in a bill of lading, but in the end concluded that the proposal was a significant improvement over the current *Sky Reefer* approach.

### *U. Time for Suit*[341]

The Hague and Hague-Visby Rules require suit to be filed within one year.[342] The Hamburg Rules extend the time limit to two years.[343] During the CMI process, it was generally agreed that a one-year period was adequate, and thus article 14.1 of the Preliminary Draft Instrument adopts the shorter period. When the issue was discussed in last spring's UNCITRAL Working Group meeting, however, a few delegates suggest that a two-year period would be necessary.[344] In article 66 of the Revised Draft Instrument, therefore, the "one" is placed in brackets.[345]

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338. *Id.*

339. *See Eleventh Session Report*, *supra* note 79, para. 158 (noting "[s]trong support" for the Hamburg Rules' approach). Delegations speaking in favor of this approach included Australia, Austria, China, India, Spain, and UNCTAD.

340. *See Eleventh Session Report*, *supra* note 79, para. 158 (noting support for leaving the issue "to the discretion of the parties"). The representatives of the carriers' interests (the International Group of P&I Clubs, the ICS, and BIMCO) spoke in favor of this approach.

341. This issue is addressed in chapter 14 of the UNCITRAL Draft Instrument. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 14.1–14.5; *Revised Draft Instrument*, *supra* note 82, art. 66–71.

342. *See* Hague Rules, *supra* note 7, art. 3(6); Hague-Visby Rules, *supra* note 9, art. 3(6); *see generally* Michael F. Sturley, *Time-for-Suit Provisions*, *in* 2A BENEDICT ON ADMIRALTY § 163 (7th rev. ed. 2003).

343. *See* Hamburg Rules, *supra* note 3, art. 20(1).

344. *Eleventh Session Report*, *supra* note 79, para. 168.

345. *Revised Draft Instrument*, *supra* note 82, art. 66. *See also Eleventh Session Report*, *supra* note 79, para. 169.

### *V. Contractual Freedom*[346]

The chapter titled "Limits of Contractual Freedom" may prove controversial for two reasons. I have already discussed the proposal in the WSC/NITL Agreement to permit complete freedom of contract for the parties to a service contract and the current U.S. proposal to give freedom of contract to the parties to an OLSA.[347] This has been and will continue to be highly controversial.

In addition, this chapter may also be controversial because of its suggestion (in brackets[348]) to *decrease* freedom of contract. Under article 3(8) of the Hague and Hague-Visby Rules[349] and article 23 of the Hamburg Rules[350] the carrier is free to increase its liability but may not decrease its liability. Thus the Hague, Hague-Visby, and Hamburg Rules are sometimes described as "one-way mandatory." They are mandatory with respect to one party, but not the other. The bracketed language in article 17.1 of the Preliminary Draft Instrument (article 88 of the Revised Draft Instrument) would also prohibit a carrier from increasing its liability, or from decreasing a shipper's liability. This would make the new Instrument "two-way mandatory." At last spring's meeting of the UNCITRAL Working Group, the majority view appeared to favor the current one-way mandatory system, although there was also some support for versions of a two-way mandatory system.[351]

## IV. CONCLUSION

Efforts to modernize the law governing the carriage of goods by sea and to restore the international uniformity of the late 1930s have been underway—in fits and starts—for almost half a century. In many ways, the obstacles to success today seem far greater than they were at the beginning of this process. As this article has shown, many issues remain to be resolved in the UNCITRAL process (and many more could have been discussed here). And as the Hamburg Rules so vividly demonstrate, completing the UNCITRAL process is merely the first step in achieving a successful convention that will be broadly ratified by the world's maritime and commercial powers.

Despite the obvious reasons for pessimism, there is considerable cause for optimism as well. Whereas the Hamburg Rules have been heavily criticized as the product of a political process[352] in which practical and commercial concerns were often ignored, the current UNCITRAL process is particularly attuned to the practical and commercial needs. Commercial interests were represented in the CMI process from the beginning, and commercial observers have regularly participated in all of the CMI and UNCITRAL meetings. If the affected commercial interests can ultimately agree on a new international

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346. This issue is most directly addressed in chapter 17 of the UNCITRAL Preliminary Draft Instrument and chapter 19 of the Revised Draft Instrument. *See UNCITRAL Preliminary Draft Instrument*, *supra* note 54, arts. 17.1–17.2; *Revised Draft Instrument*, *supra* note 82, arts. 88–89.

347. *See supra* Part III.C.

348. *See supra* note 215 (explaining use of brackets).

349. Hague Rules, *supra* note 7, art. 3(8); Hague-Visby Rules, *supra* note 9, art. 3(8).

350. Hamburg Rules, *supra* note 3, art. 23.

351. The Netherlands, for example, argued that it was appropriate that the carrier's liability could be increased by agreement but not decreased. However, the Netherlands also argued that the shipper's liability (under chapter 7) should be subject to increase but not decrease. Denmark, on the other hand, favored a full two-way mandatory regime. And France ambiguously declared that it was "not opposed" to a two-way mandatory regime. *See Eleventh Session Report*, *supra* note 79, para. 205.

352. *See generally* Frederick, *supra* note 31.

convention, the prospects for government ratifications and ultimate success are very strong indeed.

The principal open question, therefore, is whether the commercial interests will be able to agree on a new international convention. Although virtually everyone recognizes that the current state of affairs is unsatisfactory, that is not enough. If the new convention does not present an appropriate balance in which the needs of every major interest are addressed, some segments of the industry are likely to decide that the status quo, however bad it may be, is still preferable to the new proposal. And that may be enough to doom the project.

Until now, the individual provisions of the Preliminary Draft Instrument have been considered largely in isolation. During UNCITRAL's "first reading," the Working Group proceeded on a section-by-section basis, with each delegation expressing its views on the narrow provision that was then under discussion. Now that the Working Group has finished this "first reading," the time has come to recognize that the controversial issues can not be resolved on an individual basis. To take but one obvious example, those delegations that still favor the retention of the navigational fault exception must be persuaded that a new convention without this defense is still worth ratifying because of the other benefits it provides.

The U.S. proposal has identified ten separate issues that diverse interests within the United States have considered as a package in order to agree on a broadly acceptable commercial compromise. Although some of these ten issues have an obvious connection to each other, the true unifying theme is their importance to one or more of the commercial players. By giving some ground on issues that are relatively less important in order to gain ground on issues that are relatively more important, each participant in the process was able to agree on the final position.

The United States is, of course, only one country in this process, and the fact that the commercial interests of one country have been able to agree on a compromise proposal does not necessarily mean very much. It takes more than one country to have an international convention (even if the country in question has a large economy with a significant share of world trade). The U.S. domestic compromise is nevertheless a source for some optimism because the United States includes virtually all of the commercial interests that are part of the UNCITRAL process. Even carrier interests are well represented in the United States, despite the fact that nearly all of the nation's foreign trade is carried on foreign vessels, because the WSC is well-organized and politically powerful. If all of the major interests can agree on a compromise in the United States, there is reason to hope that these same interests may agree on a compromise in the UNCITRAL context.

Despite the similarities in commercial interests, national differences will still arise. Issues that are unimportant under U.S. law, for example, may be critical in other countries. The treatment of inland carriers under Europe's regional road and rail conventions has long been recognized as a critical issue in reaching an acceptable agreement. Thus, the U.S. proposal's list of ten key issues cannot be the end of the story. But it may be the beginning of the next stage in this story. If each country identifies the issues that are truly key to its reaching an agreement, perhaps the Working Group will have a manageable list that can form a basis for the next round of discussions. The time has come to start focusing on the compromises that must be made to achieve the goals that everyone is pursuing.