THE MARITIME LAW ASSOCIATION OF THE UNITED STATES
RESPONSE TO THE CMI CONSULTATION PAPER
DATED 1 JUNE 2001

CONSULTATION PAPER DATED 1 JUNE 2001:

1. Scope of Application – Chapter 3.

Article 3.1 is based on Article 2 of the Hamburg Rules and applies the Instrument widely to international carriage. Thus the Instrument will apply to both inward and outward carriage (as recommended by the Uniformity Sub Committee) and if the contract of carriage is entered into, or the transport document is issued, in a contracting state. References to the port of loading or port of discharge have been omitted since the Instrument is drafted to apply to door to door transport (see Articles 4.1 and 4.4). The Instrument will apply if either the place of receipt or the place of delivery, which may be inland and in another jurisdiction from the port of loading or discharge, is in a contracting state.

Views are requested as to whether these provisions are acceptable.

OUTLINE INSTRUMENT DATED 1 JUNE 2001:

3.1 The provisions of this Instrument apply to all contracts of carriage in which the place of receipt and the place of delivery are in different States if:

(a) the place of receipt specified either in the contract of carriage or in the transport document is located in a Contracting State, or

(b) the place of delivery specified either in the contract of carriage or in the transport document is located in a Contracting State, or

(c) the actual place of delivery is one of the optional places of delivery or ports of discharge specified either in the contract of carriage or in the transport document and is located in a Contracting State, or

(d) the contract of carriage is entered into in a Contracting State or the transport document is issued in a Contracting State, or

(e) the contract of carriage or the transport document provides that the provisions of this Instrument or the legislation of any State giving effect to them are to govern the contract.

This chapter is generally based on article 2 of the Hamburg Rules. The references to the ports of loading and discharge, which were included in Yearbook 2000 Draft 2.1(a), (b), and (c), have been deleted in view of the decision taken in Singapore with respect to door-to-door shipments. The impact of this deletion, however, is an effective narrowing of the scope of application.

The term "Contracting State" is no longer bracketed because there was a clear majority in Singapore for the view that the Instrument should ultimately be a convention.

COMMENTS OF THE U.S. MLA:

The U.S. MLA is in accord with the wording of this Section, and agrees that the Draft Outline Instrument should provide for the widest scope of application possible. It should be recognized that some nations may adopt the final instrument as domestic law, without necessarily becoming Contracting States. The U.S. MLA also suggests that a provision be included that any contract of carriage or transport document shall be required to contain a statement that the contract is subject to the provisions of this instrument (as is presently required under article 23(3) of the Hamburg Rules).

The U.S. MLA also suggests that the wording of Section 3.1 be clarified so that charter parties and similar private contracts that make reference to the Instrument are not subject to the Instrument as a matter of law, but simply incorporate the Instrument as a term of the contract.

CONSULTATION PAPER DATED 1 JUNE 2001:

2. Charterparties – Article 3.3.l.

Article 3.3.1, as drafted excludes charterparties from the application of the Instrument. The Hague, Hague-Visby and Hamburg Rules also exclude charterparties, but do not define a "charterparty." It is not believed that absence of a definition has caused problems in practice, but other forms of contract, such as contracts of affreightment, volume contracts, service contracts and slot charters, have been developed in more recent years.

Views are requested as to:

(i) whether the exclusion of charterparties should be maintained, and, if so,

(ii) whether, and how, a charterparty should be defined, and

(iii) whether the exclusion should be expanded to include such other forms of contract. Such an expansion would give rise to problems of definition and views are invited as to how the expanded exclusion should be limited.

OUTLINE INSTRUMENT DATED 1 JUNE 2001:

3.3.1 The provisions of this Instrument do not apply to charter parties.

This provision follows the first sentence of article 2.3 of the Hamburg Rules. During the discussion at the ISC's fourth meeting in October, the question was raised how broadly this exclusion should apply. The charter party exclusion in international conventions goes back to the Hague Rules, and has been retained in essentially the same form ever since. Modern practice, however, goes well beyond traditional charter parties. It will thus be necessary to decide if this traditional exclusion should continue to be limited to traditional charter parties, or if it should be expanded to other contracts of carriage such as contracts of affreightment, volume contracts, service contracts, and similar agreements.

COMMENTS OF THE U.S. MLA:

(i) The U.S. MLA supports the exclusion of charter party contracts from this draft instrument. Charter parties have historically been excluded from the Hague and Hague-Visby Rules because of the private nature of their contractual arrangement.

(ii) The U.S. MLA recognizes that a workable definition for "a charter party" may be valuable, but based upon our own experience in seeking a workable definition we concluded that the inclusion of a definition in the instrument would ultimately cause confusion and unnecessary restrictions or side effects. The Hague and Hague-Visby Rules survived nearly 80 years without a definition of charter party, and the U.S. MLA therefore takes the view that the definition should be left up to the courts and the developments in the trade.

(iii) The U.S. MLA would also support expanding the draft instrument to include contracts of affreightment, towing contracts, and similar agreements that are functionally equivalent to traditional charter parties.

CONSULTATION PAPER DATED 1 JUNE 2001:

3. Through Transport – Articles 4.2 and 4.3.

The draft Outline Instrument which was printed in CMI Yearbook 2000 ("the Yearbook 2000 Draft") included a provision dealing with through transport (3.2 and 3.3). The commentary on those provisions and the accompanying "Door to Door Transport" paper explained what was meant by "through transport." The Singapore Conference concluded that through transport should not be outlawed, but that safeguards should be included in the Instrument.

Article 4.3 sets out two alternative ways in which this could be done (Alternatives I and II). Either specific duties should be imposed on a carrier who arranges through transport, as in Alternative I, or a general duty should be imposed as in Alternative II.

Comments are invited as to how these safeguards should be drafted.

OUTLINE INSTRUMENT DATED 1 JUNE 2001:

4.2 The parties may agree in the contract of carriage that

(a) particular activities that pursuant to the contract of carriage are to be performed during the period referred to in article 4.1.1, such as loading, stowage, discharging, or temporary storage of the goods, shall be carried out by or on behalf of the shipper or the consignee;

(b) the carrier acting as an agent of the shipper may contract out specified parts of the carriage to a third party, thereby limiting the scope of the contract of carriage.

In the event that a negotiable transport document is issued, such document shall on its face reflect any agreement made in accordance with this article.

This provision is substantially the same as Yearbook 2000 Draft. In the last sentence "on its face" has been added.

4.3 In the event that the carrier acting as an agent of the shipper contracts out certain specified parts of the carriage to a third party, it shall:

Alternative I

(a) conclude a contract with such third party on the terms that are customary for the particular mode of transport or are compulsorily applicable to the part of the [carriage that is contracted out;

(b) take care that parties to such contract shall be the shipper and such third party, while the consignee under such contract shall be a subsequent carrier or the consignee under the contract of carriage, as the case may be;

(c) exercise reasonable care, having regard to the specific factors that locally apply, in the selection of the third party;

(d) provide such third party with all information and instructions that are necessary for a proper carrying out of his tasks, including, as the case may be, information on any loss of or damage sustained by the goods and any instructions on the handing over of the goods to a subsequent carrier or to the consignee under the contract of carriage;

(e) take care that any information that the shipper, the controlling party, or the consignee may reasonably request in respect of the part of the carriage contracted out to the third party, such as the name of the third party and the intended or actual place or date of transfer of the goods to the third party, is provided to any of these persons with reasonable despatch;

(f) provide the consignee under the contract with the third party with all the information and documents that may be required for such consignee to obtain delivery of the goods from the third party;

(g) effect payment of the remuneration due under such contract, unless otherwise agreed.]

Alternative II

[exercise due diligence in selecting the third party, conclude the contract with the third party on customary terms and do everything that is reasonably necessary or desirable for enabling the third party to perform duly under such contract.]

The two alternative drafts of article 4.3 are substantially the same as in Yearbook 2000 Draft, with the following exceptions:

In (e) it has been added "such as the name of the third party and the intended or actual place or date of transfer of the goods to the third party", in order to indicate that this essential information should be included.

A provision (f) has been added. To obtain delivery of the goods is essential for the consignee. The obligation of the carrier, acting as an agent, under (d) to provide the third party with all the information necessary for such delivery, may not be sufficient for this purpose. Under certain circumstances the eventual consignee may need also some information or documents from the carrier, acting as an agent, before it is able to obtain delivery of the goods.

COMMENTS OF THE U.S. MLA:

(i) The U.S. MLA does not see Article 4.2(a) as one limited to through transport. Indeed, it is more likely intended to cover the situation under port-to-port bills of lading in which FIO or FIOS arrangements are negotiated between the shipper and the carrier. In order to accommodate the widest scope of commercial activity and practice, the U.S. MLA has no objection to the concept of the parties agreeing to allow the shipper or the consignee to load or stow the

cargo. However, the carrier must remain ultimately responsible, as against an innocent third party, for proper load, stow, and discharge.

Furthermore, the final clause of Section 4.2 does not offer adequate protection to consignees and other innocent third parties. Because a transport document on its face must reflect an agreement under this article only when a "negotiable transport document is issued," a carrier would be free to issue a non-negotiable transport document without disclosing an agreement under this article.

(ii) The U.S. MLA does not endorse Article 4.2(b), which is more likely to involve door-to-door carriage or transshipment operations. The U.S. MLA favors the mandatory application of the instrument to all parties that participate on behalf of the carrier in performing the carrier's obligations. As written, this provision would promote attempts by carriers and their agents to seek ways to avoid the application of the instrument by defining their efforts as "on behalf of the shipper." In truth, every action under a contract of carriage is an activity carried out on behalf of the shipper. Allowing different rules and liability schemes to apply to specified segments of the carriage would result in a lack of uniformity and predictability.

As regards Article 4.3, the U.S. MLA repeats the same objections recited above in Point 3(ii). However, to the extent that such a section is required in the new instrument, the U.S. MLA prefers Alternative II which is closer to our present law and more in line with our common law system.

CONSULTATION PAPER DATED 1 JUNE 2001:

4. Obligations of the Carrier and Basis of Liability - Chapter 5 and Article 6.1

Article 6.1.1 has been drafted on an alternative basis - Alternative I(a) and (b) and Alternative II - and the wording of these alternative provisions is explained in the commentary. These alternatives have been drafted not to offer a straight choice between one provision or the other, but to illustrate the various policy choices which must be made in order to arrive at a coherent and acceptable liability regime.

Views are therefore invited on the following issues:-

(i) Whether the fault based regime, which was the regime preferred at Singapore, should be a regime based on presumed fault.

(ii) If so, whether the wording of the provisions setting out the carrier's core liability should be based on Alternative I(a) or (b).

(iii) Whether the exemptions should be drafted as presumptions of absence of fault, as in Article 6.1.2 as drafted, or whether some, or all, of them should be drafted as exceptions which would exonerate the carrier from liability.

It should be noted that (i), (ii), (iii) and (iv) correspond with similar provisions in other transport conventions, e.g. CMR where the provisions corresponding to (i) and (iii) are exonerations.

If they are to be drafted, as in Article 6.1.2, as presumptions, it may be thought that some, or all, of the circumstances fall within the general words of Alternatives I(a) and (b) and that it is therefore strictly unnecessary to specify them.

(iv) Whether the obligations as set out in Article 5.2 should be included.

(v) If so, whether the words in brackets in Alternative II should be included.

(vi) Whether an article should be included to provide for an allocation of loss, and, if so, whether an article along the lines of Article 6.1.3 is satisfactory.

OUTLINE INSTRUMENT DATED 1 JUNE 2001:

Alternative I(a)

6.1.1 [The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that neither its fault nor that of a performing party caused the loss or damage.]

There was overwhelming support at Singapore for a regime based on fault regime as opposed to a more stringent regime

This alternative provides that the carrier's liability shall be based on fault and that the carrier will be liable for loss, damage or delay unless it can prove that neither its fault nor that of a performing party (as defined) caused the loss, damage or delay. The burden of proof, as in Article IV Rule 2(q) of the Hague-Visby Rules, is on the carrier.

It should be noted that the Hamburg Rules are also a fault based regime and the 'common understanding' annexed thereto makes clear that the burden of proof rests on the carrier, subject to the specific provisions of the Hamburg Rules which modify this position.

Alternative I(b)

[The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that such loss or damage was caused by events or through circumstances that a diligent carrier could not avoid or the consequences of which a diligent carrier was unable to prevent.]

This alternative similarly provides that the carrier's liability shall be based on fault, but the presumption of fault is expressed in different language based on the CMNI Budapest Convention.

Alternative II

[The carrier shall be liable for loss resulting from loss of or damage to the goods as well as from delay in delivery, if the occurrence that caused the loss, damage, or delay took place during the period of its responsibility as referred to in article 4.1, unless the carrier proves that neither its fault nor that of a performing party caused the loss or damage. In order to prove the absence of fault the carrier must

provide evidence that it has taken such reasonable measures as the characteristics of the transport and the circumstances of the voyage require and, in particular, that it has taken the measures described in article 5.2.]

If article 5.2. is included, Alternative I(a) could be expanded, as above, to provide that proof of compliance with article 5.2. was a prerequisite on the carrier's part of proving absence of fault.

COMMENTS OF THE U.S. MLA:

(i) The U.S. MLA agrees that the regime should be based on "presumed fault," meaning that if a cargo claimant proves that the occurrence that caused the loss, damage, or delay took place during the period of the defendant carrier's responsibility, then the defendant carrier's responsibility for that occurrence is presumed. The cargo claimant need not prove the defendant carrier's "fault." It is important to stress, however, that a "presumed fault" regime (by definition) creates only a presumption, which is necessarily rebuttable. The U.S. MLA's support for a "presumed fault" regime is premised on the assumption that satisfactory provisions will exist to govern the carrier's rebuttal burden.

(ii) The U.S. MLA generally supports the approach taken in Alternative I(a) because it more closely follows the well-established approach of the Hague and Hague-Visby Rules. Alternative I(a), however, corresponds only to article 4(2)(q) of the Hague and Hague-Visby Rules. The U.S. MLA strongly supports the continued recognition of the "catalogue" of defenses in article 4(2)(b)-(p) of the Hague and Hague-Visby Rules, part of which is included in Article 6.1.2 of the Revised Draft Outline Instrument. Alternative I(a) should be expanded to recognize that the carrier can rebut the "presumed fault"* either *by "prov[ing] that neither its fault nor that of a performing party caused the loss or damage"* or *by proving that one of the circumstances listed in Article 6.1.2 caused the loss or

damage (thus creating the non-fault presumption mentioned in Article 6.1.2). In addition, Article 6.1.2 should include the full catalogue of defenses.

(iii) The U.S. MLA believes that the Article 6.1.2 exemptions could be drafted either as presumptions of absence of fault or as exceptions which would exonerate the carrier from liability. The practical effect would be the same. If they are drafted as presumptions of absence of fault (as in the Revised Draft Outline Instrument), then the cargo claimant has the opportunity to rebut the presumption (by proving that the fault of the carrier or a performing party did cause the loss or damage). If they are drafted as exceptions which would exonerate the carrier from liability (as in the Hague and Hague-Visby Rules), then there should be explicit exceptions to the exceptions to state that the carrier is not exonerated from liability when the cargo claimant proves that the fault of the carrier or a performing party caused the loss or damage.

The U.S. MLA recognizes the argument that "some, or all, of the circumstances [listed in Article 6.1.2] fall within the general words of Alternatives I(a) and (b) and that it is therefore strictly unnecessary to specify them." This argument may even be compelling in some countries. The Nordic Codes, for example, appear to have eliminated the list without creating difficulties. At least in the United States, however, it is unlikely that the ultimate Convention would be applied as intended unless the full "catalogue" of defenses in article 4(2)(b)-(p) of the Hague and Hague-Visby Rules is included. U.S. judges generally lack experience in maritime law. Many would assume that if the law were amended to delete the full catalogue of defenses then the intention must have been to change the law. Some judges would be unwilling, as a matter of principle, even to

consider the* travaux préparatoires *that would demonstrate a different intent. The U.S. MLA accordingly reiterates its view, expressed at the meetings of the International Sub-Committee on Uniformity of the Law of the Carriage of Goods by Sea, that the full catalogue of defenses should be included in the text of the final Convention. This inclusion will be very helpful in some countries (including the United States) and will cause no harm in other countries (even if it is unnecessary). Just as the Uniformity International Sub-Committee reached a consensus on this conclusion (see 1999 Yearbook at 109), so the current International Sub-Committee should also support the inclusion of the full catalogue of defenses from article 4(2)(b)-(p) of the Hague and Hague-Visby Rules.

Although the U.S. MLA strongly favors the continued inclusion of the full catalogue of defenses from article 4(2)(b)-(p) of the Hague and Hague-Visby Rules, we do not favor the expansion of the catalogue. Thus we object to the drafting of Article 6.1.2(iv) to the extent that it could be construed to permit the carrier to avoid liability when it is "handling, loading, stow[ing], or unloading" cargo "on behalf of the shipper," etc. Similarly, we object to the drafting of Article 6.1.2(v) to the extent that it could be construed to absolve a carrier from any liability occurring after a danger has arisen, even if the danger has passed. For example, if a container had caused a problem during a voyage but the problem was resolved, the carrier should not be entitled to avoid any subsequent liability for unrelated incidents. Similarly, Article 6.1.2(vi) ("fire") should be restricted to fires on a vessel, and should protect only those operating the vessel. Fires on land should not be a defense, nor should land-based defendants be entitled to the benefit of the fire defense.

(iv) The obligations as set out in Article 5.2 should be included in the Convention (subject to the comments that follow).

(v) All of Alternative II for Article 6.1.1 is in brackets. Based on the commentary following Alternative II, however, the U.S. MLA assumes that the question refers to the possible expansion of the language referring to Article 5.2. The U.S. MLA would not favor a provision that treated the carrier's fulfilling the Article 5.2 obligations as a necessary part of satisfying its burden of proof under Article 6.1.1 or as a precondition to relying on the Article 6.1.2 presumptions or exonerations.

If the carrier's breach of Article 5.2 is* not *causally related to the loss, it is irrelevant and should be ignored. If the carrier's breach of Article 5.2* is *causally related to the loss, then the carrier could not satisfy its burden under Article 6.1.1 or rely on Article 6.1.2 in any event. When the unseaworthiness that results from the carrier's breach of Article 5.2 is causally related to the loss, then "its fault . . . caused the loss or damage." The carrier could not satisfy its burden of proof under Article 6.1.1, and the case should fall within an exception to the exceptions created by Article 6.1.2.

Under the Harter Act, the U.S. Supreme Court held that the carrier's failure to exercise due diligence to furnish a seaworthy vessel precluded the carrier from relying on section 3 of the Act (which generally corresponds to article 4(2) of the Hague and Hague-Visby Rules), even when the resulting unseaworthiness was unrelated to the loss. **May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft (The Isis),** ***290 U.S. 333 (1933). The Hague Rules***

changed this rule. The U.S. MLA would not favor a return to the Harter Act regime.

(vi) An article along the lines of Article 6.1.3 should be included to provide for an allocation of loss. Article 6.1.3 substantially as drafted is satisfactory. The U.S. MLA supports the concept expressed in the bracketed language, but would support an amendment to clarify that the carrier's liability for one-half the damage is a default rule that should apply only when there is no evidence to establish the correct allocation. It is unclear what is meant by "sufficient clarity" in the current draft. When it is uncertain whether the carrier should be liable for 80% or 90% of the damage, for example, the court should do its best to pick some figure in that range. It should not hold the carrier liable for only 50% of the damage simply because it does not have enough evidence to choose between 80% and 90% "with sufficient clarity."

CONSULTATION PAPER DATED 1 JUNE 2001:

5. Delay – Article 6.4.

(i) There was widespread support at Singapore for the unbracketed words in Article 6.4.1. Views were divided as to whether or not any liability for delay should be imposed on the carrier where no specific time for delivery is provided for in the contract of carriage.

Views are sought as to whether a provision imposing such liability should be imposed. The words in brackets in Article 6.4.1 impose a liability based on "reasonableness."

(ii) Article 6.4.2 provides that the carrier's liability for consequential loss arising from delay should be limited by reference to the freight payable in respect of the goods delayed.

The Singapore Conference did not necessarily support a separate limit based on freight for consequential loss arising from delay; some delegates were of the view that the limits in Article 6.7 should apply.

Views are sought on this question.

OUTLINE INSTRUMENT DATED 1 JUNE 2001:

6.4 Delay

6.4.1 Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed upon [or, in the absence of such agreement, within the time it would be reasonable to require from a diligent carrier, having regard to the characteristics of the transport and the circumstances of the voyage].

At the Singapore Conference, the first part of the provision had widespread support, while the views on the bracketed language were divided.

6.4.2 If the loss or damage caused by delay in delivery includes consequential loss or damage, the amount payable as compensation for such consequential loss or damage shall be limited to an amount equivalent to [… times the freight payable for the goods being delayed]. In addition, the aggregate liability under article 6.7.1 and the first sentence of this article shall not exceed the limit that would be established under article 6.7.1 for the total loss of the goods in respect of which such liability was incurred.

If the damage due to delay is physical damage to the goods, such damage can be dealt with according to the rule relating to loss or damage to the goods. However, the loss incurred in connection with delay may be wholly or partly consequential loss. Under the Hague-Visby Rules such damage arguably does not qualify for compensation. It is proposed to change this. The CMNI Budapest Convention limits this liability to the amount of the freight.

In view of the commercial aspects of delay in delivery, it may be questioned whether article 6.4.2 should be of mandatory nature, *i.e.* parties should be allowed to make their own arrangements as to timely arrivals and to put an agreed amount of liquidated damages on arrivals overdue.

The drafting of a provision on excessive delay did not receive support in Singapore.

COMMENTS OF THE U.S. MLA:

(i) The U.S. MLA is not in favor of including the language contained in the bracketed section of Article 6.4.1. Liability for delay should be limited to instances when such damages has been specifically provided for in the contract.

(ii) The U.S. MLA is of the opinion that any damages for delay should be subject to the same limits provided in Article 6.7.

CONSULTATION PAPER DATED 1 JUNE 2001:

6. Conclusive Evidence – Article 8.3.3.

This Article as drafted provides that a transport document is conclusive evidence of the receipt of the goods as described therein when it is in the hands of a third party acting in good faith (cf. Hague-Visby Rules Article III Rule 4, Hamburg Rules Article 16.3.)

Views are sought as to whether in the case of non negotiable transport documents there is any scope for a conclusive evidence rule.

OUTLINE INSTRUMENT DATED 1 JUNE 2001:

8.3.3. Prima Facie and Conclusive Evidence

Except as otherwise provided in article 8.3.4, a transport document is

(a) prima facie evidence of the carrier's receipt of the goods as described in the transport document; and

(b) conclusive evidence of the carrier's receipt of the goods as described in the transport document [if the transport document has been transferred to a third party acting in good faith or if a third party acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the transport document].

This provision is substantially the same as Yearbook 2000 Draft 8.3.3.

Article 8.3.3(b) recognises that, in order to protect innocent third parties who rely on the descriptions in transport documents, in some circumstances a transport document is not simply prima facie evidence but conclusive evidence. The ISC was unable to reach consensus on the definition of these circumstances, however, and thus the key language in article 8.3.3(b) is bracketed to show the need for further discussion. There appears to be much broader support for the first alternative ("if the transport document has been transferred to a third party acting in good faith"), at least in the context of a negotiable transport document that has been duly negotiated to a third party acting in good faith. There appears to be weaker support for the second alternative ("if a third party acting in good faith has paid value or otherwise altered its position in reliance on the description of the goods in the transport document"), particularly in the context of a non-negotiable transport document.

COMMENTS OF THE U.S. MLA:

The U.S. MLA supports the application of Article 8.3.3(b) to non-negotiable transport documents. The justification for the "conclusive evidence" rule is not the nature of the document but the innocent third party's reliance on it. The U.S. MLA therefore favors the inclusion of the bracketed language. Without the bracketed language, 8.3.3 might be too inflexible and might permit a fraud to be committed against an innocent third party.

Furthermore, the U.S. MLA would support the extension of the "conclusive evidence" rule to govern not only the description of the goods but also statements in the transport document such as "freight pre-paid." Thus article 9.5(a), for example, should be expanded to cover all transport documents, not just negotiable transport documents, "if a third party acting in good faith has paid value or otherwise altered its position in reliance on the [statement] in the transport document."

CONSULTATION PAPER DATED 1 JUNE 2001:

7. Containers – Article 8.3.5.

Article 8.3.5 (b), provides that it is a prerequisite of the qualifying clause being effective that the container is delivered intact, closed and undamaged.

Views are sought as to whether this provision is acceptable.

OUTLINE INSTRUMENT DATED 1 JUNE 2001:

When Qualifying Clauses Are Effective

Subject to article 8.3.6, a qualifying clause in a transport document is "effective" for the purposes of article 8.3.4 under the following circumstances:

(a) For non-containerised goods, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms.

(b) For goods shipped in a closed container, a qualifying clause that complies with the requirements of article 8.3.1 will be effective according to its terms [if the carrier or a performing party delivers the container intact and undamaged and there is no evidence that the container has been opened after the carrier or a performing party received it].

This provision is substantially the same as Yearbook 2000 Draft 7.3.5. Some of the bracketed language in the Yearbook 2000 Draft has been modified to provide that the container must merely be closed (not sealed).

The carrier's classic rationale for relying on a qualifying clause and escaping liability in a containerised goods case is that the carrier delivered to the consignee exactly what it received from the shipper: a closed container (the contents of which could not be verified). It is arguable that as soon as the carrier delivers something different (*e.g.*, a container that is so damaged that goods may have been lost during shipment or a container that has been opened during the voyage), the equities shift. At this point the carrier can no longer establish the same chain of custody, and it furthermore appears that the carrier has done at least something wrong. The consignee's entitlement to rely on the description of the goods in the transport document accordingly becomes much stronger. Article 8.3.5(b) recognises this shift in the equities. The remaining bracketed language reflects the differences of opinion within the ISC.

COMMENTS OF THE U.S. MLA:

The U.S. MLA would like the bracketed language changed to include the requirement that both the container and the seal be delivered intact. The requirement that the container be delivered "undamaged" should be defined to limit the damage to damage that could have been causally connected to the loss.

CONSULTATION PAPER DATED 1 JUNE 2001:

8. Identification of the Carrier – Article 8.4.2.

This Article sets out a presumption as to the identity of the carrier, if the transport document "fails to identify" the carrier. If this Article were omitted, the Instrument would not deal with the consequences of the transport document failing to identify the carrier. The provisions of Article 8.2.3(a), which deals with the effect of a transport document signed by the Master, should be read together with this Article.

This issue was discussed at length by the Uniformity Sub Committee and reference should be made to the reports of its meetings published in the CMI Yearbooks. Views were very much divided on this issue at Singapore.

Views are therefore sought as to whether:

(i.) a presumption along the lines of Article 8.4.2 should be included

(ii.) if so, what should constitute failure to identify the carrier.

(iii.) Whether Article 8.4.2 should apply generally, or only to transport documents signed by the Master.

OUTLINE INSTRUMENT DATED 1 JUNE 2001:

8.2.3 Signature

(a) The transport document shall be signed by or for the carrier or a person having authority from the carrier. [A transport document signed by or for the master of a ship carrying the goods is deemed to have been signed on behalf of the registered owner or the bareboat charterer of the ship.]

(b) Unless this is inconsistent with the law of the country where the transport document is issued, the signature on the transport document may be in handwriting, printed in facsimile, perforated, stamped, in symbols, made by any other mechanical means, or done electronically in accordance with chapter 2.

This provision is based on article 14.2 and 14.3 of the Hamburg Rules.

8.4.2. Failure to Identify the Carrier

If the transport document fails to identify the carrier but does indicate that the goods have been loaded on board a named vessel, then the registered owner of the vessel shall be presumed to be the carrier. The registered owner can defeat this presumption if it proves that the ship was under a bareboat charter at the time of the carriage and the bareboat charterer accepts contractual responsibility for the carriage of the goods.

This provision is substantially the same as Yearbook 2000 Draft 7.4.2.

This provision gives effect to the views expressed in the Uniformity Sub-Committee. The issue remains controversial, as reflected in the Singapore Report: "There was more support for the proposed presumption . . . that the registered owner of the vessel named in an ambiguous transport document shall be the contracting carrier than there was for a presumption that the registered owner of a performing vessel is the performing carrier. But views were very much divided on these issues and the desirability of any presumption affecting the registered owner." The provision here implements only the first presumption mentioned in the Singapore Report, for which there was "more support."

COMMENTS OF THE U.S. MLA:

The U.S. MLA thinks that a presumption along the lines of Article 8.4.2 should be included. The problem addressed by Article 8.4.2 has not been a

source of great difficulty in the United States, but it has created difficulties in other countries and the final instrument should attempt to solve the problem. Although the solution of Article 8.4.2 is imperfect, it remains preferable to any other potential solution that has been discussed.

The U.S. MLA does not think that a failure to identify the carrier should be precisely defined. Courts should be given the flexibility to determine what constitutes an adequate identification on the facts of individual cases.

The U.S. MLA thinks that Article 8.4.2 should apply generally. It should not be limited to documents signed by the master.

CONSULTATION PAPER DATED 1 JUNE 2001:

9. Mandatory Provisions

(i) A clear majority at Singapore considered that the Instrument should take the form of a convention and that the "core provisions", including the carrier's liability for loss or damage occurring on the sea leg, should be mandatory. What other provisions should be included in such mandatory core provisions remains open for further consideration.

Such a convention should supersede the Hague, Hague-Visby and Hamburg Rules. There are other provisions contained in the Instrument which correspond with provisions in these Rules. It would therefore be logical for such provisions to be mandatory in addition to the provisions dealing with the carrier's obligations and liabilities in Chapters 5 and 6. Such provisions are contained in Chapters 4, 7, 8, 14, 15, 16 and 17.

As drafted Chapter 9 contains a number of provisions which are non mandatory inasmuch as they will only apply if the parties do not agree otherwise. Chapters 10, 11, 12 and 13, as drafted, are mandatory.

Views are sought on the extent to which the provisions of the Instrument should be mandatory. Special considerations may apply to E-Commerce (Chapter 2) and to door to door transport (Article 4.4).

(ii) Article 17.1 contains a general provision that, unless it is specified otherwise, it is not permitted to derogate from the provisions of the Instrument. Article III Rule 8 of the Hague Rules and Article 23.1 of the Hamburg Rules contain similar provisions in respect of the carrier's liability. Article 17.1, as drafted, extends this to the shipper. It leaves open whether or not it should be permissible for either party to increase its respective liabilities.

Views are also sought on this issue.

COMMENTS OF THE U.S. MLA:

(1) The U.S. MLA supports the view that the provisions in the Convention that correspond to or supersede mandatory provisions in current conventions or national law should also be mandatory, including any inland extensions of such mandatory provisions. Thus almost all of the Revised Draft Outline Instrument should be mandatory. But the U.S. MLA agrees that those articles in chapter 9 that are currently drafted as non-mandatory provisions should remain non-mandatory.

The U.S. MLA does not support the mandatory application of article 9.6(a), which declares that "the carrier is entitled to retain the goods until [the] payment" of certain expenses, "[n]otwithstanding any agreement to the contrary." To use the common law terminology, this provision seems to be saying that the parties may not agree to waive the carrier's lien over the goods without waiving the consignee's underlying liability. We see no basis for such a rule. Indeed, the carrier's issuance of a "freight pre-paid" bill of lading is essentially a waiver of

the carrier's lien. Furthermore, the U.S. MLA objects to the phrase "or otherwise" in this article (particularly if the article were to remain mandatory). Although a consignee may be liable for payments "otherwise" than under national law (e.g., under international convention, including international conventions other than this one), the current drafting is too indeterminate. It could arguably sanction a lien in favor of the carrier if a boilerplate clause in an adhesion contract made the consignee liable for a payment, even if that liability was not enforceable under national law or international convention.

(2) The U.S. MLA supports the inclusion of the second sentence in Article 17.1, which is now in brackets, to permit the carrier or a performing party to increase its responsibilities or obligations.

ADDITIONAL COMMENTS OF THE U.S. MLA:

The U.S. MLA favors a full multimodal solution in preference to the network solution proposed under Article 4.4(a). A full multimodal solution would avoid the uncertainties regarding applicable laws and the choice of law questions that arise under a network solution. However, the U.S. MLA recognizes that political considerations make a full multimodal solution infeasible. As a result, mandatory national laws and regional conventions (such as the CMR) will continue to be applied during the periods before loading and after discharge. The final instrument should nevertheless seek to minimize the uncertainties regarding applicable laws. One possible solution would be to require each Contracting Party to specify which mandatory national laws or conventions would be applied to internal movements beyond the port and within its territory under Article 4.4(a).

In this way, the governing law would be readily known beforehand and with certainty.