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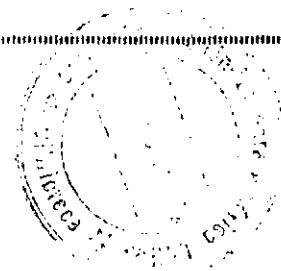


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LIABILITY AND INSURANCE IN INTERNATIONAL INTERMODAL TRANSPORT

Contributions by Latin American experts,  
comments by other experts, a note by  
the Secretariat, and proposed draft  
articles for agreements

This document was prepared for the meeting of Latin American Governments on international intermodal transport (Mar del Plata, Argentina, 20-30 October 1974).

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## INTRODUCTION

The aim of this collection of articles is to provide some basic concepts on liability and insurance in international intermodal transport. It includes contributions in which Latin American and other experts have expressed their personal opinions, as well as draft articles for conventions set forth from one to three years ago by the International Chamber of Commerce, UNCITRAL and some industrialized countries. A paper prepared by the Secretariat is also included.

The first study, by Dr. Alfredo Mohorade, under the title "Combined transport: liability and other related problems," provides a concise introduction to key issues which have been debated regarding the liability of the combined transport operator. The second contribution, by Lic. Luis Roca Fernández, "Suggestions regarding insurance aspects that should be taken into account in the draft convention on international combined transport offers a set of principles to guide the search for the most appropriate system for Latin America. This is followed by a note by the Secretariat of the Economic Commission for Latin America, "Basic questions for the selection of a liability regime for international intermodal transport," which is written as a complement to the articles by Doctors Mohorade and Roca Fernández, and as an introduction to the excerpts from proposed international legislation which deals with liability regimes of the combined transport operator and of maritime lines which assume responsibility in the case of transshipment.

These three articles are followed by the following documents:

IV: Pertinent clauses of "The uniform rules for a combined transport document," issued by the International Chamber of Commerce. This is a version of the network system of liability, based explicitly on the draft Convention on International Combined Transport of Goods (TCM Convention).

V: Comments on the relationship between "The uniform rules for a combined transport document," and the Hague Rules (Brussels Convention of 1924) which delimits the responsibility of maritime liner operators. These comments also refer to the rule of the combined transport operator as regards indemnities for loss or damage to the cargo under his responsibility.

VI: A version of the network system of liability proposed in 1972 by the Government of France.

VII: Articles for a uniform system of responsibility, with "strict liability," proposed by several industrialized countries in 1972.

VIII: Basic rules governing the responsibility of the maritime carrier, with "strict liability," proposed as modifications of the Hague Rules.

/I. Combined Transport



I: COMBINED TRANSPORT  
LIABILITY AND OTHER RELATED PROBLEMS

by Alfredo Mohorade

1. The sudden appearance on the modern transport scene of the Combined Transport Operator - a physical or legal entity who assumes responsibility for the delivery of goods to an agreed destination by means of their material transfer by different modes of transport - calls for a clear definition of the nature of the relations between such Operators and the shippers, as well as the nature of the relations which will have to be established between the Operators and the owners of the companies directly responsible for the various stages of transport.

Because of this, the problem of liability assumes particular importance and the most determined efforts will have to be made to establish suitable and effective bases in this respect. In this connection, it should be clearly understood that the present paper does not claim to provide definite and specific solutions, but merely seeks to provide a schematic outline of the problem which can be used as a basis for later elaboration.

2. The basis of liability. The obligation to indemnify a person for damage caused to him falls into two major categories: (a) subjective liability based on negligence and (b) objective or strict liability.

(a) Subjective liability: Under this type of liability, the person who undertakes to perform a duty - in this case the Combined Transport Operator - must pay damages when he fails in the performance of his duty, i.e., when he "omits to perform those duties which are required by the nature of the obligation and are in keeping with the circumstances of the persons, time and place". In other words, in this case the conduct of the alleged defaulter will have to be suitably evaluated, so as to determine his liability in respect of the claim against him. The attitude of the person responsible for passing judgment is obviously of great importance, for he will have to analyse a number of circumstances, as the above quotation from article 512 of the Civil Code of Argentina indicates.

/To give

To give a specific definition of what is meant when it is said that someone is liable to the extent of his negligence, writers on the subject have come up with the most varied definitions, of which the best known is probably that of the brothers Mazeaud, outstanding French jurists, who refer to "an error in conduct" as a means of distinguishing negligence capable of generating consequent liability. The problem is far from easy, and indeed it is one of the most difficult in the whole field of law, for as already stated, a great deal depends on the individual view of the person who must judge the matter.

The fact remains, however, that the great majority of countries have adopted as the basis of liability - except in a few cases which will be analysed further on - the subjective system or that based on proof of default.

(b) Objective Liability: This system completely ignores any consideration of the conduct of the person causing the damage or of whether he is at fault or not, the only requirement being to prove the relation between the damage and the act causing such damage.

This is the solution adopted by the various standard regulations governing occupational accidents, damages caused to third parties on the ground by aircraft, and nuclear accidents. Thus, for example, when a worker suffers an injury in the performance of his job, the employer must pay compensation, whether he was negligent or not, and if an object falling from an aircraft injures or kills a person on the ground, the obligation to pay compensation stems from the fact that the falling object caused the damage, it being of no importance whether the carrier has any defence whatever. The same is true for nuclear accidents. Objective liability is based on the risk created by the owner of the object or activity concerned, his conduct in connection with the injury incurred being of no importance whatever in respect of his obligation to pay compensation.

As regards combined transport, the various draft conventions drawn up by UNIDROIT, the International Maritime Committee, IMCO, etc., have opted for the subjective liability system, whereas the U.S.A. seems to favour the system of objective liability.

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This is one of the problems that must be dealt with by the Latin American Group in order to establish what they consider the most suitable position to be taken at the forthcoming discussions in Geneva.

3. The system of liability to be adopted. Another matter with which the Group must deal in connexion with the possible CT Convention is what system of liability most effectively covers the interests of the shippers.

In view of the fact that each mode of transport (road, rail, air, sea, inland waterways) is subject to specific international conventions or national legislation, it must be decided whether the regulations of the CT Convention will take precedence over the existing rules, or whether these will still govern each mode of transport separately. In the latter event, if damage occurs during transport by sea, the Brussels Convention will apply; with respect to air, the Warsaw Convention, etc. This system of liability is known as the "network system". On the other hand, if it is decided that the Convention should enact its own regulations with respect to liability, whatever the stage of the journey where the damage occurs (damage can occur not only while goods are in a means of transport, but also when in a warehouse, storehouse, shed or dockside in the country of origin, on the way or at the destination), a uniform system of liability will have been established.

The arguments and reasons put forward in favour of one system or the other are many and varied, and the discussions on this particular aspect - especially with the highly developed countries (including the USSR but excluding the USA) - may prove to be the most significant as well as the most barren.

This is a subject which has received very little attention so far or has been dealt with very superficially by the countries of the Latin American Group; this is understandable because this group of countries has placed emphasis on and given priority to questions of an economic and political nature rather than juridical ones, since the latter are of a subsidiary nature.

The issue cannot be avoided, however, and adequate preparations should be made by the Latin American countries so that they can fully

/co-ordinate their

co-ordinate their own strategy with that of the countries of the Group 77 and enable a common front to be presented to the countries of groups B and D.

In the light of the foregoing, the following paragraphs will set out some very general remarks on the subject.

The highly-developed countries base their views on this matter on a single main premise. They say that while damage may be discovered during a particular stage of the transport, it may remain unnoticed until arrival at the final destination, in which case it would be impossible to establish where the damage occurred.

The point is that the previously mentioned countries, when speaking of unitized transport, think only of containers and nothing more; this can be seen from the working papers distributed at Geneva, where the English versions made no mention of a meeting on "Combined Transport" but referred instead to a meeting on "International Container Traffic".

In reality, however, combined transport involves rather the development of the institution of combined transport operators, one of whose methods of operation - but only one - is the use of containers.

What is of greatest interest to the developing countries is not how the goods are transported (on pallets, in containers, etc.), but what liability is borne and what guarantees are offered by the Combined Transport Operators. The most recent experiment of the developed countries has been to put forward the International Chamber of Commerce document (another matter to be studied by the Latin American Group), which is along the same lines as the various combined transport drafts rejected in the past.

The countries of the Group 77 may decide to insist that the combined transport operators should be subject to extensive liabilities and should provide ample guarantees that they will carry out their obligations. If so, it is logical to advocate the adoption of a uniform system of liability, rejecting any form of liability based on the "network system". The reasons for this are twofold, as outlined below.

Firstly, approaching the question from the point of view of the shipper, it is essential from the start of the transport operation that

/both he



both he and the insurer should know the Operator with whom he enters into a contract will be liable. If, from the outset, the shipper and the insurer are fully aware of the defences open to the Operator and the limitations on the latter's liability, there will automatically be greater security in the transactions.

Secondly, our countries must counter the developed countries' viewpoint by emphasizing that since all transport conventions - or at least those regarding maritime and air transport - are in a state of crisis (clear proof of this is provided by the UNCITRAL effort and the Guatemala Protocol), it would be ridiculous to continue to maintain systems which are being revised.

Assuming, then, that the basis of the liability of the CTO would be the "uniform system" - i.e., the system of liability would be the same whatever the stage of transport at which the damage occurred - the defences which the CTO could put forward against the shipper's claim must be analyzed.

In this respect, it should be mentioned that various systems exist side by side, depending on the degree to which the countries concerned apply the various international conventions or, as regards the applicable national legislation, the mode of transport involved.

In the continental group of countries or those using the Napoleonic Code, if a claim was made against the carrier (in this case the CTO), he could put forward the defence of "force majeure" and its variations, such as inherent vice in the object or default by the shipper. This meant that if the person under the obligation to deliver goods received by him for transport showed that an event was either unforeseeable or unavoidable (storms, strikes, fire, etc.) he was not liable in any way.

The shipowners objected strongly to this, however, and sought to specify the defences which could be put forward against claims by shippers. This gave rise to what are known as the Hague Rules, which were subsequently incorporated in the Brussels Convention of 1924. This lays down that in the main, once a maritime carrier has fulfilled his duty of exercising due diligence to ensure the seaworthiness of his ship, he can escape liability by invoking one of the subparagraphs of article 4 of the Convention.

/It should

It should be noted in this connexion that in recent years there have been a number of attacks on the existing system (i.e., that followed by the States which have acceded to the Brussels Convention), especially at the meetings held by UNCITRAL. It is not possible in the present paper to go into all that has transpired to date, but for reference purposes those who are interested should read the UNCTAD working paper (TD/B/C.4/ISL/6/Rev. 1) as well as the various UNCITRAL documents on the work done so far.

The idea would seem to be to follow the recent trends set by air transport laws, which would be widened to include traditional situations specific to maritime law (fire, reasonable deviation).

In this connexion, the reader is recommended to study the work by the Venezuelan jurist Dr. Julio Sánchez-Vegas entitled "Recomendaciones que van a regir una póliza de seguro en una Empresa de Transporte Combinado", in which he discusses possible solutions to the problem.

While it is true that no-one can pretend to be the possessor of the ultimate truth on this matter, it may be noted that the world-wide trend at the moment is towards widening the liability of any person contracting an obligation. In this respect it would be worth while (for example), reading the views of legal experts on liability arising in connexion with the use of motor vehicles, in both its extracontractual and contractual aspects (including the carriage of goods and passengers without payment).

In this connexion, however, it should be made quite clear that there can be no question of the developed countries beating a strategic retreat as regards liability in maritime transport by going back to the acceptance of a wide range of defences when it is a question of combined transport. Such a course cannot be accepted as a serious possibility and should be rejected out of hand.

A sound procedure would be for the legal experts of the region to keep in close contact with each other as the most effective means of co-ordinating ideas on this burning issue of CTO liability, with the ultimate aim of joint planning with African and Asian jurists. This would be the ideal solution in order to enable the Group 77 to present a common front against the countries of groups B and D.

4. Other questions to be dealt with. While recognizing that this depends on the achievement of the necessary progress in each case, the following points must inevitably be studied by the Latin American Group in connexion with a possible TCM Convention;

(1) Obligatory or optional nature of the TCM Convention:

(1) Must the Convention cover all combined transport situations?

Will it be optional? How can the shippers' rights be guaranteed most effectively?

(ii) Issue of the CT document:

(1) Is this to be done by the CT operator? (2) Will the shipper have the right to demand its issue?

(iii) Negotiability of the CT document:

(1) Should it be negotiable or not? (2) Who is responsible for specifying the nature of the document, the CTO or the shipper?

(3) What is the role of the guarantor banks to be?

6. Conclusion. Here I wish to repeat the statement that there is no intention on my part to offer any solution in this document, the only aim of which is to provide a brief review of the subject, on which so far little has been said.

It may be noted, for example, that only Argentina, Paraguay and Perú have acceded so far to the Brussels Convention of 1924. Due consideration should also be given to the fact that the first of these countries is currently studying the possibility of reforming its internal legislation which is at present along the lines of the principles of the Convention, while objections have been raised in the country against the said Convention.

It would therefore be highly desirable if experts on the subject were to come to the meeting in Buenos Aires to help to formulate with the greatest possible care the position to be taken over liability vis-a-vis the other regional groups.



II: SUGGESTIONS REGARDING INSURANCE ASPECTS THAT SHOULD BE  
TAKEN INTO ACCOUNT IN THE DRAFT CONVENTION ON  
INTERNATIONAL COMBINED TRANSPORT

by Luis Roca Fernández

1. The adoption of a combined transport convention will certainly bring about changes in the form of insurance of international trade merchandise, since it involves the creation of a new entity -- the combined transport operator (CTO) -- some of whose responsibilities will be different from those of current transport operators.
2. Assuming that the adoption of this convention is based on a genuine desire to achieve progress in and make improvements to existing systems of world trade and to simplify the problems encountered, it can also be assumed that the intention is to correct shortcomings as regards responsibility for transport and the protection afforded by insurance.
3. At present, the various kinds of agreements and legislation impose very little responsibility on the transporters and carriers, compared with the owners of the cargo, to such an extent that this has given rise to the phenomenon of double and triple insurance, since the suppliers and owners of the cargo prefer to take out their own insurance than to embark on litigation against the transport operators, who benefit from a large number of exemptions.
4. If international transport is to be improved, then at the same time something must be done to put an end to this excessive flexibility as regards the responsibility of the person effecting the entire shipping operation, since any combined transport enterprise must be a professional, responsible and financially solvent entity if it is to be worthy of its function.
5. Considering that it is the person who effects the transport operation who must guarantee that the merchandise arrives safely on time, it

/does not

does not seem logical that his responsibility should be so flexible as to remove any incentive to be more efficient and reliable because of the knowledge that the owners or suppliers of the cargo are reluctant to take legal action in view of the small chance of obtaining any fair compensation for the loss or damage suffered.

6. The solution, therefore, must be for the person responsible for the transport operation to be likewise entirely responsible to the owners of the goods entrusted to him in respect of all contingencies that may arise. In this way, only one insurance should be necessary to cover the transport operator's risks, yet this would cover all the risks involved in modern transport operations.
7. Once there is a guarantee that the transport operator (whether a combined transport operator or not) will assume all risks involved in the transport operation, the owner or supplier obviously no longer needs to take out insurance of his own, since he knows that he will be adequately and fairly compensated in the event of any mishap.
8. Since the risks to be assumed by the transport operator will be precisely specified, they can all be covered by a cargo policy incorporating the new risks involved in the entire transport operation, and although this expanded coverage will increase the cost, this will be offset by the saving on the double and triple insurance, which will obviously no longer be taken out, and as a result the overall cost will remain the same or even be reduced.
9. If any real progress is to be made in the field of insurance, a solution must be sought whereby the shipper will effectively assume his responsibilities, thus avoiding a situation in which the other parties to the transaction have to make up for his shortcomings. If the situation is approached in this way, the insurance industry can be relied upon to provide the necessary coverage for this type

/of risk

of risk in the cargo insurance branch, which is less costly than insurance for liability.

10. If a solution based on cargo insurance is adopted, the repercussions on the insurance markets of the developing countries will certainly be less serious than they would be if the coverage of these risks were assigned to liability insurance, as our countries have much more experience in cargo insurance than in liability, which, because of its wide-ranging and specialized nature, tends to be handled on the international market.
11. Quite apart from the fact that the type of responsibility imposed on the transport operator (whether a combined transport operator or not) must be stricter and more specific in its effective application, there are other aspects of the problem which must be borne in mind too, such as the fact that the Convention must stipulate that the insurance taken out by the transport operator must be issued by a company in the country of the purchaser or owner of the goods.
12. This principle that the insurance must be taken out in the country of the purchaser of the goods is based on the simple fact that the price to the buyer includes all the costs, which have been transferred to the price of the article, so it is not desirable to further increase the price of imports through the cost of foreign insurance, when this can be taken out in the buyer's own country, thereby bringing about a saving in foreign currency and a strengthening of the local insurance market -- a position which was accepted by all countries in the resolution on insurance adopted at UNCTAD III.
13. Consequently, the international combined transport convention or any other instrument adopted should incorporate this advance made by the developing countries in the field of insurance, since it will certainly put an end to CIF purchases, which have such a bad effect on the already deteriorated foreign trade balances of our countries.

/14. I believe

14. I believe that a joint position of Latin American countries can be mapped out along the lines indicated above, since the precise technical solutions to be adopted can be studied at the same time as the type of liability which is to cover international trade is being defined.
15. Consequently, the principles that should be taken into account in the field of insurance are: that the insurance covering the new modes of transport should come under the cargo insurance branch, in which we already have experience and underwriting capacity; that the liability of the person responsible for the transport operation, whether a combined transport operator or not (we should not commit ourselves to accepting the combined transport operators as an established fact), should be sufficiently strict and specific for it to be made effective rapidly and without paperwork; and that the insurance should be taken out by the transport operator in the country purchasing and paying for the goods, in order to conform to the UNCTAD resolution in support of national insurance markets.



III: BASIC QUESTIONS FOR THE SELECTION OF A LIABILITY REGIME FOR  
INTERNATIONAL INTERMODAL TRANSPORT

Note by the Secretariat

The purpose of this short essay is to suggest some of the basic considerations for the selection of a liability regime for the Combined Transport Operator. It is written as a complement to the articles by Dr. Alfredo Mohorade and Dr. Luis Roca Fernández, included in this same anthology, and as an introduction to the excerpts from proposed international legislation which deals with liability regimes of these operators and of maritime lines which assume responsibility in the case of transshipment.

Three principles are offered to guide the choice of liability regimes, as follows:

1. Ample insurance coverage available to the user, with each intermediary assuming liability necessary to insure honest, careful and expedite handling of the cargo and documentation, without unnecessarily complicating the processing of claims or duplicating insurance administration costs, and permitting the user to take advantage of self-insurance or his own open policies where it is most convenient for him.

With regard to this principle, several key decisions must be made:

- a) Among the most controversial issues is the effectiveness of liability based on fault as a means to insure honest, careful and expedite handling of the cargo and documentation by the transporters and other enterprises engaged in cargo handling.

There are two extreme positions on this issue, both of which merit serious analysis. One position is that the cargo owner ought to rely on his own cargo insurance, and that only under very special circumstances would the insurer try to recuperate the indemnization

/from a transporter

from a transporter or other agency responsible for cargo handling.<sup>1/</sup> This argument presumes that responsible actions by the CTO, transporter or other cargo-handling agency should depend on careful regulation of entry into these activities by the governments, according to strict predetermined international norms and national legislation, and on the factor of competition among different transport modes, different CTO's, or different intermodal transport combinations. The proponents of this point of view assert that liability based on fault is only occasionally an effective mechanism to bring about more responsible attitudes and actions, in part because in many cases there is little actual discrimination among different entities as to premiums charged, in part because premiums are usually small relative to the freight and in part because the premiums are passed on to the clients.

The other position is in favor of strict liability, whereby only in very exceptional circumstances can the CTO, transporter or other cargo-handling agency cite exemptions from responsibility, and in any case would carry the burden of proof. Proponents of this point of view consider liability based on fault to be an effective incentive to responsible attitudes and actions; that CTO's, transporters and other cargo-handling agencies would have to have their own insurance anyway, and that strict liability on their part would avoid the necessity of

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<sup>1/</sup> Some CTO's and land transport companies in Latin America presently adopt this principle, at least as an alternative for the user. One mechanism is that the user takes out a cargo insurance policy and endorses it to the CTO or transporter. This is not compatible with international intermodal transport of sealed unit-loads, unless the policy is endorsed to the CTO. A second mechanism is that the cargo insurer draws up a letter indicating that it will not attempt to recuperate from the CTO or the transporters. Insurers charge a certain percentage over the regular premium when these mechanisms are used.

separate cargo insurance; and that service agencies should be prepared in general to respond directly to the client for all aspects of the services provided according to the terms of the contract between the client and the agency.

b) Another key question concerns the desirability of creating a new insurance which is added to carrier's liability insurance and cargo insurance. From one point of view, this complicates excessively the situation as regards indemnization or litigation. From another point of view, this is necessary in order that the CTO is made to assume liability in relation to the responsibilities he contracts regarding the delivery, delay, damage or loss of the cargo. It should be noted that there is general consensus that in previous debates on this subject, there was considerable confusion on the meaning of "third insurance." Presumably, when a new insurance is created, not to replace existing insurance but which does assume some of the coverage of the previously existing insurance, premiums of each of the insurance policies are adjusted to the new situation. The additional costs to the user with the addition of a "third insurance" should be limited to administrative costs of that insurance and to coverage not provided to the owner of the merchandise previously.

c) A third crucial question is the importance of associating risk and premiums. On this, there is a considerable difference in Latin America between land transport and maritime insurance premiums, and in general between unitized cargo and non-unitized cargo insurance premiums. There are years of experience and large amounts of accumulated data for the determination of cargo insurance premiums in the case of non-unitized maritime transport. <sup>2/</sup>

<sup>2/</sup> However, insurers in more industrialized countries tend to discriminate less among cargo routes than the comparative risks would seem to warrant. They establish premiums close to world-wide averages, and the insurers in the developing countries must charge considerably more at times since they must respond more to local conditions.

/In some cases,

In some cases, special discounts are offered for palletized or containerized goods, but especially with regards to containers, there is still a certain amount of uncertainty. Insurers that have offered discounts for containerized goods in some cases withdrew these discounts when entire containers began to disappear, and the same premiums were again charged for unitized and non-unitized cargo.

In the case of Latin American international land transport, the insurers do not have the experience or data necessary to discriminate among premiums, according to risk. At present, on South American transcontinental routes, cargo insurance rates are seven or eight times more when maritime transport is used rather than land transport. This same low land transport premium is charged on other land routes, where the risks are evidently much greater. In the face of any large-scale loss by insurers, they may react as did the international insurers in the face of concentrated container losses, increasing premiums to maritime transport levels and eliminating one of the natural advantages that land transport offers. Ideally, insurers will have the data or antecedents in order to make more discrimination of rates, relating them to risks.

In the case of both cargo insurance and customs' guarantees (for the cargo, containers or vehicles), one system used is a special fund or guarantee system set up and operated by the transporters or CTO's themselves. It should be kept in mind that this system tends to lead to lack of discrimination among premiums or fees paid into the fund on the basis of the risk experience in the case of each participating transporter or CTO. The implication is a subsidy from more responsible to less responsible participants.

/ 2. Ample opportunities

2. Ample opportunities for the user to file insurance claims, and ability to carry out litigation where necessary without undue costs or difficulties of obtaining and using available evidence in his favor.

Major problems for the implementation of this principle include the following:

a) The problem where there is no agent of the CTO or transporter which is at fault, in the same locality as that of the owner of the cargo. This, of course, implies more difficulty on the part of the user in settling claims.

b) The problem of jurisdiction over the case, in the case of litigation, wherein the owner of the goods at the time of damages or loss has difficulties of access to the courts which have jurisdiction over the case.

c) The problem that in Latin America it is common that cargo insurers learn of damages past the date when claims can be filed. This has led to the routine filing of claims in some places, even without evidence that the CTO or carrier were really responsible, and in turn, a habit on the part of some carriers of ignoring the first filing of a claim.

d) The problem where the CTO and the carrier are the same, and where the user is dependent on the CTO for evidence against the carrier.

A basic question, in addition to the above problems, is how to implement the norm that the CTO should represent the owner of the cargo during litigations. Reference is made here to the opinion of experts consulted that independently of the position which the CTO has during litigations, he is not entitled to collect a different amount from transporters or other cargo-handling agencies than the amount of indemnity which his insurer pays to the owner of the cargo. The opinions of these experts are summarized in Part VI.

3. Insurance and reinsurance arrangements such that an increasing share of the market is insured by Latin American institutions, and that a high and increasing proportion of the net collections (total premiums minus premiums reinsured outside of country plus indemnizations returned to country) remain in the Latin American country.

Major questions which must be answered with respect to the implementation of this principle include the following:

a) The proportion of total coverage for which each type of insurance responds in practice must be clarified. Traditionally in Latin America, the national insurers have been able to insure directly the cargo to a great extent, while they are in a much weaker position to insure transporters' liability, particularly in the case of maritime transport. There are great variations as to the proportion of the cargo insurance premiums which are reinsured abroad.

There has been considerable conjecture that an insurance to cover the CTO's liability would, like maritime liability, be difficult for the Latin American insurers to absorb.

The different proposals which have been made with regard to CTO's liability, and which are included in this anthology, may be distinguished grafically according to the amount of the total coverage for which each insurance is really likely to respond. Graph 1 illustrates these differences.

With the no-fault liability system, the amount of coverage offered by the carriers, ports, warehouses and CTO's would be quite small, and the rest would have to be covered by cargo insurance.

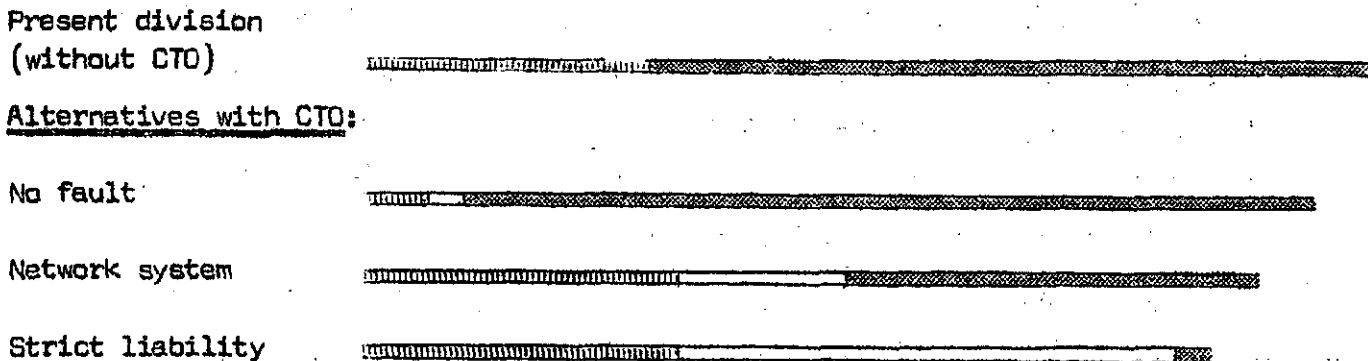
The present situation, where the carriers, warehouses and ports normally enjoy extensive exemptions from liability, involves a division between the coverage by the insurance of the cargo-handling agencies and cargo insurance.

/Graph 1

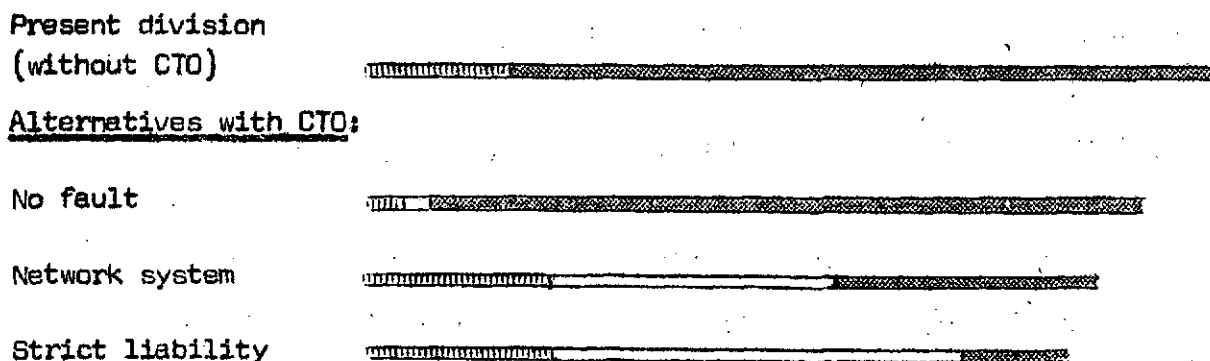
Graph 1

TOTAL COVERAGE OF RISK BY DIFFERENT TYPES OF INSURANCE-ALTERNATIVE LIABILITY SYSTEMS

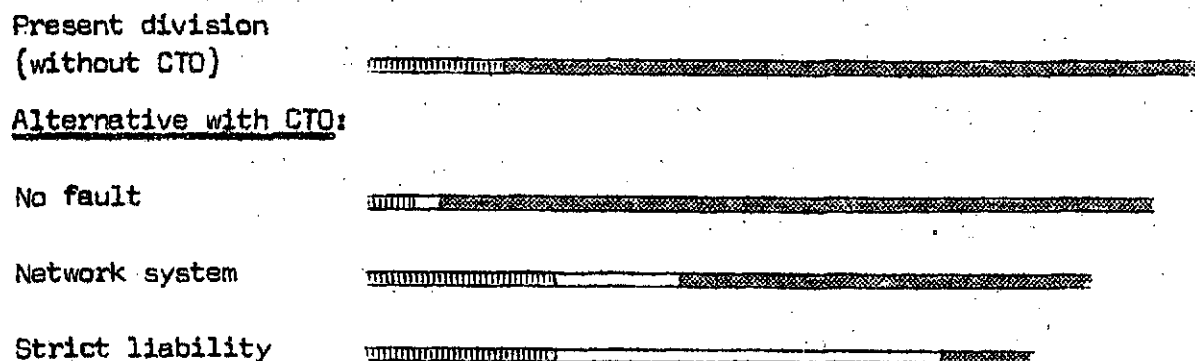
BREAK BULK CARGO



LESS THAN CONTAINER LOAD (LCL) CARGO



FULL CONTAINER LOAD (FCL) CARGO



KEY: Insurance of carriers, ports and warehouses  
 CTO's insurance  
 Cargo insurance or self-insurance

NOTES: The proportions are meant to be illustrative and are only intended to show relative differences as to the amount of the total risk covered by each type of insurance. It is assumed that the major leg of the movement is via maritime transport. It is assumed that containerization results in 25% less total risk, with a greater percentage reduction for the carriers' insurance, and that the intervention of the CTO results in 10%, 20% or 25% less risk in the case of no fault insurance, the network system or strict liability, respectively.

The intervention of the CTO could have the effect, apart from whatever liability he carries, of increasing the amount of risk covered in practice by the carriers, ports and warehouses (shown by the arrow marked A). This is because he should be in a better position than the owner of the cargo, or of many cargo insurers, to pinpoint which cargo-handling agency was at fault for damages.

Apart from this, the choice of alternative proposals for network system or strict liability should have little impact on the amount of risk covered by the carriers, ports and warehouses. Much more important is the division of coverage of risk between cargo insurance and the CTO's liability.

With the network system (see Parts V and VII), the amount of coverage by the CTO depends on the manner the cargo is packaged. In the case of the full container load (FCL), the CTO usually receives the container from the shipper already packed and sealed. This means that the CTO can make use of a very important exemption under the proposed systems - when the fault lies with (or could be shown to have been due to) poor packing of the container. In litigation on hidden damage of cargo in containers, this exemption is very important.

In the case of the less than container load (LCL), the CTO normally assumes responsibility for packing the container. His proportion of the total coverage will be quite a bit more, therefore, than in the case of FCL shipments.

In the case of break-bulk or palletized shipments under the network system, one might suppose that the situation would be the same as with LCL shipments. However, experience shows that when CTO'S pack containers, they are very attentive to the preparation or wrapping of the shipments they receive from the shipper, and will reject any shipments which have any signs of defects. Thus we can assume that the CTO's coverage of risk is increased with LCL shipments.

/Finally, the



Finally, the proposed strict liability systems (see Parts VIII and IX) imply a large-scale transfer of coverage of risk from cargo insurance to CTO's liability.

b) The second question to be answered is the likelihood that premiums will be adjusted to the new reality of actual coverage of risks. If there is a large scale transfer of coverage from cargo insurance to CTO's liability, will the former then experience reduced premiums? As was noted earlier, when there are radically new risk situations, there can be brusque changes of premiums on the basis of the insurers' consideration of the importance and direction of certain factors. A large-scale loss can lead to a reversion to much higher schedules, and there can be a very long period of adjustments based on accumulated experience. These transitory periods can involve higher total premiums paid by the shippers, and temporarily higher or lower outflow of exchange in the form of reinsurance (which is especially important when there is fear of possible concentration of risk) or premiums on policies from foreign countries.

c) Extremely important are the implications of the CTO's activities for the concentration of risk. If there is little or no greater concentration of risk than at present, the transfer of coverage from cargo insurance to CTO's liability should not have much impact on the ability of the Latin American countries to retain increasing proportions of net collections, assuming that the insurance industry adopts or is permitted to adopt measures to be able to offer appropriate types of policies for cargo movements under combined transport documents. Even if there is greater concentration of risk due to the CTO's activities, the Latin American insurance industry could offer insurance to cover the CTO's liability, with high retention levels in the region, by means of pools.

/d) Finally, there

d) Finally, there is the feasibility of reducing the disparity among national insurance legislations in Latin America. This disparity has resulted in an inability by insurers of the region to offer the most appropriate coverage for international intermodal cargo movements. Although this legislation is oriented toward the protection of the development of national insurance industries, the insurers of the region are not permitted to combine their resources and thus to offer competitive policies for door-to-door transport risk coverage. Also, combined transport operators formed by multi-national firms with substantial capital have advantages in backing up the responsibilities they assume for the cargo, in comparison with local operators that must rely on local insurers.

IV : UNIFORM RULES FOR A COMBINED TRANSPORT DOCUMENT \*

of the International Chamber of Commerce

Liability for loss or damage

- A. Rules applicable when the stage of transport where the loss or damage occurred is not known.

Rule 11

When in accordance with Rule 5 (a) hereof the CTO is liable to pay compensation in respect of loss of, or damage to the goods and the stage of transport where the loss or damage occurred is not known:

- (a) such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the contract of combined transport, they should have been so delivered;
- (b) the value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price, or, if there is no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality;
- (c) compensation shall not exceed 30 francs per kilo of gross weight of the goods lost or damaged, unless, with the consent of the CTO, the consignor has declared a higher value for the goods and such higher value has been stated in the CT document, in which case such higher value shall be the limit.

However, the CTO shall not, in any case, be liable for an amount greater than the actual loss to the person entitled to make the claim.

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\* These rules were explicitly based on the draft Convention on the International Combined Transport of Goods (TCM).

Rule 12

When the stage of transport where the loss or damage occurred is not known the CTO shall not be liable to pay compensation in accordance with Rule 5 (e) hereof if the loss or damage was caused by:

- (a) an act or omission of the consignor or consignee, or person other than the CTO acting on behalf of the consignor or consignee, or from whom the CTO took the goods in charge;
- (b) insufficiency or defective condition of the packing or marks;
- (c) handling, loading, stowage or unloading of the goods by the consignor or the consignee or any person acting on behalf of the consignor or the consignee;
- (d) inherent vice of the goods;
- (e) strike, lockout, stoppage or restraint of labour, the consequences of which the CTO could not avoid by the exercise of reasonable diligence;
- (f) any cause or event which the CTO could not avoid and the consequences of which he could not prevent by the exercise of reasonable diligence;
- (g) a nuclear incident if the operator of a nuclear installation or a person acting for him is liable for this damage under an applicable international Convention or national law governing liability in respect of nuclear energy.

The burden of proving that the loss or damage was due to one or more of the above causes or events shall rest upon the CTO.

When the CTO establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events specified in (b) to (d) above, it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of these causes or events.

- B. Rules applicable when the stage of transport where the loss or damage occurred is known.

Rule 13

When in accordance with Rule 5 (e) hereof the CTO is liable to pay compensation in respect of loss or damage to the goods and the stage of transport where the loss or damage occurred is known, the liability of the CTO in respect of such loss or damage shall be determined:

- (a) by the provisions contained in any international Convention or national law, which provisions:
- (i) cannot be departed from by private contract, to the detriment of the claimant, and
  - (ii) would have applied if the claimant had made a separate and direct contract with the CTO in respect of the particular stage of transport where the loss or damage occurred and received as evidence thereof any particular document which must be issued in order to make such international Convention or national law applicable; or
- (b) by the provisions contained in any international Convention relating to the carriage of goods by the mode of transport used to carry the goods at the time when the loss or damage occurred, provided that:
- (i) no other international Convention or national law would apply by virtue of the provisions contained in sub-paragraph (a) of this Rule and that;
  - (ii) it is expressly stated in the CT Document that all the provisions contained in such Convention shall govern the carriage of goods by such mode of transport; where

/such mode

such mode of transport is by sea, such provisions shall apply to all goods whether carried on deck or under deck; or (c) by the provisions contained in any contract of carriage by inland waterways entered into between the CTO and any sub-contractor, provided that:

(i) no international Convention or national law is applicable under subparagraph (a) of this Rule, or is applicable, or could have been made applicable, by express provision in accordance with sub-paragraph (b) of this Rule and that

(ii) it is expressly stated in the CT Document that such contract provisions shall apply; or

(d) by the provisions of Rules 11 and 12 in cases where the provisions of sub-paragraphs (a), (b) and (c) above do not apply.

Without prejudice to the provisions of Rule 5 (b) and (c), when, under the provisions of the preceding paragraph, the liability of the CTO shall be determined by the provisions of any international Convention or national law, this liability shall be determined as though the CTO were the carrier referred to in any such Convention or national law. However, the CTO shall not be exonerated from liability where the loss or damage is caused or contributed to by the acts or omissions of the CTO in his capacity as such, or of his servants or agents when acting in such capacity and not in the performance of the carriage.

#### Liability for Delay

#### Rule 14

If, in the case of delay, the claimant proves that damage has resulted, other than loss of or damage to the goods, the liability of the CTO for such damage shall be compensation not exceeding the

/freight payable

freight payable for the goods concerned or the value of such goods as determined in accordance with Rule 11 hereof, whichever is the lesser.

Rule 15

The CTO shall, however, not be liable to pay compensation for damage resulting from delay when such damage could not have been reasonably foreseen by the CTO at the time of issuance of the CT document, nor shall the CTO be liable to pay compensation if the delay was caused by any of the events enumerated in Rule 12 (a) to (g).

The burden of proving that the delay was due to one or more of the above causes or events shall rest upon the CTO.

When the CTO establishes that, in the circumstances of the case, the delay could be attributed to one or more of the causes or events specified in Rule 12 (b) to (d), it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the delay was not, in fact, caused wholly or partly by one or more of these causes or events.





V: THE RELATIONSHIP BETWEEN THE UNIFORM RULES FOR A COMBINED TRANSPORT DOCUMENT AND THE HAGUE RULES, AND THE SITUATION OF THE COMBINED TRANSPORT OPERATOR AS REGARDS INDEMNITIES AND RECOURSE

Question submitted by ECLA:

"The Uniform rules for a combined transport document, of the International Chamber of Commerce, appears to create the possibility that the CTO, in determined circumstances, could receive a different amount from the transporter, in terms of a settlement of claims, than he could be obligated to pay to the shipper. In the case of the 'network system' adopted in the Rules, this only seems possible when the following four conditions apply: (a) the CTO has evidence against the transporter, (b) there are no 'obligatory' international conventions or national laws which apply, (c) the shipper and CTO have not explicitly stated in the CT Document that all of the provisions in a 'voluntary' international convention shall apply, and (d) this does not involve inland waterways transport. The number of cases where all of these conditions would hold is difficult to anticipate, especially given that it is not clear, under the wording of Rule 13 paragraphs a) and b) of the ICC Rules, if the Hague Rules would be an 'obligatory' or 'voluntary' international convention. Article VI of the Hague Rules allows these Rules to be departed from by private contract, in the case of non-ordinary commercial shipments, to the detriment of the claimant in terms of liability (although, of course, we would not expect the shipper to want to depart from the Hague Rules to his detriment in economic terms), and they might thus be considered a 'voluntary' international convention which would have to be expressly referred to in the CT Document in order for liability conditions of the Hague Rules to be applied to the CTO. If it is supposed that the Hague Rules are among the 'international Convention or national law' mentioned in paragraph a) of Rule 13 of the ICC Rules, then the

/question arises

question arises why specific mention is made to sea transport in paragraph b) of the same Rule, rather than in paragraph a) or a separate paragraph."

Replies:

The following are summaries of replies by reknown European and United States experts on maritime law.

Respondent 1: Summary of reply

The intention in Rule 13 A is to refer to international conventions or national laws which contain rules of a mandatory character - i.e. which cannot be departed from by private contract - to the detriment of the claimant. The problem is that such conventions or national laws customarily contain mandatory as well as non-mandatory provisions. Further, apart from the provision in the European CMR article 41, there is nothing in the major international transport conventions to prevent the carrier from accepting a higher liability than under the mandatory provisions, which are merely intended to give the customer a "minimum" protection. In this sense, the provisions are only mandatory in one direction. A literal interpretation of Rule 13 A may therefore lead to the somewhat surprising result that only the rules of the CMR are intended. Nevertheless, it was clearly intended to incorporate international conventions or national laws containing mandatory rules applicable for the protection of the cargo owner and, further, to give the CTO the benefit of the particular exceptions from a limitation of a liability contained in such international conventions or national laws, irrespective of the fact that he might be entitled to abstain from such protection. Thus, Rule 13 A is certainly intended to incorporate the provisions of the Hague Rules.

/As to the

As to the specific reference in Rule 13 B to the situation where it should be expressly stated in the CT document that all provisions contained in a convention shall govern the carriage of goods by the relevant mode of transport, this reference was deemed necessary to cover the situation when the Hague Rules do not apply ex proprio vigore but only by way of a special clause (a so-called Clause Paramount).

Under the system of the ICC Uniform rules and the TCM Draft it is possible that the CTO will have to pay his customer an amount without having a full recourse against the carrier who has performed the transport. The "network liability system" of the ICC Rules and of the TCM Draft tend to preserve recourse possibilities better than a uniform system of liability would have done. On the other hand, recourse may very well be barred owing to certain circumstances (failure to notify claims, time bar, insufficient evidence as against the carrier, etc.). The other possibility, namely that the CTO will recover more from the carrier than he has been obligated to pay to the customer is hardly likely to occur. The carrier, standing in a contractual relationship with the CTO, can never be legally bound to pay more for the loss incurred by the CTO than is required to cover his loss. And the loss incurred by the CTO can never exceed the amount which he will have to pay to the customer. In this context, I would like to stress the fact, that the uniform liability - if kept at a low level - could carry with it the result that the customer would have been better off had he concluded a contract directly with the underlying carrier instead of the CTO. Possibly, under some national systems of law, the customer would in order to solve such situations be given a contractual remedy directly against the underlying carrier, in spite of the fact that the contract in a formal sense merely exists between the CTO and the underlying carrier (quasi-contractual remedy).

Respondent 2: Summary of reply

As to the possibility that the CTO could recover more than he pays to the cargo owner, the CTO's cause of action against the actual carrier is for indemnity and the provable damages in an action for indemnity are, therefore, limited to the amount paid. The cargo owner may be free to seek a higher amount, however, than that received from the CTO. The ICC Rules deal only with the cargo owner's right against the CTO, leaving the cargo owner's right against the actual carrier intact. Thus, if the limitation of the actual carrier's liability should be higher than the limitation of the CTO's liability, the cargo owner could recover the higher amount even though the CTO's recovery would be limited to the lower amount.

VI: DRAFT ARTICLES FOR NETWORK SYSTEM -

FRENCH VERSION \*

Article 9

1. The CTO shall be liable for loss of, or damage to, the goods occurring between the time when he receives the goods into his charge and the time of delivery.
2. The CTO shall, however, be relieved of this liability for any loss or damage to the extent that such loss or damage arose or resulted from:
  - (a) any unforeseeable or unavoidable incident the consequences of which the CTO cannot mitigate;
  - (b) inherent vice of the goods;
  - (c) the wrongful act of the consignor or the consignee;
  - (d) a nuclear accident if, under special regulations, regarding liability in respect of nuclear energy in force in a contracting State, the operator of a nuclear plant or a person acting for him is responsible for this damage.
3. The burden of proving that the loss or damage was due to one of the causes, or events, specified in paragraph 2 of this Article shall rest upon the CTO.

Article 10

Eliminated.

Article 11

1. When the CTO is liable for compensation in respect of loss of, or damage to, the goods, such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the contract of combined transport (...) they should have been so delivered.

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\* UN/IMCO Conference on International Container Traffic (E/CONF.59/17).

2. The CTO shall pay compensation not exceeding ..... in respect of damage resulting from delay.

Article 12

Notwithstanding anything provided for in the other Articles of this Convention, when the place where the loss, damage or delay occurred is known, the liability of the CTO is determined by the international convention or the national law applicable to the carriage during which the loss, damage or delay occurred.

VII: DRAFT ARTICLES FOR UNIFORM SYSTEM \*

Presented by Australia, Canada,  
Norway and Sweden

Article 9A

1. The CTO shall be liable for loss of or damage to the goods occurring between the time when he received the goods into his charge and the time of delivery.
2. The CTO shall be liable for damage caused by delay in delivery of the goods. Delay in delivery of the goods shall be deemed to occur when the CTO has not made the goods available for delivery to the consignee within the agreed time-limit or, failing an agreed time-limit, when the actual duration of the whole combined transport operation, having regard to the circumstances of the case, exceeds the time it would be reasonable to allow for its diligent completion.
3. The CTO shall, however, not be liable if he proves that the loss, damage or delay was caused by circumstances which he could not avoid and the consequences of which he was unable to prevent.

Article 9A bis

In any event the CTO shall not be liable if he proves that the loss, damage or delay was caused by:

- (a) an act or omission of the consignor or consignee, insufficiency of packing or marks, or the inherent defect, quality or vice of the goods;
- (b) \*\* act, neglect or default in the navigation of a ship occurring during carriage by water;
- (c) \*\* fire occurring during carriage by water, unless the fire was caused by the actual fault or privity of the CTO or the water

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\* UN/IMCO Conference on International Container Traffic (E/CONF.59/17).

\*\* A final clause should provide for revision of sub-paragraphs (b) and (c) in case the Hague Rules are revised.

carrier or by lack of exercise of due diligence to make the vessel sea-worthy, properly to man, equip and supply the vessel or to make it fit and safe for the reception, carriage and preservation of the goods.

- (d) a nuclear accident if, under special regulations in force in a contracting State governing liability in respect of nuclear energy, the operator of a nuclear plant or a person acting for him is responsible for this damage.

#### Article 10A

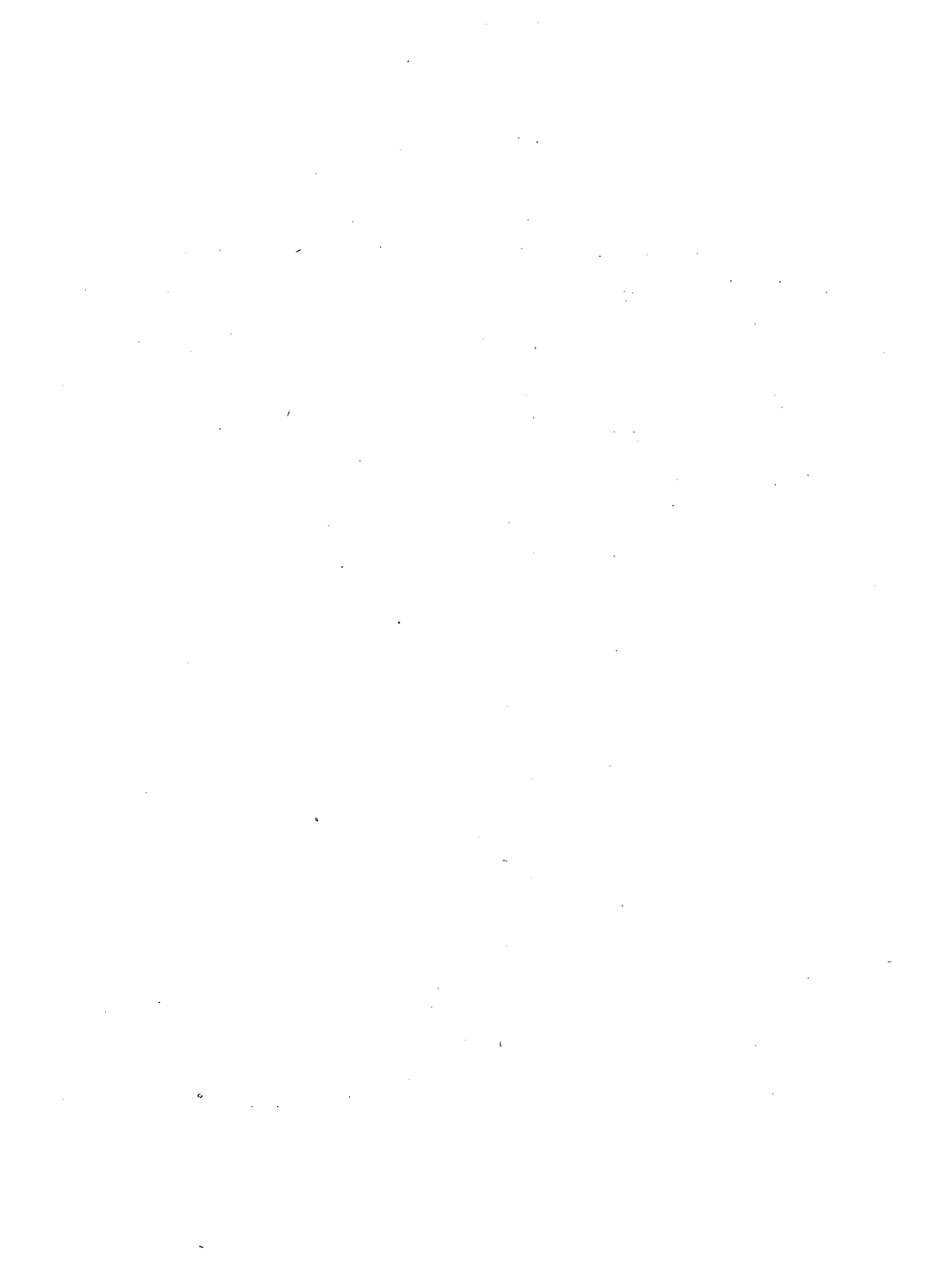
1. When the CTO is liable for compensation in respect of loss of, or damage to, the goods, such compensation shall be calculated by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with the contract of combined transport (...) they should have been so delivered.
2. The value of the goods shall be fixed according to the commodity exchange price or, if there be no such price, according to the current market price or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.
3. Compensation shall not, however, exceed ..... francs per kilo of gross weight of the goods lost or damaged. The minimum gross weight of such goods shall be deemed to be ..... kilos.
4. Higher compensation may be claimed only when, with the consent of the CTO, the value for the goods declared by the consignor which exceeds the limits laid down in this Article has been stated in the CT Document. In that case the amount of the declared value shall be substituted for that limit.



Article 11A

1. In case of delay, if the claimant proves that damage has resulted, other than loss of or damage to the goods, the CTO shall pay in respect of such damage compensation not exceeding .....

2. If the goods have not been made available (for delivery) to the consignee within sixty days after the period of time as defined in paragraph 1, the claimant shall have the right to treat them as lost.



VIII: PROPOSED CHANGES FOR HAGUE RULES \*

Basic rules governing the responsibility of the carrier

(Replacing article 3(1) and (2), article 4(1) and 4(2)  
of 1924 Brussels Convention)

1. The carrier shall be liable for all loss of or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article ..., unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.
2. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.
3. Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce loss or damage, the carrier shall be liable only for that portion of the loss or damage attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss or damage not attributable thereto.

Transshipment

(There does not exist a corresponding provision in the 1924 Brussels Convention).

Article

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

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\* Report of the Working Group on the International Shipping Legislation (United Nations Commission on International Trade Law) A/CN.9/WG.III/WP.13, 28 November, 1973.

responsible for the entire carriage according to the provisions of this Convention.

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

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

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

#### Article

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

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

#### Limitation of liability

(Article 4(5) of 1924 Brussels Convention; article 2 of  
1968 Brussels Protocol)

#### Article

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

/2. For the

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

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

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

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

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