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CARGO LIABILITY REGIMES

Prepared for the OECD Maritime Transport Committee

by

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This report has been prepared for the MTC and is being made available to a wider audience.

Organisation for Economic Co-operation and Development
Organisation de Coopération et de Développement Economiques

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Report to the OECD's Maritime Transport Committee

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Report to Secretariat of OECD's Maritime Transport Committee

Summary of Conclusions and Recommendations

The 'expected outputs' of my work under my terms of reference are set out in paragraphs 6-8 of Part I. I summarise my conclusions and recommendations under each 'output' below.

First output: *"List of key elements that go to make up the existing cargo liability regimes"*

The main features of a cargo liability regime covering sea transport are described in paragraphs 12 to 18 of Part II of this report.

Second output: *"Break-up of the above items into those where there is agreement, and those crucial items where there is substantial disagreement"*

Paragraphs 12 to 18 note the main areas in which the principal current regimes differ between themselves or deal with cargo liability less than comprehensively. Paragraph 19 identifies the fifteen most important areas of difference, in the form of 15 questions for more detailed analysis and discussion.

My conclusions and recommendations on each of these questions are given in Part III of the report (paragraphs 21-85) and are summarised below.

Third output: *"Qualitative analysis of items where there is disagreement, and possible compromise formulations that could form the basis of a widely acceptable set of Common Rules"*

Objectives of a cargo liability regime

Question A: Should any new regime extend to *loss from delay* in the delivery of goods? If so, what special provisions are needed?

Recommendation 1: The OECD's Maritime Transport Committee (MTC) should support the Comité Maritime International (CMI) in covering in their draft instrument liability for loss from delay in delivery of goods, at least where the contract contains an express provision as to timing.

The issue of constructive loss in the event of excessive delay is a subsidiary point. If further discussion in the CMI were to find an acceptable formulation here, this would be welcome, but not essential.

Paragraph 24

Scope of a regime

Question B: To what *types of transport document* should a new regime apply – only to bills of lading, or also to other and non-negotiable transport documents evidencing a contract of carriage?

Recommendation 2: The MTC should support the CMI's aim of a regime comprehending all goods carried by sea under any kind of transport document (subject to the traditional exclusion of charterparties).

Paragraph 27

Question C: Are up-to-date business methods, notably *electronic transactions*, adequately covered?

Recommendation 3: The existing regimes provide inadequately for electronic communications and documentation. The MTC should support the CMI's aim of developing a regime that is fully adapted to electronic commerce.

Paragraph 30

Question D: Should any new regime make specific provision for *performing carriers* as well as for the *contracting carrier*?

Recommendation 4: The main requirement is that a claimant's ability to proceed against either the contracting or the performing carrier is assured. The MTC should encourage the CMI to continue their discussions with the industry on the best way to achieve this.

Paragraph 33

Question E: Should *particular cargoes* be excluded, or subject to special provisions?

i) Live animals

Recommendation 5: Those drafting a new regime should ascertain the views of the livestock trade – both shippers and carriers. If they are in favour of exclusion, so be it. Otherwise livestock should be covered, perhaps as in the Hamburg rules.

Paragraph 36

ii) Deck cargo

Recommendation 6: The MTC should support the CMI in bringing deck cargo within a new regime, subject to appropriate clarification of the carrier's and shipper's duties and rights.

Paragraph 38

Question F: Should any new regime apply to goods *bound* for a contracting state, even if their *port of origin* is in a non-contracting state?

Recommendation 7: The MTC should support the CMI in applying a new regime to a participant state's inbound as well as outbound trade, subject to suitable safeguards over preparation and timing.

Paragraph 45

Question G: Should a regime apply only while the goods are *on board ship*, or to the whole *period in which goods are in the custody* of a contracting carrier, or otherwise?

Recommendation 8: The MTC should support the CMI in designing a new cargo liability regime for maritime transport to cover the whole of a contracted journey including any land sectors, unless the main contract and relevant subcontracts expressly provide otherwise, and subject to their ensuring that there is no conflict with the relevant cargo liability regimes for inland transport.

Paragraph 48

Question H: What account needs to be taken of *intermodal transport*, and of the different cargo liability regimes that apply to other modes and intermodally?

Insofar as this question comes within my terms of reference it is covered under Question G.

Liability of carrier for loss and damage (and delay)

Question I: How should *responsibilities be allocated* between carrier and shipper? What *defences* should be available to the carrier, and where should the burden of proof lie?

(i) How to express the responsibilities of the *carrier* and its liability for loss of goods and damage to goods?

Recommendation 9: The *criteria* for a new liability regime should be as follows:

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

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

c) it should be as clear and as certain in its interpretation as possible;

d) it should provide for an efficient and economical distribution of insured risk; and

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

Paragraph 55

Recommendation 10: Carriers' *'nautical fault' defence* under the Hague and Hague-Visby rules should be discarded as an obstacle to agreement on a uniform regime for the future and as incompatible with contemporary public policy towards maritime safety. Any future cargo liability regime should not place on carriers any lesser responsibility for the operation and seaworthiness of their ships than they and their insurers already accept under other maritime legislation. Carriers could, however, be allowed the defence of proving that the occurrence leading to loss or damage was not due to their fault or neglect, even in the navigation or management of the ship or in maintaining its seaworthiness.

Paragraphs 57, 58

Recommendation 11: A carrier's *other legitimate defences* might include –

- any cause over which none of the parties with an interest in the contract could have had any control, and

- fault of the shipper or cargo owner, or of the goods themselves, or of whoever was responsible for preparing them for dispatch.

Paragraph 59

(ii) How to express the *shipper's* responsibilities in respect of the carriage of goods?

Recommendation 12: It would be appropriate to place on shippers an obligation to provide the carrier with full and accurate information –

a) about special features of the goods relevant to their handling and carriage – in particular, any dangerous qualities and any special precautions appropriate, and

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

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

- by their failure to meet these obligations, or

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

Paragraph 62

Recommendation 13: Insofar as the MTC agree with Recommendations 9-12, they should communicate them to the CMI and invite the CMI to seek further guidance from the MTC on contentious issues of maritime policy if they wish.

Subject to that, the details of a new liability regime should be left to the CMI in consultation with industry.

Paragraphs 60, 64

Monetary limits of liability

Question J: What *monetary limits of liability* should apply, to what units of cargo, and in what circumstances?

Recommendation 14: The MTC should commission a short authoritative study by an independent economist to establish, as far as possible, the equivalents in today's SDRs of –

- the 1924 Hague liability limit,

- the 1936 US COGSA limit, and

- the Hague-Visby limits established both in 1968 and in 1979,

taking into account both changes in the value of money in the main trading countries and any broad movements in the composition and unit value of seaborne trade. The study should preferably be carried out in consultation with both carriers and cargo interests. The resultant figures should form the basis for discussion of new liability limits.

Paragraph 69

Recommendation 15: The MTC should support the CMI's intention of including in any future cargo liability regime an accelerated procedure (subject to proper safeguards) to enable limits to be kept in line with changing economic and trading conditions without undue formality and delay.

Paragraph 70

Documentary provisions

Question K: Where there are different views on *requirements in respect of documentation*, what provisions are appropriate?

Recommendation 16: There are legal and practical issues here of importance and some complexity; but they do not raise questions of principle or policy. The MTC should leave the CMI to resolve them in continued discussions with the industry.

Paragraph 67

Claims, disputes and enforcement

Question L: What period of notice is appropriate for the *notification of loss or damage*?

Recommendation 17: For loss or damage to goods, the MTC should accept the prevailing view in favour of the shorter timelimits set in the Hague rules. If claims for economic loss from delay in delivery are to be admissible under the new regime, the MTC should support the CMI in setting a 21-day time limit for them (as with road, inland waterway and air transport).

Paragraph 77

Question M: What timebar is appropriate on the *initiation of legal proceedings*?

Recommendation 18: The MTC should suggest to the CMI that they retain the 1 year timebar (save for recourse actions), unless they receive compelling arguments from the industry for an extension.

Paragraph 79

Question N: Should any new regime contain explicit provision for *arbitration or alternative forms of dispute resolution*?

Recommendation 19: The MTC should suggest to the CMI that they include in their draft instrument a provision safeguarding the parties' freedom to agree to settle their disputes by arbitration.

Paragraph 81

Question O: What provisions are appropriate for determining the *forum in which proceedings may be brought*?

Recommendation 20: The MTC should indicate to the CMI that it would see no objection to their including in their draft instrument a well-precedented choice of forum provision.

Paragraph 85

Fourth output: "*Appraisal of the impact of key items for which no agreement may be possible"*

- The issues identified under *Objectives* and *Scope* – Questions A-H – are not crucial to the operation of a new cargo liability regime of some sort; but answers in favour of comprehensiveness would make a new regime's introduction more worthwhile. In most cases there seems to be wide support for a comprehensive answer.

- The issues of *Documentation* – Question K – are important and should be resolvable by the CMI in agreement with the industry.

- Questions L-O – over *Claims, disputes and enforcement* – are crucial, but the prospects for agreement seem fair. Question O is the most difficult here.

- Questions I and J – *Liabilities* and their *Limits* – are the most crucial of all, and disagreements persist.

Paragraphs 87-91

Conduct of MTC's forthcoming discussions

Recommendation 21: At its discussions in January the MTC might group the outstanding questions as follows:

- **Questions B, C, D, E, F, K, L, M and N**, where the answers are hopefully uncontroversial.

- **Questions A, G, H, and O**, where the answers may still need debate.

- **Questions I and J**, where the answers will certainly need debate.

Paragraph 92

Recommendation 22: The MTC should also consider, in the light of my report, how best to work with the CMI, other interested international organisations and industry towards a new regime likely to command wide international acceptance. An immediate first step will be for MTC to decide what message to send on this subject to the CMI's conference in February.

Paragraph 96

Other matters

Recommendation 23: The MTC should suggest to the CMI that any new instrument be prepared as a binding international convention; but pending its coming into force it might be used as a model law or model contract terms.

Paragraph 94

Recommendation 24: The MTC should indicate to the CMI that it sees no objection in principle to granting parties to a contract of carriage controlled freedom to opt out of elements of a new liability regime, *provided* that the CMI can find a way of protecting fully the interests of –

a) those who are in a weak bargaining position, and

b) third parties who acquire an interest in the cargo under the contract.

Paragraph 95

CARGO LIABILITY REGIMES

Report to Secretariat of OECD's Maritime Transport Committee

REPORT

Part I - Introduction

Terms of reference

1. I have prepared this report at the request of the secretariat of the Maritime Transport Committee of the OECD. The formal project description given me in July is at Annex A. In summary, my objective has been "to identify those elements of existing cargo liability regimes for which there is no general agreement and which are crucial to the operation of those regimes, and attempt to find workable formulations that may allow them to be included in an instrument that would be broadly acceptable to all parties".

Method of work

2. I began by producing a paper about the first two outputs required of me – a list of the key elements of existing cargo liability regimes, identifying among them the crucial items where there is no general agreement. In the paper I posed a number of questions, requesting confirmation of the elements I had listed and comments on the items of disagreement. I sent this paper out at the end of July to the parties listed at Annex B, which also indicates the responses I received. At the same time I asked several members of the MTC for information about their national cargo liability legislation, and I received helpful replies from Canada, Denmark, France, Germany, Korea and Norway. I also received from members of the US Maritime Law Association useful papers and advice about the US Carriage of Goods by Sea Act (COGSA) 1936 and the proposals for replacing it with new legislation (the latest version of which I refer to here as 'COGSA 1999'). Finally, I have received whatever assistance I have requested from the MTC secretariat.

Acknowledgements

3. I am most grateful to all those mentioned above and in Annex B who have given me information and views, whether in writing or orally. Without their help I should not have been able to compile this report, for the contents of which, nevertheless, I accept full responsibility.

Others' work on cargo liability

4. A number of other initiatives on cargo liability are also in progress. The European Commission, UNCTAD and UNECE have also been doing work on multimodal cargo liability. Particularly relevant to the MTC's concerns and to my task is the project on issues of transport law that has been undertaken by the Comité Maritime International (CMI), with encouragement from UNCITRAL. To take this project forward, the CMI set up last year an international subcommittee with these terms of reference:

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

Although it is evident from this that the CMI's project has a wider scope than my own, which is limited to cargo liability, nonetheless cargo liability has formed an important port of their work. Moreover, although, in the nature of the CMI as a maritime body, the subcommittee's work was to be focussed on transport by sea, they were subsequently asked "to consider how the instrument might accommodate other forms of carriage associated with the carriage by sea". This conveniently matches my own project description, which asks me "to consider the potential application of existing maritime liability rules to the total transport task **where this includes a maritime leg**".

5. Those with whom I have been in contact have rightly emphasised to me the importance of my project – and the MTC's further work on this subject – being carried out in close cooperation with the CMI and the other bodies active in this field. I have accordingly kept in close contact with the chairman of the CMI's international subcommittee, who has generously made available to me the outcome of this work so far. I have indeed held back my report for a few weeks (with the agreement of the MTC secretariat) so as to take full account of the framework for discussion and consultation, in the form of a draft 'outline instrument', that the subcommittee have just prepared for consideration at the CMI's conference in Singapore next February. My report includes, for each area where maritime cargo liability regimes differ, a statement of the CMI subcommittee's latest thinking, as given in the 'outline instrument', so that the MTC can take this into account in reaching their own conclusions.

Structure of report

6. Part II of this report deals with the first two of the "expected outputs" from my work, namely –

- "A list of key elements that go to make up the existing cargo liability regimes."
- "A break-up of these items into those where there is agreement, and those crucial items where there is substantial disagreement."

It sets out the features of the main existing cargo liability regimes, which will also need to be covered in any future regime; it notes those elements where the current regimes differ and on which opinion in governments and industry is still divided.

7. These differences are described and analysed more fully in Part III, which deals with the third "expected output" of my work:

- "A qualitative analysis of items where there is disagreement, and possible compromise formulations that could form the basis of a widely acceptable set of Common Rules."

8. Part IV contains material relevant to the fourth "expected output" –

- "An appraisal of the impact of key items for which no agreement may be possible."

It also covers some other issues not dealt with earlier and suggests how the MTC might take the subject forward.

Part II - Existing Maritime Cargo Liability Regimes: Common Elements and Differences

Background

9. There are at present at least three international regimes of maritime cargo liability in force in different countries of the world – the original Hague rules (1924), the updated version known as the Hague-Visby rules (1968, further amended 1979), and the Hamburg rules (1978). The principal country with a system still based on the original Hague rules is the United States. Most of the other major trading nations of North and Central America, Europe, the Far East and Australasia, and South Africa, follow the Hague-Visby rules or an adaptation of them. (In addition it is common for charterparties and bills of lading to incorporate the Hague or Hague-Visby rules contractually.) Because of the wide use of the Hague and Hague-Visby rules over many years, their interpretation has been well established by case law – a factor to which the carriers and insurers in particular attach importance. The countries that have so far adopted the Hamburg rules account for only a small proportion of world trade.

10. There is, however, considerable dissatisfaction with each of these regimes – with Hague and Hague-Visby because they are often seen as in need of modernisation and as too restricted in scope, and with all three because of disagreements over the substance. Over recent years, in the absence of an approach to these difficulties that commands widespread international agreement, countries have tried to deal with them nationally in different ways; and this has led to an increasingly diverse and complex situation around the world. The Nordic Maritime Code, for example, in force in Denmark, Finland, Norway and Sweden, incorporates a number of features of the Hamburg rules, although the four countries continue to regard themselves as part the Hague-Visby system. As already mentioned, there are now moves in the United States to bring in a new national regime there to replace the legislation of 1936 based on the Hague rules.

11. There is consequently a growing concern among governments and industry over the unnecessary complexities, delays and costs that the growing diversities inflict on international trade, and there is a correspondingly enhanced desire for the establishment of a single regime that countries around the world would agree to apply consistently[1]. That has been the stimulus for the CMI's current work; and for the MTC's initiative in this area.

Common features of maritime cargo liability regimes

12. The following paragraphs outline a common specification that any fully effective maritime cargo liability regime should meet. They also mark up the main respects in which existing regimes differ or are deficient.

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[1] Although the carriers have tended to maintain up to the present that there is still an adequate uniformity among major trading countries on the basis of Hague/Hague-Visby, a senior figure has recently commented in this context that "the increasing proliferation of national maritime law equals uncertainty and unnecessary litigation" and that "the development in liner shipping has made certain new rules and adjustments of the existing rules desirable"; and he favoured "an international and consensus approach" as "the only way to revise maritime law". *(Mr Knud Pontoppidan of A P Møller/Mærsk speaking at the UNCITRAL/CMI Transport Law Colloquium on 6 July 2000).*

13. ***Objectives***. As a minimum, the objectives of a maritime cargo liability regime may be expressed as follows:-

- to allocate responsibilities for the handling and care of goods that are the subject of a contract of carriage of goods by sea;
- to define the extent of a carrier's liability for loss or damage to those goods;
- to specify the documentation and procedures necessary to establish liability and its quantum in particular cases; and
- to provide for the enforcement of liability established under the regime.

Some, but not all, existing regimes also set out to cover liability for *delay in delivery* of cargoes, as well as for loss and damage – see **Question A** below.

14. Although a regime may allow the parties to a contract of carriage to agree to increase the rights and privileges it confers, it should not allow one party to exploit its bargaining power to deprive the other – or any interested third party – of the regime's protection. Paragraphs 93-95 in Part IV comment further on this.

15. ***Scope***. To maximise the benefits of a cargo liability regime, its scope should be widely drawn -

a) Some regimes cover all ordinary commercial shipments made in the ordinary course of trade, whatever the *form of contract of carriage* or transport document; others are restricted to shipments covered by negotiable bills of lading – see **Question B** below.

b) A new regime should be applicable to modern and prospective business methods, including in particular *electronic means* of drawing up, authenticating and transmitting contracts, bills of lading and other formal documents. In this respect most existing regimes are probably deficient – see **Question C** below.

c) It should secure the rights and obligations of all those with an interest in the cargo and its transport by sea – including contracting carrier, performing carrier, shipper, consignee, and any third party to whom title to the goods may pass during transit, and their servants and agents. Not all current regimes, however, distinguish between *contracting carrier and performing carrier* – see **Question D** below.

d) It should cover all kinds of cargo, subject to reasonable requirements for the declaration and identification of dangerous goods – though some regimes exclude *live animals* and *deck cargo* – see **Question E** below.

e) It should cover all cargoes carried –

- between and from contracting states (some regimes also cover cargoes *carried to* a contracting state, even when they originate in a non-contracting state – see **Question F** below),
- under bills of lading (or other evidentiary documents) issued in contracting states,

- under bills of lading (or other evidentiary documents) providing for the application of the regime,

whatever the nationality of the ship, the carrier, the shipper, the consignee, or any other interested party.

f) Some regimes cover the whole period of sea carriage, including the time when goods are in the carrier's charge in port; other regimes are more limited – see **Question G** below.

g) It should establish a clear and workable interface with related regimes - e.g. the law of general average; liability limits for shipowners; damage caused by nuclear incidents; liability limits for passengers' luggage; and liability regimes for other modes of transport and for intermodal transport. This last requires particular attention in modern conditions of increasingly integrated door-to-door transport of goods – see **Question H** below.

16. ***Liability of the parties.*** A cargo liability regime needs to define clearly the responsibilities of the parties to a contract of carriage. In particular –

a) It needs to determine the *basic responsibility of the carrier* under the contract of carriage in respect of loss or damage (or delay) to the goods.

b) It needs to specify what *defences* are available to the carrier in the event that goods are lost or damaged (or delayed), and who bears the burden of proof;

c) Where a carrier is liable, it needs to establish the *monetary limits* of that liability, the units of cargo to which they apply, and the currency in which they are denominated.

d) It needs to provide that the limits *may be breached* if the loss or damage (or delay) results from the carrier's deliberate act or omission or from its culpable recklessness.

Though the existing regimes deal with each of these issues, the provisions they make for (a)-(c) are different, and there is no consensus yet on a common approach. The existing regimes also differ over their coverage of *shippers' responsibilities* and liabilities. These matters are discussed in more detail below – see under **Questions I** and **J**.

17. ***Documentation***. A cargo liability regime should be based on – or embody – a common understanding of the nature and purpose of the documentation that is to be used if a claim is to qualify under it. In particular, it should lay down for bills of lading (or similar documents of title):

a) the information to be included – and the effect of the omission of any particular,

b) the documents' evidential value in stating the nature and quantity of the goods and their condition,

c) how to deal with false or unverifiable particulars, and

d) safeguards for third parties to whom a bill of lading has been transferred in good faith.

There are differences in the handling of (a)-(c) between the existing regimes – see **Question K** below. A new regime would also need to deal with (a)-(c) for non-negotiable transport documents if such documents were included within the regime.

18. ***Claims, disputes and enforcement*** A cargo liability regime needs -

a) To lay down some procedural requirements for the handling of claims: e.g. timelimits for –

i) Notification of loss or damage to the party alleged to be responsible.

ii) Initiation of legal proceedings:

the existing cargo liability regimes are at variance over these timelimits – see **Questions L** and **M** below;

b) to cover claims under whatever law (contract, tort etc) they are brought, and to contain fair and effective provision for their enforcement and for the resolution of disputes;

c) to determine the *acceptability of arbitration* (and other methods of dispute resolution) as an alternative to litigation in the settlement of disputes: the existing regimes are not at one on this point – see **Question N** below;

d) to decide whether the jurisdiction in which the claimant may bring proceedings should be determined solely by the contract of carriage and national law, or whether the claimant should have a wider choice of forum: there is no consensus yet on this issue – see **Question O** below.

Main differences and deficiencies in existing cargo liability regimes

19. There are innumerable differences between the Hague, Hague-Visby and Hamburg rules, and the variant forms of them adopted around the world – differences of style and drafting as well as substance. The brief survey above has identified the main areas of policy in which these regimes differ between themselves or deal with cargo liability less than comprehensively. There are fifteen of these areas that deserve more detailed examination. I list them below in the form of questions A-O that I shall address in Part III.

Objectives of a cargo liability regime

A **Should any new regime extend to *loss from delay* in the delivery of goods? If so, what special provisions are needed?**

Scope of a regime

B **To what *types of transport document* should a new regime apply – only to bills of lading, or also to other and non-negotiable transport documents evidencing a contract of carriage?**

C **Are up-to-date business methods, notably *electronic transactions*, adequately covered?**

D **Should any new regime make specific provision for *performing carriers* as well as for the *contracting carrier*?**

E **Should *particular cargoes* be excluded, or subject to special provisions?**

F **Should any new regime apply to goods *bound for* a contracting state, even if their *port of origin* is in a non-contracting state?**

G **Should a regime apply only while the goods are *on board ship*, or to the whole *period in which goods are in the custody* of a contracting carrier, or otherwise?**

H **What account needs to be taken of *intermodal transport*, and of the different cargo liability regimes that apply to other modes and intermodally?**

Liability of carrier for loss and damage (and delay)

I **How should *responsibilities be allocated* between carrier and shipper? What *defences* should be available to the carrier, and where should the burden of proof lie?**

J **What *monetary limits of liability* should apply, to what units of cargo, and in what circumstances?**

Documentary provisions

K **Where there are different views on *requirements in respect of documentation*, what provisions are appropriate?**

Claims, disputes and enforcement

L **What period of notice is appropriate for the *notification of loss or damage*?**

M **What timebar is appropriate on the *initiation of legal proceedings*?**

N **Should any new regime contain explicit provision for *arbitration or alternative forms of dispute resolution*?**

O **What provisions are appropriate for determining *the forum in which proceedings may be brought*?**

Part III – Elements of Existing Cargo Liability Regimes on which there are Significant Differences

Introduction to Part III

20. At the end of Part II I identified fifteen areas of scope, substance, and procedure, in which the main cargo liability regimes differ between themselves in important respects or deal with cargo liability less than comprehensively. I listed fifteen corresponding questions for closer examination in Part III. In this Part I examine each of these questions in more detail, with reference to a selection of the main current and proposed regimes: namely –

- the Hague rules (as the basis of COGSA 1936, still in force in the US);
- the latest version (1979) of the Hague-Visby rules;
- the Hamburg rules;
- the relevant sections of the Nordic Code (as enacted in Norway), as an example of how one group of important trading and shipping countries has chosen to modernise the Hague-Visby regime;
- the latest version of the proposals for a new regime in the United States ('COGSA 1999'); and
- the CMI international subcommittee's latest ideas (of November 2000) for a framework of law for the transport of goods by sea (which I refer to as their 'outline instrument').

I also make reference, where appropriate, to the international liability regimes in force for goods carried by air (the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air) and by road (the Geneva Convention on the Contract for the International Carriage of Goods by Road, known as the 'CMR Convention')[2], and to the international regime recently agreed but not yet in force for goods carried by inland waterway (the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways, known as the 'CMNI Convention').

Objectives of a cargo liability regime

Question A: Should any new regime extend to *loss from delay* in the delivery of goods? If so, what special provisions are needed?

21. The **Hague** and **Hague-Visby** rules refer to a carrier's liability for 'loss or damage to, or in connection with, goods'. Although this ought normally to cover delay as a cause of *damage to goods*, it is not usually held to cover *loss to the claimant* caused by delay in delivery of the goods. The **Hamburg** rules, on the other hand, impose on carriers explicit liability for 'loss resulting … from

[2] The Warsaw Convention has wide membership around the world. The parties to the CMR Convention are: nearly all the countries of Europe, some from continental Asia, and two from north Africa.

delay in delivery' (subject to certain defences); and they define delay by reference to 'the time expressly agreed upon' for delivery or, if no such time has been agreed, by reference to the time of delivery which 'it would be reasonable to require of a diligent carrier'. The Hamburg rules go on to provide for a claim for constructive loss of the goods if they have not been delivered within 60 days of the expected time of delivery[3]. These Hamburg provisions are incorporated in the **Nordic Code**[4]. The draft US **COGSA 1999** does not set out in this respect to amend COGSA 1936 (which is based on the Hague rules), and neither makes any mention of delay[5]. So, should 'COGSA 1999' be enacted, it will not expressly admit claims for economic loss due to delay, any more than COGSA 1936 does at present. The **CMI subcommittee** in their outline instrument propose covering loss from delay, but only when a time for delivery has been expressly agreed upon by the parties[6]. They are not at this stage including a provision for constructive loss of the goods if their delivery has been delayed by more than a stipulated period of time.

22. The shippers favour coverage of delay in delivery. The carriers are opposed; but, if delay were to be included in a new regime, they would want it limited to cases where a time for delivery was stipulated in the contract, as proposed by CMI. Carriers are similarly opposed to a provision for gross delay to count as constructive loss.

23. Special provision for loss or damage from delay is not *essentia*l to a cargo liability regime: it is absent from the present Hague and Hague-Visby rules. But delay in delivery is as much a legitimate concern of cargo interests as is loss or damage to the goods themselves; the timing of sea journeys is less unpredictable than it was 80, or even 40, years ago; customers expect greater punctuality; delay is well covered, for example, by the CMR regime for road transport and by the CMNI regime for inland waterways[7]; and a new maritime regime could hardly claim to be comprehensive if it did not address the subject of delay. If there is no provision for delay in a new regime, then there will be continuing differences in the treatment of delay in different jurisdictions, with some disallowing any claim for economic loss due to delay and others perhaps upholding similar claims but outside the liability limits; and uniformity will not be achieved.

24. My *recommendation* therefore is that the MTC should support the CMI in including loss from delay in delivery in the draft instrument they are preparing, at least where the contract contains an express provision as to timing. The formulation used in Hamburg and CMR for other cases, defining delay by reference to 'the time which it would be reasonable to require of a diligent carrier'[8] or similar words, is no doubt more difficult to apply to sea than to road transport and would import substantial uncertainty. The issue of constructive loss in the event of excessive delay is a subsidiary point, and one which presents particular difficulty in maritime transport, where it is not uncommon for goods to be delayed substantially in transit (e.g. by strikes, civil conflict, etc) in circumstances where

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3 Article 5(1)-(3).

4 e.g. Norwegian Maritime Code (NMC) section 278.

5 In practice in the US loss from delay seems sometimes to have been covered via article IV(4) of the Hague rules, which excuses a carrier from breach of the contract of carriage for 'any reasonable deviation'. By interpreting 'reasonable' strictly and 'deviation' widely, the courts have been able to find that the circumstances leading to delayed delivery amounted to an unreasonable deviation and so constituted a breach of the contract of carriage not subject to limitation of liability under the rules.

6 Outline instrument 5.4.1.

7 CMR articles 17(1), 19 and 20; CMNI articles 5, 16(1), 20(3).

8 Hamburg article 5(2).

their whereabouts is still known and they remain recoverable. If further discussion in the CMI were to find an acceptable formulation here, this would be welcome, but not essential.

25. I mention limits of liability for delay under Question J below.

Scope of a regime

Question B: To what *types of transport document* should a new regime apply – only to bills of lading, or also to other and non-negotiable transport documents evidencing a contract of carriage?

26. The **Hague** and **Hague-Visby** rules apply only to contracts of carriage by sea that are *evidenced by a bill of lading* or similar document of title[9]. They exclude goods carried against a sea waybill, consignment note or other non-negotiable document. The **Hamburg** rules apply to *all contracts of carriage by sea* (save charterparties) that meet the stated geographical tests, including those evidenced by non-negotiable transport documents like sea waybills[10]. The **Nordic Code** follows Hamburg in this respect[11]. **COGSA 1999** is similarly broad in scope (in the US the term 'bill of lading' has traditionally been given a wider interpretation than in many other jurisdictions), though it would allow the parties to 'service contracts' as defined in US legislation to contract out of the regime[12]. The **CMI subcommittee's** current proposals too apply to 'transport documents' in a wide sense: while maintaining the limited exclusion of charterparties, they cover not only traditional bills of lading and waybills, but also current and future substitutes[13].

27. There seems to be a growing consensus in favour of a more comprehensive regime than provided by Hague and Hague-Visby. In recent years more and more goods have been carried under non-negotiable transport documents rather than under bills of lading. One reason for this is that globalisation is increasing ocean carriage of goods between units of a single company, where no change of ownership during transit is contemplated. With time therefore, the Hague and Hague-Visby rules, interpreted literally, apply to a shrinking proportion of goods carried internationally. I *recommend* that MTC supports the CMI's aim of a regime comprehending all goods carried by sea under any kind of transport document (subject to the traditional exclusion of charterparties). I would not expect this to be controversial.

Question C: Are up-to-date business methods, notably *electronic transactions*, adequately covered?

28. Businesses, including shipping, are rapidly adapting themselves to electronic communications and documentation. Governments are having to update their laws to recognise these new business methods. Of the more modern regimes, the **Hamburg** rules make provision, taken up in the **Nordic Code**[14], for electronic signatures on bills of lading[15]; and **COGSA 1999** contains broader

9 Article I(b).

10 Articles 2 and 18.

11 NMC sections 251 and 253.

12 Sections 2(a)(5&10), 7(j).

13 Outline instrument 1.1; 1.12; 2.1; 2.3.

14 NMC section 296.

15 Article 14(3).

provision for electronic bills of lading and electronic communications[16]. But the **Hague** and **Hague-Visby** rules, drafted as they were before the electronic age, contain no reference to electronic media. All the older regimes need review to ensure they suit, and indeed facilitate, modern business practices. The **CMI subcommittee** rightly have this point in mind and are drawing on the UNCITRAL model law on electronic commerce and on their own experts for the relevant drafting[17].

29. I have no reason to believe that this is a controversial matter. I *recommend* that the MTC supports the CMI's aim of developing a regime that is fully adapted to modern, and prospective, electronic commerce.

Question D: Should any new regime make specific provision for *performing carriers* as well as for the *contracting carrier*?

30. The **Hague** and **Hague-Visby** rules apply only to the carrier who is a *party to the contract of carriage*[18]. These contracting carriers (who may be non-vehicle operating carriers - NVOCs) may, however, entrust carriage, for whole or part of a voyage, to one or more other carriers. The **Hamburg** rules make provision also for the actual (or *performing*) *carrier* of the goods, if different from the contracting carrier[19]; and the **Nordic Code** follows them in this[20], as do (with drafting refinements) **COGSA 1999**[21] and the **CMI subcommittee's** current proposals[22].

31. The rationale for covering performing, as well as contracting, carriers is as follows. Because contracting carriers' terms sometimes seek to exempt them from liability for loss or damage attributable to a performing carrier (if different), it is important, in a regime intended to be comprehensive, that the position of the performing carrier, and its relationship with the contracting carrier over liability, should be covered. Otherwise shippers may need to seek compensation from an performing carrier who might be unknown to the shipper, or who might have effectively excluded its liability, or who might not be subject to suit by the shipper for jurisdictional reasons.

32. The carriers, however, would prefer a regime limited to the contracting carrier and not bringing in those without a direct contractual relationship with the shipper. They believe that opening up direct recourse for claimants against performing carriers encourages a proliferation of parallel lawsuits that are expensive and wasteful. The carriers' concept is that the contracting carrier should deal with claims in respect of any stage of the carriage covered by the contract. If the loss or damage is attributable to carriage by a performing carrier other than the contracting carrier, then it should be for the contracting carrier to seek recourse against the performing carrier. For such a system to be effective and acceptable, it would have to prohibit a contracting carrier from disowning liability for any loss or damage attributable to a performing carrier who had carried out any part of the contracted carriage for the contracting carrier. Shippers, on the other hand, are worried about cases where the contracting carrier may have gone out of business or may default.

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16 Sections 2(a)(5), 2(b).

17 Outline instrument 1.18.

18 Article 1(a).

19 Articles 1(1&2), 10 and 11.

20 NMC sections 251, 285-7.

21 Sections 2(a)(1-4) and 5(b&c).

22 Outline instrument 1.2 – 1.4; 5.3.

33. My view is that in principle either system would be satisfactory, provided that the claimant's ability to proceed against either the contracting or the performing carrier is assured. I recommend therefore that the MTC encourages the CMI to continue their discussions with the industry on the best way to achieve this.

Question E: Should *particular cargoes* be excluded, or subject to special provisions?

34. There are three types of cargo that call for mention here: live animals, deck cargo, and containers.

i) Live animals

35. The **Hague** and **Hague-Visby** rules[23] *exclude* live animals, as do **COGSA 1999**[24] and the **CMI subcommittee's** proposals[25]. The **Hamburg** rules, followed by the **Nordic Code**, *cover* them, subject to exclusion of particular risks inherent in the trade[26]. The **CMR** regime is similar[27]. **CMNI** excludes them unless the carrier has contravened the terms of the contract of carriage[28].

36. This is a specialised trade. Although in designing a new cargo liability regime the presumption should be in favour of comprehensiveness, the outcome on this issue will not be crucial to the regime's success. The drafters should ascertain the views of the trade – both shippers and carriers – and if they are in favour of exclusion, so be it. Otherwise they should be covered, perhaps on the same basis as under Hamburg. I *recommend* accordingly.

ii) Deck cargo

37. The **Hague** and **Hague-Visby** rules do not apply to cargo which is carried on deck in accordance with the contract of carriage[29]. The **Hamburg** rules, followed by the **Nordic Code**, do apply to deck cargo, but subject to special provisions that are designed to ensure that deck carriage takes place either because required by law or with the knowledge and consent of the shipper and that the shipper's right to compensation is safeguarded if that is not so[30]. **COGSA 1999** covers deck cargo, without special provision. The **CMI subcommittee's** proposals apply to containers carried on deck without special provision, and to other deck cargoes subject to special provisions equivalent to those in the Hamburg rules[31].

38. The exclusion of deck cargo under the Hague regimes is an anachronism that belongs to the age before containerisation when circumstances of seaborne trade were different from now. In a comprehensive modern regime deck cargo should be covered, albeit subject to appropriate clarification

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23 Article I(c).

24 Section 2(a)(6).

25 Outline instrument 1.16.

26 Hamburg rules 1(5) and 5(5); NMC section 277.

27 CMR article 17(4) (f).

28 CMNI article 18(1)(h)

29 Article I(c).

30 Hamburg rule 9; NMC sections 263, 284.

31 Outline instrument 5.6.

of the carrier's and shipper's duties and rights. I *recommend* that MTC supports the CMI's approach, which is not likely to be controversial.

iii) Containers

39. The original **Hague** rules unsurprisingly make no reference to containers. In the **subsequent sets of rules** containers are treated as other cargo, except in relation to limits of liability (which I deal with under Question J) and to the verification of contents and weight (see under Question K).

Question F: Should any new regime apply to goods *bound for* a contracting state, even if their *port of origin* is in a non-contracting state?

40. The original **Hague** rules applied only to bills of lading issued in a contracting state[32].

41. The **Hague-Visby** and the **Hamburg** rules, however, apply to the carriage of goods under bills of lading on *international journeys* whenever a bill of lading is *issued in a contracting state*; and they apply *regardless of the nationality of ship, carrier, shipper, consignee or any other interested person*[33]. The **Nordic Code**[34] and the **CMI subcommittee's** proposals[35] adopt similar terminology. So much is common ground.

42. Beyond this, the application of the **Hague-Visby** rules is mandatory only where the goods are *loaded* in a port in a contracting state, while the **Hamburg** rules (followed by the **Nordic Code**) additionally apply where goods are *discharged* (even though not loaded) in a contracting state[36]. US **COGSA 1999**[37] is drafted to apply, like the present US law COGSA 1936[38], to all relevant carriage *to or from* the United States. In addition to the Nordic states, some other states that are parties to the Hague-Visby regime, including Japan, are understood to apply their rules to inbound as well as outbound shipments. The **CMI subcommittee's** proposals follow the Hamburg formulation[39]. The **CMR Convention** on road transport and the **CMNI Convention** on transport by inland waterway apply to the carriage of goods *to or from* a Contracting Party[40].

43. No-one wants a further multiplication of international cargo liability regimes that will proliferate conflict of laws and other uncertainties generating complication and expense. It follows that no new regime is likely to be ratified by governments unless it is widely welcomed by industry and looks certain, within a short space of time, to be accepted by a large majority of the world's trading nations. That being so, it should not matter that the new rules apply to contracting parties' inbound as well as outbound trade, because *ex hypothesi* –

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32 Article X.

33 Hague-Visby article X; Hamburg article 2(1&2).

34 NMC section 252.

35 Outline instrument 2.

36 Hamburg article 2(1)(b); NMC section 252(2).

37 Section 3(a).

38 Section 13.

39 Outline instrument 2.1(b&c).

40 CMR article 1(1); CMNI article 2(1).

a) there will be an expectation of their coming into force for all important trades in both directions within a foreseeable time, and

b) there should be little opposition to their extensive use in the interim.

44. If there is a problem with the application to inbound as well as outbound trade, it will be a temporary one; and certain mechanisms could be used to alleviate it, both by encouraging extensive voluntary use of the new rules as soon as they were agreed, and by ensuring that they did not come into force mandatorily until a substantial proportion of the world's trading community were committed to their implementation. (For example, the entry into force of the new rules could be triggered by a ratification requirement weighted by volume of international trade, not expressed as a simple number of depository states, as in the Hamburg rules.)

45. I *recommend* therefore that, subject to adoption of measures such as those suggested in the previous paragraph, the MTC should support the CMI in their proposal to apply the new rules to each contracting state's inbound as well as outbound trade. This is unlikely to be controversial within the industry.

Question G: Should a regime apply only while the goods are *on board ship*, or to the whole *period in which goods are in the custody* of a contracting carrier, or otherwise?

46. The **Hague** and **Hague-Visby** rules cover carriage of goods only *from the time they are loaded onto a ship to the time when they are discharged from it*[41] (known as 'tackle to tackle'). The **Hamburg** rules, followed by the **Nordic Code**, cover in addition *the time during which the carrier is in charge of the goods at the port of loading and at the port of discharge*[42] ('port to port'). Neither provides a comprehensive regime for combined land and sea journeys under a single contract of carriage. In the US, despite this limitation in the Hague rules reflected in COGSA 1936, carriers have remained responsible for goods before loading and after discharge (from receipt to delivery) under the Harter Act 1893[43]. **COGSA 1999** is drafted to provide a unified regime for the carriage of goods under a contract of carriage including a sea leg for the whole period '*from the time goods are received by a carrier to the time they are delivered by a carrier to a person authorised to receive them*'[44]. The **CMI subcommittee's** current framework[45] uses similar phraseology, making the carrier responsible for the goods '*from the time that the carrier has received [them] from the consignor in the place of receipt until the time that [they] are delivered by the carrier to the consignee in the place of delivery*'), though it gives the contracting parties flexibility to relieve the carrier of responsibility for certain activities if they so agree. The CMI text covers both the 'multimodal transport' case (where the contracting carrier accepts responsibility for the whole of the journey, though it may subcontract parts of it on its own responsibility) and the 'through carriage' case (where the contracting carrier accepts responsibility for part of the journey only and undertakes to subcontract the rest as the shipper's agent); in the latter case it rightly includes provisions to safeguard the position of the cargo interests.

47. The problem with the Hamburg regime is that it does not deal adequately with modern door-to-door or inland-depot-to-inland-depot transportation, leaving the land leg of any through journey to

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41 Article I(e).

42 Hamburg article 4; NMC sections 274, 275.

43 See US COGSA 1936 section 12.

44 Section 2(a) (8).

45 Outline instrument 3.

be governed by the cargo liability regime for the relevant land mode[46]. This does not matter if the loss or damage to goods is clearly attributable to the land sector or to the sea sector, because then it will be clear which modal liability regime should apply. But in many cases it will not be clear which regime should apply – either because it is not apparent on which mode the loss or damage took place (common for containerised traffic), or because (as often happens) the loss or damage took place during transhipment. The Hague and Hague-Visby regimes suffer from the same defect; and they leave an additional hiatus between receipt of goods in the port of departure and their loading on ship, and between their discharge at port of destination and their delivery to the consignee or representative within the port.

48. If the aim is to maximise clarity and comprehensiveness and to facilitate modern integrated multimodal carriage, then the approach of the CMI must be the right one in placing the whole of a contracted journey under the responsibility of the contracting carrier and (so far as possible) under a single cargo liability regime. (More thought, however, needs to be given to the liability regime that would govern loss or damage attributable to an inland sector of a multimodal journey: to place this under the maritime regime, as the CMI's subcommittee currently propose[47], might be open to objection on the grounds that the maritime regime would be less favourable to the claimant than, for example, the roads regime. There is a risk of other marginal conflicts too[48].) The CMI's approach, though requiring some further discussion, should not for the most part be controversial. I therefore *recommend* that the MTC support the CMI in its approach here; the CMI should, however, consider further the interface between their proposed regime and relevant regimes for inland transport, in order to ensure that there is no conflict.

Question H: What account needs to be taken of *intermodal transport*, and of the different cargo liability regimes that apply to other modes and intermodally?

49. The **Hague** and **Hague-Visby** rules take no account of transport by other modes except to permit carriers and shippers to enter into arrangements over liability for cargo prior to loading on a ship and subsequent to discharge[49]. The **Hamburg** rules too confine themselves to regulating cargo liability in respect of carriage by sea, even when this is undertaken under a contract that also covers transport by other modes[50]. **COGSA 1999** and the **CMI subcommittee's** proposals deal with transmodal transport that includes a sea leg in the way described in paragraph 46 above. As mentioned above, this approach is useful in providing a rational and workable cargo liability regime for door-to-door or depot-to-depot journeys that include a sea leg.

50. In Annex C I have made a preliminary analysis of the various contractual and liability arrangements that could apply to a multimodal journey that includes a maritime leg. The carrier and shipper interests to whom I have spoken doubt if it would be profitable to try to go further than the type of regime described in Case D(i), which is the regime that is contemplated by the CMI's subcommittee and that I have recommended in paragraph 48 above. In any case to go further and consider rules specific to multimodal transport is outside my terms of reference, which are limited to 'the potential application of existing maritime cargo liability rules to the total transport task **where this includes a maritime leg'.**

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46 Article 1(6).

47 Outline instrument 5.3.1.

48 See under Case D(i) in paragraph 9 of Annex C.

49 Article VII.

50 Article 1(6).

Liability of carrier for loss and damage (and delay)

Question I: How should *responsibilities be allocated* between carrier and shipper? What *defences* should be available to the carrier, and where should the burden of proof lie?

51. This is the core issue, and probably also the most complex and controversial one. It can best be subdivided into two sub-issues:

i) How to express the responsibilities of the *carrier* and its liability for loss of goods and damage to goods?

ii) How to express the *shipper's* responsibilities in respect of the carriage of goods?

(i) How to express the responsibilities of the *carrier* and its liability for loss of goods and damage to goods?

52. The drafting of the current cargo liability regimes is intricate, and the differences between them are considerable, both in principle and in detail. A slightly simplified comparison of the relevant terms of the Hague and Hague-Visby rules (almost identical on this subject), the Hamburg rules and the Nordic Code, together with the proposals in COGSA 1999 and in the CMI subcommittee's outline instrument, is provided in tabular form in Annex D.

53. The **Hague/Hague-Visby** rules *define the carrier's responsibilities narrowly*. They refer specifically to the seaworthiness, manning, equipment and provisioning of the ship, to the fitness and safety of the cargo spaces for the cargo, and to the proper treatment of the cargo; and they provide the carrier with 17 separate defences, including – most controversially – the so-called 'nautical fault' defence: that loss or damage was due to 'act, neglect, or default of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship'[51]. The **Hamburg** rules, on the other hand, place on the carrier a *wider and more general liability for the goods while in the carrier's charge*; and they replace the 17 Hague defences with three[52], the main one being that the carrier 'took all measures that could reasonably be required to avoid the occurrence and its consequences'. The **Nordic Code** *borrows* (in redrafted form) *from both Hague and Hamburg*[53], as well as introducing some material of its own. It follows Hamburg in placing the wide general liability on the carrier and in substituting for most of the Hague regimes' detailed defences an opportunity for the carrier to show that 'the loss was not due to its fault or neglect'; but the Code follows Hague in placing on the carrier specific (but strengthened) responsibilities over seaworthiness and fitness of the cargo spaces; it also retains Hague's nautical fault defence. **COGSA 1999** *follows Hague* closely, the only major difference being removal of the nautical fault defence[54]. Provisions as to the burden of proof differ confusingly between the regimes.

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51 Articles III(1&2), IV(1,2&4).

52 Article 5(1,4&6).

53 See principally sections 262, 275 & 276.

54 Section 9(a-d,g).

54. The **CMI subcommittee** in their work[55] have identified four main options for a future liability regime. Summarised, and much simplified, these are as follows. The **first option** is to leave the Hague/Hague-Visby provisions unaltered; this would be the option favoured by the carriers, but strongly opposed by the shippers. The **second option** is also closely to follow Hague/Hague-Visby, but to remove the controversial 'nautical fault' defence. The **third option** would be more similar in effect to the Hamburg and Nordic regimes in making the carrier liable unless it were able to prove that the loss or damage did not result from any fault or neglect on its part. The **fourth option** would be an even stricter regime, under which the carrier would be liable unless it could prove that the cause of the loss or damage was outside its control altogether; such a regime might be modelled on that in the CMR Convention for road transport[56].[57] Though the gradations of possible liability regimes from Hague-Visby to the strictest are innumerable, these four options represent a sensible selection of the main alternatives for the purpose of discussion. Detailed drafting of a legally sound regime is something that CMI are best placed to carry forward; but no doubt they would be helped by guidance from the MTC as to the criteria that the maritime administrations and governments of OECD member states would expect an acceptable regime to meet.

55. I *recommend* that the criteria for a new liability regime should be as follows:

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

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

c) it should be as clear and as certain in its interpretation as possible;

d) it should provide for an efficient and economical distribution of insured risk; and

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

56. A full appraisal of the options against these criteria would require a greater engagement with carrier, insurer, shipper and other maritime and trading interests than has been possible in the present exercise. But I offer the following provisional thoughts for the MTC's consideration.

57. *The first option and the nautical fault defence*. The **first option** – the option that preserves this defence – should not, I suggest, be pursued. It is true that it matches up to criteria (c) and (d) – carriers and insurers favour it as a longstanding and familiar regime providing relative certainty of interpretation by virtue of extensive case law and thus also some efficiency of insurance cover – but to attach overriding importance to these two criteria would be to stifle change indefinitely. Option 1 fails on the other three counts. On criterion (e), it would not represent any convergence with other regimes. Because shipper interests are firmly opposed to Hague-Visby and because governments are increasingly moving away from a uniform implementation of it (as is clear even from the limited analysis in this report), it would not meet criterion (b). As for criterion (a), the rationale for the present exercise (and for that of the CMI) is widespread concern at the fragmentation of maritime cargo liability regimes internationally and the effect of that on the efficiency of trade. Reaffirming the

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55 Outline instrument 4; 5.1.

56 CMR article 17.

57 The defence of trying to save life or property at sea would be in common to all options.

Hague liability principles without change will not reverse that (indeed it may well accelerate it). Moreover, in view of technological advances over 80 years and of the far more demanding safety standards that shipowners now have to meet (not least under the International Safety Management Code), is it any longer acceptable for carriers to escape liability by pleading the "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship"? Such a defence would be grotesque and inadmissible if pleaded in a case of liability for injury to a ship's passenger or for environmental damage from an oil spill, and I believe that democratic governments would find it hard to justify to their legislatures today re-enacting any exemption from carrier liability in these terms. I suggest that any future cargo liability regime should not place on carriers any lesser responsibility for the operation – and indeed for the seaworthiness – of their ships than they and their insurers already accept under other maritime legislation. Otherwise, however unjustly, carriers' commitment to the disciplines of maritime safety will appear incomplete.

58. *Second, third, and fourth options.* Any regime that corrected this incompatibility of Hague with modern ideas of responsibility for transport safety would score well against criteria (a) and (e). It would also meet what has perhaps been the shippers' main criticism of the Hague regimes. The **fourth option** is attractive in moving to a regime of apparent simplicity and in taking a bold step towards convergence with the international cargo liability regimes for roads and air. But if carrier and insurer interests are for good reason opposed to such a radical change, then the **third option**, or even a variant of the **second option**, should also provide a basis for acceptable compromise. If carriers are prepared to accept full responsibility in principle for the seaworthiness, navigation and management of their ships – as indeed they do in other contexts – then it will not be unreasonable to allow them the defence of proving that the occurrence leading to the loss or damage was not due to their fault or neglect, even in the navigation or management of the ship or in maintaining its seaworthiness.

59. *Treatment of the other defences*. Those of the 17 defences that do not relate to the seaworthiness, navigation or management of the ship – or to an attempt to save life or property, about which there is no disagreement – can be categorised under two heads:

a) force majeure, or events over which none of the parties with an interest in the contract can have had any control ('perils, dangers or accidents of the sea …', 'act of God', 'act of war', 'act of public enemies', 'arrest or restraint of princes, rulers or people, or seizure under legal process', 'quarantine restrictions', 'strikes or lockouts or stoppage or restraint of labour …' (at least those not caused by the carrier), and 'riots and civil commotions'[58]);

b) apparent fault of the shipper or cargo owner, or of the goods themselves, or of whoever was responsible for preparing them for dispatch ('act or omission of the shipper or of the owner of the goods …', '… inherent defect, quality or vice of the goods', or insufficiency of packing or marks[59]).

Under a new regime the above defences could be covered by generic phrases or, if the carriers were reluctant to lose the security of the Hague phraseology, by generic phrases incorporating the Hague defences as non-exclusive lists of examples. ('Fire' – the remaining Hague defence not mentioned above – is a special case, because, depending on the circumstances, it may caused by deficient seaworthiness or management of the vessel, or by force majeure, or by fault of the shipper or the goods. If the agreed defences were expressed generically, it too might not need separate mention.)

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58 Hague/Hague/Visby article IV(2)(c-h,j,k).

59 ibid article IV(2)(i,m-o).

60. But this is an extremely complex area, and detailed drafting of duties, liabilities and defences is best entrusted to lawyers and industry experts in discussion. The CMI is well placed to provide an appropriate forum for this – indeed has done for many years. What has been missing in this case has been direction from governments, and specifically from maritime administrations, on policy issues and on the outcomes that they would be prepared to commend to their ministers. My *recommendation* on this issue is that the MTC should agree a set of criteria that it believes a new cargo liability regime should meet – and I have suggested five criteria in paragraph 55 above. The MTC should then communicate these criteria to the CMI and, if possible, offer them guidance on relevant public policy issues such as maritime trade facilitation and maritime safety – as again I have suggested in paragraph 57. This might help the CMI by allowing them to concentrate their efforts on options that governments will be glad to implement. If in their continuing discussions the CMI and industry experts encounter policy issues that they are unable to resolve by agreement, then it will be open to them to seek further guidance from the MTC.

(ii) How to express the *shipper's* responsibilities in respect of the carriage of goods?

61. The responsibilities laid on shippers in one or more of the regimes under discussion are threefold.

a) The Nordic Code (alone of existing regimes)[60] lays on shippers a duty *to deliver goods* 'at the place and within the period indicated by the carrier', and to deliver them 'in such a way and in such condition that they can be conveniently and safely brought on board, stowed, carried and discharged'. The CMI subcommittee proposes a broadly similar duty[61].

b) All the existing regimes and COGSA 1999 make the shipper responsible for informing the carrier about the nature of any *dangerous goods* in a consignment[62]. The Nordic Code includes a similar requirement for any goods needing to be *handled with special care*[63]. Hamburg and the Nordic Code add that the shipper must tell the carrier of any necessary precautions[64]. All the existing regimes and COGSA 1999 make the shipper liable for any *damage and expense caused by goods* shipped in breach of the relevant requirements[65]. The CMI subcommittee proposes to cover these responsibilities as part of a general duty on the shipper to provide the carrier with 'all the information, instructions and documentation which is necessary, desirable or of importance for the handling and carriage of the goods, including precautions to be taken by the carrier …' and by a general liability on the part of the shipper for any loss or damage caused by the goods[66].

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60 NMC section 255.

61 Outline instrument 6.1.

62 Hague/Hague-Visby article IV(6); Hamburg article 13; NMC section 257; COGSA 1999 section 9(i)(2)

63 NMC section 258.

64 Hamburg article 13(2); NMC section 257.

65 Hague/Hague-Visby article IV(6); Hamburg article 13(2); NMC section 291; COGSA 1999 section 9(i)(2)

66 Outline instrument 6.3; 6.6.

c) All the regimes make the shipper liable to the carrier *for the accuracy of the information* that he provides to the carrier about the goods[67]. The CMI subcommittee proposes a similar provision[68].

In addition each regime makes it clear that the shipper is only liable for loss or damage sustained by the carrier if it results from fault or neglect on the shipper's part[69].

62. This points in my view to the need for an obligation on shippers to provide the carrier with full and accurate information –

a) about special features of the goods relevant to their handling and carriage – in particular, any dangerous qualities and any special precautions appropriate, and

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

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

- by their failure to meet these obligations, or
- by the goods themselves, if due to the shippers' fault or neglect.

63. I am doubtful whether it is necessary or appropriate to place a more general responsibility on the shipper in relation to delivery to the carrier, for the following reasons:

a) it is the carrier that is providing a service to the shipper and not vice versa;

b) it is in the shipper's own interests to deliver the goods to the carrier on time, at the right place, and properly packed and labelled, and the defences available to the carrier should include damage to goods caused by faulty delivery by the shipper;

c) the shipper will be liable for damage done by the goods through the shipper's own fault or neglect.

64. I *recommend* that the MTC indicate to the CMI that it would be in favour of provisions on the lines indicated in paragraph 62, which should not be controversial.

Question J: What *monetary limits of liability* should apply, to what units of cargo, and in what circumstances?

65. ***Limits present and proposed***. The different limits of liability set by the Hague, Hague-Visby (as amended in 1979), and Hamburg rules, by the Nordic Code, and by US COGSA 1936 and 'COGSA 1999' are tabulated in Annex E. All of these regimes except Hague and COGSA 1936

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67 Hague/Hague-Visby article III(5); Hamburg article 17(1); NMC section 301; COGSA 1999 section 9(f)(2)A.

68 Outline instrument 6.3&4.

69 Hague/Hague-Visby article IV(3); Hamburg article 12; NMC section 290; COGSA 1999 section 9(f); outline instrument 6.6 (the drafting of which is subject to further discussion).

provide that, where goods are consolidated in a container, pallet or similar article of transport, the number of packages for the purpose of the per-package limitation should be taken as that shown in the bill of lading (or other transport document). The CMI subcommittee have not yet proposed limits, though their outline instrument shows that they are minded to follow Hamburg in setting a limit for economic loss from delayed delivery in terms of the freight payable for the goods delayed[70]. For comparison, limits established under some other modal cargo liability regimes are given in a footnote to the table; the rationale for the limits for waterborne cargoes being less than those for cargoes carried by road or air is that shipping cargoes are said to be of relatively low average value.

66. ***Breach of limits***. All the regimes, except the original Hague rules, contain standard wording preventing a carrier from limiting liability if it is proved that the loss or damage 'resulted from its act or omission done with intent to cause damage, or recklessly and with knowledge that damage would probably result'[71]. Similar wording should be included in any new regime; this is not controversial.

67. ***A review of limits***. There seems to be consensus that liability limits should continue to be expressed in terms of both a per-package figure and a per-kilogramme figure, whichever gives the higher result. Shippers are calling for an increase in the Hague-Visby per-package limits 'to a level that realistically reflects the value of the lost or damaged shipments'[72], though neither they nor the carriers have yet stated what increases they might consider acceptable. In my view the starting point for the consideration of new limits should be the uprating of the present limits to reflect changes in the value of money since those limits were fixed. Shippers and carriers may then wish to advance arguments why the values should be further adjusted, up or down.

68. ***Present limits in today's values***. With the help of data given me by the MTC secretariat I have made a very rough calculation of the uprated value of -

- the limit established in the US by COGSA 1936 to reflect the limit in the Hague rules, and
- the SDR limits established by the Brussels Protocol of 1979 that translated the Hague-Visby limits into Special Drawing Rights (SDRs).

The results are very different. The purchasing power of US$1.00 today is of the order of one twelfth of what it was in 1936. Thus a simple conversion of the 1936 COGSA limit of US$500.00 to today's values would indicate a figure of the order of US$6,000.00 or SDR 4,656, some 7 times the current per-package limit under Hague-Visby. A conversion of 1979 SDR values into those of today is a complex exercise because the SDR is based on a weighted basket of currencies the composition of which changes over time, and a plausible inflation adjustment would have to take account both of this and of inflation rates in the countries concerned over the period in question. My very rough comparison of changes in SDR values over the last 20 years in terms of four of the world's main trading currencies and of inflation rates in those countries suggests that SDR limits established in 1979 should be multiplied by 2 or 2½ to give comparable values for 2000.

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70 Outline instrument 5.4.2.

71 Hague-Visby article IV(5)(e); cf Hamburg article 8; NMC section 283; COGSA 1999 section 9(h)(3)(d); outline instrument 5.8.

72 Joint shippers' declaration from the 2000 Tripartite Shippers' Meeting (of shippers' organisations from Asia, North America and Europe) held in Israel on 10-13 September 2000.

69. ***The way forward***. Clearly there is a lot of room for debate here. My provisional conclusion is that discussion of new limits needs to *start* at a doubling of the 1979 Hague-Visby figures – but even this needs to be verified by experts. I *recommend* that, to clarify the issues and to narrow the scope for argument, the MTC should commission a short authoritative study by an independent economist – whether from the OECD secretariat of from outside – to establish, as far as possible, the equivalents in today's SDRs of –

- the 1924 Hague liability limit,
- the 1936 US COGSA limit, and
- the Hague-Visby limits established both in 1968 and in 1979.

The study should endeavour to take into account both changes in the value of money in the main trading countries and any broad movements in the composition and unit value of seaborne trade. The study should preferably be carried out in consultation with both sides of the industry – both carriers and cargo interests.

70. ***Future adjustment of limits***. The Hamburg rules and other more recent liability conventions applying to water transport have included provision for the uprating of limits by an accelerated procedure that enables limits to be changed without the formality and delay of a full diplomatic conference and ratification process[73]. This accelerated procedure is normally subject to stringent safeguards to prevent increases in limits that are precipitate, or excessive in amount or frequency, or supported by an insufficient majority of interested states. In order to avoid future cargo liability limits getting too far out of line with changes in economic and trading conditions, I *recommend* that the MTC support the CMI's intention[74] that a similar procedure, including proper safeguards, be included in any future cargo liability regime.

Documentary provisions

Question K: Where there are different views on *requirements in respect of documentation*, what provisions are appropriate?

71. All the international regimes contain detailed provisions for the issue of bills of lading, the information to be included in them (and in other transport documents where relevant), their evidentiary value, the treatment of false or unverifiable particulars, the protection of third parties holding a negotiable bill of lading, etc; and there are many differences of detail. Some of these provisions are not directly relevant to cargo liability, and are therefore outside my terms of reference. The more significant differences that are relevant to cargo liability are briefly described below.

72. The **Hamburg** rules (followed by the **Nordic Code**) contain provision that the failure of a bill of lading to include all the particulars required by the rules does not necessarily vitiate its legal validity as a bill of lading[75]. The **Hague** and **Hague-Visby** rules do not contain such a provision.

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73 Hamburg article 33; and see, for example, article 15 of the 1992 Civil Liability Convention, and article 37 of the CMNI Convention.

74 Outline instrument, note to 5.7.

75 Hamburg article 15(3); NMC section 297.

73. The **Hamburg** rules (followed by the **Nordic Code**) provide that, in the absence from a bill of lading of any note of the apparent condition of the goods, they are deemed to have been in apparent good condition[76]. The **Hague** and **Hague-Visby** rules do not contain such a provision.

74. The **Hamburg** rules (followed by the **Nordic Code**) contain provision for cases where the carrier may doubt the accuracy of particulars in a bill of lading but have no reasonable means of checking them[77]. **COGSA 1999** also makes detailed provision for such cases[78]. These provisions are fuller than those in the **Hague** and **Hague-Visby** rules[79].

75. All these are legal and practical issues of importance and some complexity; but they do not at present raise questions of principle or policy. The CMI subcommittee are dealing with them[80], and there is no reason why they should not be able to resolve them in continued discussions with the industry. They do not require the MTC's attention at this stage.

Claims, disputes and enforcement

Question L: What period of notice is appropriate for the *notification of loss or damage*?

76. The periods of notice set for notification of loss or damage by the Hague, Hague-Visby, and Hamburg rules, by the Nordic Code, and by US COGSA 1936 and 'COGSA 1999', together with the CMI's proposals, are tabulated in Annex E, with a note on the corresponding limits in the CMR, CMNI and Warsaw Conventions. It will be seen that in this case, for loss or damage to goods, **all subsequent maritime regimes** covered in the table follow **Hague/Hague Visby**, except the **Hamburg** rules. This reflects the concern of carriers and others that prompt notice is of great practical importance. I *recommend* that the MTC accepts the prevailing view in favour of the shorter timelimits.

77. For economic loss from delay (which Hague/Hague-Visby and COGSA do not recognise) **Hamburg** and the **Nordic Code** set a deadline of 60 days; the **CMI subcommittee** suggest 21 days (as under CMR for roads, CMNI for inland waterways, and Warsaw for air). If delay in delivery is to be a part of the new regime, I *recommend* that MTC supports the CMI subcommittee's proposal.

Question M: What timebar is appropriate on the *initiation of legal proceedings*?

78. The timebars set by the Hague, Hague-Visby, and Hamburg rules, by the Nordic Code, and by US COGSA 1936 and 'COGSA 1999' for the initiation of legal proceedings are tabulated in Annex E. The CMI subcommittee have not yet taken a view on the matter.

79. It will be seen that the timebar for launching initial legal proceeding on a claim under the rules is one year after the relevant delivery date in **all cases but under Hamburg**. (For other modes, the CMR and CMNI Conventions set one year, the Warsaw Convention two years[81].) In view of the

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76 Hamburg article 16(2); NMC section 299

77 Hamburg article 16(1); NMC section 298

78 Section 7(e,f,g).

79 Article III(3&5).

80 Outline instrument 7.

81 CMR article 32; CMNI 24; Warsaw article 29.

desirability of expeditiously settling claims and establishing the liability exposure of parties and their insurers, I *recommend* that the MTC suggest to the CMI that they retain the one year timebar, unless they receive compelling arguments from the industry for an extension. The CMI should include separate provision for recourse actions, the need for which may not be evident before the initial timebar has been passed.

Question N: Should any new regime contain explicit provision for *arbitration or alternative forms of dispute resolution*?

80. The **Hamburg** rules contain explicit provision for arbitration in disputes that arise under the rules, if the parties so agree[82]. The **Hague** and **Hague-Visby** rules are silent on this, and thus do not require the repeal of laws prohibiting arbitration where these exist. The **Nordic Code** acknowledges the freedom of parties to agree to have disputes settled by arbitration, as does **COGSA 1999**[83]. This is a matter not yet addressed in the CMI subcommittee's proposals.

81. It seems right to follow the Hamburg rules in safeguarding the parties' freedom to agree to settle their disputes by arbitration (or other forms of dispute resolution). I *recommend* therefore that the MTC suggest to the CMI that they include such a provision in their draft instrument.

Question O: What provisions are appropriate for determining the *forum in which proceedings may be brought*?

82. The **Hague** and **Hague-Visby** rules are again silent on this, preserving the negotiating parties' freedom of contract and leaving the issue of jurisdiction to the private international law of the country in which suit may be brought. The **Hamburg** rules, on the other hand, contain detailed provisions governing where judicial or arbitral proceedings may be brought under the rules[84]. The gist of these provisions is as follows:

> A claimant may initiate proceedings, at his or her choice, in any state within whose jurisdiction is situated one of the following:
>
> - the principal place of business of the defendant; or
> - place where the contract was made (if defendant has there a place of business through which the contract was made); or
> - the port of loading;
> - the port of discharge;
> - any forum specified in the contract of carriage.
>
> Nonetheless, if the parties agree on any other forum *after* a claim has arisen, that agreement is effective.

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82 Article 22.

83 NMC section 311; COGSA 1999 section 13(b).

84 Article 21, 22(3).

The **Nordic Code** broadly follows these provisions of the Hamburg rules[85]. **COGSA 1999** seems to be intended to produce the same effect, but it is drafted from a national US standpoint[86]. The CMI subcommittee have not yet addressed this issue.

83. There is a clear choice here. Either any new regime should uphold the freedom of the parties to agree in their contract of carriage where any disputes are to be litigated or arbitrated, or claimants are to be given the choice of forum offered in the Hamburg rules. Under that regime the claimants *may* institute proceedings anywhere specified in the contract of carriage; but they *may instead* choose one of the other forums offered by the rules, even if the defending party did not consent to it in the contract.

84. On the one hand, some may question why it should be open to the claimant to override the parties' choice of forum expressed in the contract of carriage. Under the Hague system it was left to nations, if they so wished, to govern the enforceability of forum selection clauses in contracts through their national law. Provisions such as those in the Hamburg rules requiring a multiple choice of forum for the claimant could be undesirable in encouraging 'forum shopping'.

85. On the other hand, a claimant under a bill of lading may not have been a party to the original contract of carriage, and it could be unfair to require that claimant to be bound by the contracting parties' selection of forum. Moreover, provisions for choice of forum for claimants are in force under some other modal cargo liability regimes. For example, the CMR Convention and the Warsaw Convention provide road and air transport claimants with a choice of forum similar to that in the Hamburg rules[87]. That being so, there seems to be good reason – and good precedent – for a choice of forum provision in any new maritime cargo liability convention. I therefore *recommend* that the MTC indicate to the CMI that it would have no objection to a choice of forum provision on the lines of that in Hamburg (and in the Nordic Code) if the CMI saw fit to include one in their outline instrument.

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85 Article 310.

86 Section 7(i)(2&3).

87 CMR article 31; Warsaw article 28.

Part IV – Concluding Remarks

Introduction to Part IV

86. In Part IV I deal with the remaining "expected output" from my work –

- "An appraisal of the impact of key items for which no agreement may be possible",

insofar as I have not done so in Part III; and I suggest how the MTC might take these matters forward. I also address two other questions that it seems desirable to resolve at this stage.

Relative importance and difficulty of outstanding issues and their handling

87. The issues identified under *Objectives* and *Scope* – Questions A-H – are not crucial to the operation of a new cargo liability regime, in that, even if each question were answered in the narrower sense, the new regime could still operate. The Hague and Hague-Visby rules are themselves narrow in scope: they do not cover delay; only apply to bills of lading; make no provision for electronic transactions; only cover contracting carriers; exclude deck cargoes and live animals; do not apply to inbound traffic from a country outside the regime; and do not extend beyond the quayside. But despite these limitations they have performed a useful role for the last 70 years and more. No doubt a new regime subject to the same limitations would also have some usefulness.

88. Whether governments would think it worth the effort to replace Hague/Hague-Visby in these circumstances is more doubtful: one big attraction of a new regime in most people's eyes will be its greater comprehensiveness. Fortunately, for most of the questions in this group there seems to be a readiness to opt for the comprehensive answer. (The hardest issues are probably Questions A and G.) This should make the introduction of a new regime, if agreed in other respects, more worthwhile.

89. The issue of *Documentation* – Question K – is crucial in the sense that the documentary and evidential issues that it covers must be settled somehow if a regime is to work. But, although there are still some unresolved disagreements here, the difficulties are not ones of principle. The CMI is well equipped to work out agreed solutions on these matters; and I would not expect the parties to let disagreements here stand in the way of a new regime that is otherwise acceptable.

90. Questions L-O relate to procedure over *claims, disputes and enforcement*. Again, it is crucial that these questions be settled before a new regime can operate. But the prospects for agreement seem fair. Question O is potentially the most difficult here.

91. That leaves Questions I and J – *Liabilities* and their *Limits* – as the areas where strong disagreements persist. These are areas absolutely crucial to the operation of an effective regime. Without solutions here that all sides of industry can accept, there will be no new regime that the legislatures of the main trading and shipping nations will be willing to enact, since most will wish to proceed by consensus. It is these two issues above all to which MTC needs to give attention (while remembering that the industrial interests may want to evaluate the package as a whole before committing themselves to accept any one part of it).

92. Hence, I *recommend* that MTC, in further discussion internally and with industry and other organisations, groups the outstanding questions as follows:

a) **Questions B, C, D, E, F, K, L, M and N**: hopefully uncontroversial matters – it should be enough to confirm that interested parties are prepared to proceed as I have recommended above;

b) **Questions A, G, H, O**: possibly controversial matters – MTC should enquire whether interested parties are prepared to proceed as recommended; some debate may be necessary;

c) **Questions I and J**: probably controversial matters – MTC should again ask whether my recommendations provide a basis for agreement, but should expect these items to need the fullest discussion.

Two other issues

93. In their papers for the Singapore conference in February the CMI subcommittee have raised two other questions on which the MTC might want to express a view.

94. ***Status of instrument***. The first is whether an instrument embodying a new regime of cargo liability and other issues of transport law should take the form -

a) of an international convention binding on contracting states, or

b) of a model law offered to governments as a recommended example for national legislation.

Despite the difficulty of agreeing a new binding convention and bringing it into force within a finite timescale, it is hard to see how otherwise the main objective of those like the MTC dissatisfied with the *status quo* – namely, the objective of restoring and re-enforcing uniformity of law and practice in these matters among trading nations around the world – can be achieved. I therefore *recommend* that any new instrument should be prepared as a binding international convention. Once the text of a convention has been widely accepted among important trading nations at both governmental and industrial levels and pending its formal entry into force, there is no reason why it should not be used by governments as a model law for enactment in advance; it might also (as already suggested in paragraph 44 above) be offered to the industry at national and international levels as a recommended set of rules for voluntary incorporation into charterparties and other contracts of carriage by sea.

95. ***Freedom of contract***. The CMI subcommittee also ask how far the provisions of a new convention should be mandatory, and how far the parties to a contract of carriage might be free to vary or exclude them by agreement. There are two groups of people who may be vulnerable if the parties are free to derogate from the convention regime by contractual agreement:

a) those who are in a weak bargaining position through lack of resources or lack of familiarity with the market, and

b) third parties who acquire rights and liabilities under a bill of lading or other negotiable transport document but were not parties to the contract of carriage; they were not therefore in a position to reject or influence any disadvantageous terms of that contract

that affect the rights and liabilities they have acquired and of which they may still be unaware.

The interests of those at (b) can be safeguarded by denying contracting parties freedom to derogate from the requirements of the convention in any contract envisaging the issue of a negotiable transport document, at least in any respect that damages the interests of third parties. The class identified at (a) is more difficult to define and therefore to protect in any less than mandatory regime. The MTC might, however, indicate to the CMI that it sees no objection in principle to granting parties to a contract of carriage controlled freedom to opt out of elements of a new liability regime, *provided* that the CMI can find a way of protecting fully the interests of those at both (a) and (b) above. I so *recommend*.

Conclusion

96. I *recommend* that the MTC at its workshop and meeting in January should address the issues exposed in this report in the way recommended in paragraph 92. It should go on to consider how best in the coming months to work with the CMI, other interested international organisations and industry towards a new regime likely to command wide international acceptance. An immediate first step will be for MTC to decide what message to send on this subject to the CMI's conference in February.

97. Now that I have examined the issues and have discussed them with the different interests I am encouraged to find what a large measure of agreement – or willingness to find agreement – now exists where controversy has persisted so long. I hope that my work in identifying the outstanding issues and in clarifying the facts and arguments on each will help to bring minds and wills still further together, to the point where MTC's current initiative and CMI's long and careful studies may now lead to agreement on the main components of a modern and effective maritime cargo liability regime that will have wide international and industrial support.

Annex A

PROJECT DESCRIPTION

CARGO LIABILITY REGIMES

The Task

The objective is to identify those elements of existing cargo liability regimes for which there is no general agreement and which are crucial to the operation of those regimes, and attempt to find workable formulations that may allow them to be included in an instrument that would be broadly acceptable to all parties.

The expected outputs for the consultancy are:

- A list of key elements that go to make up the existing cargo liability regimes.
- A break-up of these items into those where there is agreement, and those crucial items where there is substantial disagreement.
- A qualitative analysis of items where there is disagreement, and possible compromise formulations that could form the basis of a widely acceptable set of Common Rules.
- An appraisal of the impact of key items for which no agreement may be possible.

The compromise formulations identified in the second last dot point would then be the subject of discussion, at a future OECD Workshop involving representatives of all interested parties, aimed at deriving a set of Common Rules that could form the basis of a legal instrument intended for further international consideration in an appropriate forum.

Project Coverage

The MTC's main interest is in the existing cargo liability regimes as they apply to maritime transport, and this will be the consultant's principal focus.

However, it is recognised that increasingly sea carriers are offering their customers door to door services, and that for this project to be truly useful it should reflect these recent developments.

Therefore, the consultant is also asked to consider the potential application of existing maritime cargo liability rules to the total transport task ***where this includes a maritime leg.*** The importance of this distinction is that the focus should remain on maritime transport, and that there is no intent of producing a broad ranging multimodal instrument.

OECD MTC Secretariat
July 2000

Annex B

Organisation for Economic Co-operation and Development (OECD)
Maritime Transport Committee's work on cargo liability

List of organisations consulted on July paper

Organisation consulted
UNCITRAL
UNCTAD
UNECE
Comité Maritime International (CMI)
International Chamber of Commerce (ICC)
Baltic and International Maritime Council (BIMCO)
International Chamber of Shipping (ICS)
Council of European and National Shipowners Associations (CENSA)
INTERCARGO
INTERTANKO
Baltic Exchange
Institute of Chartered Shipbrokers
Federation of National Associations of Shipbrokers and Agents (FONASBA)
European Shippers Council (ESC)
US National Industrial Transportation League (NITL)
International Federation of Freight Forwarders Associations (FIATA)
International Cargo Handling Coordination Association (ICHCA)
European Intermodal Association (EIA)
International Union of Marine Insurance (IUMI)
International Group of P&I Clubs
International Association of Classification Societies (IACS)
London Maritime Arbitrators Association (LMAA)
Association des Utilisateurs de Transport de Fret (AUTF)

Annex C

Liability for cargo on multimodal journeys: a preliminary analysis

The journey

1. This annex analyses the possible contractual and liability arrangements that could apply to a simplified international multimodal journey consisting of three sectors:

- an inland sector from an inland point of receipt (whether factory door or carrier's depot) to a port;
- a maritime sector from port to port; and
- another inland sector from port to inland point of delivery (whether factory door or carrier's depot).

For the purpose of this analysis it does not matter whether the land sectors are undertaken by road, rail, or inland waterway, though the modal liability regime is different in each case. This journey can be portrayed schematically as follows:

point *land sector* > ***port*** *sea sector* > ***port*** *land sector* > ***point***
of receipt ***of delivery***

Contractual arrangements

2. There are four different kinds of contractual arrangements that might cover such a multimodal journey:

Case A: the shipper contracts separately with the performing carrier for each sector.

Case B: the shipper contracts with one of the performing carriers, who takes responsibility as carrier only for the sector performed, undertaking to contract for carriage on the other sectors as the shipper's agent – often described as 'through transport'.

Case C: the shipper contracts with one carrier, who takes responsibility for the whole journey and performs all three sectors.

Case D: the shipper contracts with one carrier – possibly a non-vehicle-operating carrier (NVOC) – who takes responsibility for the whole journey, but subcontracts the carriage (or some of it) to performing carriers.

Cases C and D represent true multimodal transport.

In real life journeys will often be more complicated than this, and arrangements for a particular journey may contain elements from more than one of the above cases.

Liability regimes

3. **Case A** is the only one contemplated by the Hague, Hague-Visby, and Hamburg[88] rules, which apply solely to the maritime sector of a journey and leave other sectors to be governed by any other applicable modal convention, by national law, or by the contract of carriage. Because these rules are limited to the maritime sector they may give rise to gaps between applicable liability regimes at points of transhipment between modes.

4. Under **Case B** the shipper is relying on the contracting carrier as the shipper's agent to ensure suitable liability provision for the sectors that the contracting carrier is not proposing to perform. If those sectors are governed by the compulsory application of an international convention on cargo liability, then well and good. But if one or more of those sectors falls outside the scope of any international convention, then the cargo interests are dependent on the diligence of the contracting carrier for ensuring that adequate cargo liability provisions apply.

5. The CMI subcommittee's proposals attempt to regulate 'through carriage' of this type in two ways[89]:

- by permitting the contracting carrier to act as the agent of the shipper in this way only if the contract so provides, and

- by requiring that if the contracting carrier makes use of this permission, he shall do so only in such a way that safeguards the cargo interests.

6. **Case C**, the first of the multimodal cases, is straightforward: the carriage is undertaken throughout by a single, contracting carrier; the shipper will have only one party to deal with concerning the carriage; and the contracting carrier will not share liability with any other performing carrier. The contracting carrier's contract of carriage with the shipper will govern liability throughout, provided that the terms are as good as, or better than, those of any compulsorily applicable international liability regime.

7. **Case D** is less straightforward, as well as more typical. Here the contracting carrier's responsibilities for carriage are shared with one or more performing carriers. Liabilities for cargo therefore exist at two separate levels: the contracting carrier is liable to the shipper (or cargo owner) for loss or damage to the cargo; and the relevant performing carrier is liable for the same loss or damage to the contracting carrier. (In addition, regimes such as the Hamburg rules, the Nordic Code, and US COGSA 1999 also make the performing carrier directly liable to the shipper (or cargo owner).) It is this complex pattern of liabilities that creates the difficulty of devising a comprehensive regime for multimodal carriage.

8. This difficulty is manageable where the loss or damage is attributable to a particular sector of the journey. In these circumstances (unless the relevant contract of carriage provides more generously) the applicable modal liability regime can govern liability at both levels; and the liability of the performing carrier to the contracting carrier will then match that of the contracting carrier to the cargo interests. But frequently the loss or damage will <u>not</u> be attributable to a particular sector of the journey. If so, the contracting carrier will still be liable to the cargo interests; but it will be unclear which modal liability regime should govern the minimum level of compensation available.

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88 Article 1(6).

89 Outline instrument 3.2(b) and 3.3

9 To deal with this double tier of liabilities in these circumstances four types of liability regime are possible in theory:

Case D(i): A regime for the multimodal journey described in paragraph 1 could retain the relevant modal rules for loss or damage attributable to a particular sector, and nominate one set of modal rules, say the maritime rules, as a 'default' regime to govern those cases where the origin of the loss or damage was uncertain and where the contract made no more generous provision. This is in effect how the 'default' regime has been determined both in COGSA 1999 and in the CMI subcommittee's outline instrument, which apply to contracts for the carriage of goods *wholly or partly* by sea[90]. (Attention, however, needs to be given here to avoiding conflict with other modal regimes: for example, the CMR convention governing the carriage of goods by road requires application of the CMR rules as the 'default' regime where loaded vehicles are carried by sea without the cargo being unloaded[91]; and the CMNI convention governing carriage of goods by inland waterways requires application of the CMNI rules where no maritime bill of lading has been issued and the distance of carriage by sea does not exceed the distance of carriage by inland waterways[92].)

Case D(ii): This regime would be similar to that at Case D(i), except that the 'default' regime to be applied where origin of the loss or damage was uncertain (or in other prescribed circumstances) would not be one of the existing modal regimes but a specially devised multimodal regime. Examples of this approach are the International Chamber of Commerce's (ICC's) uniform rules for a combined transport document issued in 1975, and the UNCTAD/ICC model rules for multimodal transport documents of 1992. (These sets of rules have recommendatory, not mandatory, effect.)

Case D(iii) A regime of this type would not just provide a 'default' regime for multimodal transport, taking the place of the modal rules in certain circumstances, but would set out completely to supersede the modal rules for multimodal journeys. The UN convention of 1980 on the multimodal transportation of goods (not yet in force) is closest to an example of such a regime, though it still allows for the application of modal rules for particular sectors in limited circumstances.

Cases D(ii) and D(iii) would, however, be liable to give rise to the problem that the rules applying to a multimodal transport operator (MTO) were at variance with the modal rules applying to a performing carrier, causing a mismatch between the MTO's liability to the cargo interests and the performing carrier's liability to the MTO for the same loss or damage. This problem would only be removed by the ultimate in cargo liability regimes –

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90 COGSA 1999 section 2(a)(5)(A); outline instrument 1.1.

91 Article 2(1).

92 Article 2(2).

Case D(iv): which would replace the modal regimes with a single regime for all cargo transport, whether multimodal or unimodal. The difficulty of gaining wide acceptance for even unambitious changes in the present modal regime for sea transport, let alone for new mandatory regimes for multimodal transport of the type described under Case D(ii) or D(iii), suggest that the prospects for developing a Case D(iv) regime are very remote indeed.

9. Cases D(ii), D(iii) and D(iv) bring into consideration journeys that may not contain a maritime sector at all and are therefore beyond my terms of reference.

Annex D - Comparison of responsibilities of carriers and their liability for goods under main cargo liability regimes

Responsibilities and exclusions	**Hague/Hague-Visby**	**Hamburg**	**Nordic Code** (references are to the Norwegian Maritime Code of 24 June 1994, as published in English by Marius of Oslo)	**'COGSA 1999'**	**CMI ISC outline instrument (November 2000)[93]**
		Significant differences from Hague/Hague-Visby rules are highlighted			
A. Carriers' duties					
1. General	_	5(1) The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4 [i.e. from taking over the goods at the port of loading until delivering them at the port of discharge], unless ---	[275, 278 – provisions equivalent to Hamburg 5(1)]	_	4.1 The carrier shall, in accordance with the terms and conditions of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee in the condition in which they were received by him from the consignor.

[93] This column does not give a comprehensive account of the CMI subcommittee's proposals, which are still in gestation. In particular, they are considering a number of different options for the liability regime and for the carrier's defences. Where their texts are still subject to a choice between these options I have omitted them.

Responsibilities and exclusions	Hague/Hague-Visby	Hamburg	Nordic Code	'COGSA 1999'	CMI ISC Outline instrument (November 2000)
A. Carriers' duties (ctd) *2. Seaworthiness and fitness of ship*	III(1) The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.	_	262 …… The carrier shall ensure … that the ship used for the carriage is seaworthy, including that it is properly manned and equipped, and that the holds, cool storerooms, refrigerated storerooms and other parts of the ship where goods are stored are in a proper condition for receiving, carrying, and preserving the goods. 265 If a ship carrying or intended to carry the goods is lost or damaged beyond repair, this does not relieve the carrier of the obligation to complete the carriage.	6(a) [A carrier] shall … exercise due diligence before and at the beginning of a voyage to: (a) to make the ship seaworthy; (b) to man, equip and supply the ship properly; (d) to make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for the reception, carriage and preservation of the goods.	(see footnote to page 1)
3. Handling of cargo	III(2) Subject to the provisions of article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.	_	262 The carrier shall perform the carriage with due care and despatch, take care of the goods, and in other respects protect the interests of the owner from the reception and to the delivery of the goods.	6(b) A carrier shall, properly and carefully, receive, load, handle, stow, carry, keep, care for, discharge, and deliver goods.	4.2 During the period of its responsibility the carrier shall properly care for the goods.

Responsibilities and exclusions	Hague/Hague-Visby	Hamburg	Nordic Code	'COGSA 1999'	CMI ISC outline instrument (November 2000)
A. Carriers' duties (ctd) *4. Examination on receipt*	_	_	256 The carrier shall to a reasonable extent examine whether the goods are packed in such a way as not to suffer damage or cause damage to any person or property. … The carrier shall inform the sender of any deficiencies he or she has noticed. The carrier is not bound to carry the goods unless he or she cannot make them fit for transport by reasonable means.	_	6.4 … [The carrier] is entitled, but never obliged, to examine whether the information, instructions and documentation provided by [the shipper] is accurate and complete.

Responsibilities and exclusions	Hague/Hague-Visby	Hamburg	Nordic Code	'COGSA 1999'	CMI ISC outline instrument (November 2000)
A. Carriers' duties (ctd) *5. Time allowed for delivery*	_	5(2) Delay in delivery occurs when the goods have not been delivered at the port of discharge … within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case. 5(3) The person entitled to make a claim for the loss of the goods may treat the goods as lost if they have not been delivered … within 60 consecutive days following the expiry of the time for delivery …	[278 – provisions equivalent to Hamburg 5(2&3)]	_	5.4.1 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.

Responsibilities and exclusions	Hague/Hague-Visby	Hamburg	Nordic Code	'COGSA 1999'	CMI ISC outline instrument (November 2000)
Carriers' duties (ctd) *6. Information on loss, damage, delay etc*	_	_	262 …… If goods have been lost damaged or delayed, the carrier shall notify the person indicated by the sender at the earliest opportunity. If such notice cannot be given, the cargo owner or … the sender shall be notified. The same applies if the carriage cannot be completed as intended.	_	(see footnote to page 1)

Responsibilities and exclusions	Hague/Hague-Visby	Hamburg	Nordic Code	'COGSA 1999'	CMI ISC outline instrument (November 2000)
B. Carriers' defences and exclusions					
1. Carrier's issues					
a) Seaworthiness and fitness of ship	IV(1) *No liability for* loss or damage arising or resulting from unseaworthiness, unless caused by want of due diligence on the part of the carrier to *comply with duties in 3(1). In case of seaworthiness,* the burden of proving the exercise of due diligence shall be on the carrier …	5(1) … - unless the carrier proves that he … took all measures that could reasonably be required to avoid the occurrence and its consequences.	276 … The carrier shall … be liable for losses in consequence of unseaworthiness because the carrier personally or a person for whom the carrier is responsible failed to take proper care to make the ship seaworthy at the commencement of the voyage. The burden of proving that proper care was taken rests on the carrier.	9(a) *No liability for* loss or damage from unseaworthiness unless … caused by a failure on the part of the carrier to exercise the due diligence required by section 6(a). 9(b) *In case of unseaworthiness* the burden of proving … due diligence is on the carrier …	(see footnote to page 1)
	IV(2) *Carrier not* responsible for loss or damage arising or resulting from: (p) latent defects not discoverable by due diligence	_	275 … - unless the carrier shows that the loss was not due to his or her personal fault or neglect …	9(c)(1)(N) *Carrier not responsible for loss or damage from:* latent defects not discoverable by due diligence	

Responsibilities and exclusions	Hague/Hague-Visby	Hamburg	Nordic Code	'COGSA 1999'	CMI ISC outline instrument (November 2000)
B. Carriers' defences and exclusions *1. Carrier's issues* (ctd) b) Navigation and management of ship	IV(2) *Carrier not* responsible for loss or damage arising or resulting from: (a) act, neglect, or default of the master *[etc]* in the navigation or in the management of the ship;	5(1) … - unless the carrier proves that he … took all measures that could reasonably be required to avoid the occurrence and its consequences.	276 The carrier shall not be liable if he or she can show that the loss resulted from – (1) fault or neglect in the navigation or management of the ship, on the part of the master *[etc]*	9(d)(2) *Where* a party alleges that the master *[etc]* were negligent in the navigation or management of the ship, the burden of proof is on that party to prove negligence in the navigation or management of the ship.	(see footnote to page 1)
c) Fire	IV(2) *Carrier not* responsible for loss or damage arising or resulting from: (b) fire, unless caused by the actual fault or privity of the carrier; …	5(4)(a) The carrier is liable (i) for loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier … (ii) for such loss, damage or delay in delivery which is proved by the claimant to have resulted from the fault or neglect of the carrier … in taking all measures that could reasonably be required to put out the fire and avoid or mitigate its consequences.	276 The carrier shall not be liable if he or she can show that the loss resulted from – (2) fire not caused by the fault or neglect of the carrier personally.	9(c)(2) *Carrier not* responsible for loss or damage … from fire on a ship, unless the fire was caused by the carrier's … fault or privity, with respect to a fire on a ship that it furnished. *Contracting carrier* not responsible for loss or damage … from fire on a ship unless the fire was caused by the contracting carrier's actual fault or privity.	

Responsibilities and exclusions	Hague/Hague-Visby	Hamburg	Nordic Code	'COGSA 1999'	CMI ISC outline instrument (November 2000)
B. Carriers' defences and exclusions *1. Carrier's issues* (ctd) d) Deviations or other hindrances	IV(4) *No carrier liability for loss or damage resulting from* any reasonable deviation IV(4) …any reasonable deviation shall not be deemed to be an infringement or breach of this Convention or of the contract of carriage …	5(1) … - unless the carrier proves that he … took all measures that could reasonably be required to avoid the occurrence and its consequences.	265 …… If hindrances arise that prevent the ship from reaching the port of discharge and discharging the goods or if this cannot be done without unreasonable delay, the carrier may instead choose another suitable port of discharge. … 275 - unless the carrier shows that the loss was not due to his or her personal fault or neglect ..	9(g)(1)(B)*No carrier liability for loss or damage resulting from* any reasonable deviation 9(g)(2)(B)An unreasonable deviation constitutes a breach of a carrier's obligations under this Act, … 9(g)(2)(A)A deviation for the purposes of loading or unloading cargo or passengers is, prima facie, not a reasonable deviation.	5.5 (a) The carrier is not liable for damage, loss or delay caused by … any … reasonable deviation. (b) An unreasonable deviation constitutes a breach of a carrier's obligations under this Instrument, …
e) Saving life etc	IV(2) *Carrier not* responsible for loss or damage arising or resulting from: (b) saving or attempting to save life or property at sea; IV(4) *No carrier liability for loss or damage resulting from* any deviation in saving or attempting to save life or property at sea	5(6) The carrier is not liable … where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.	275 … [equivalent to Hamburg 5(6)]	9(c)(1) *Carrier not* responsible for loss or damage … from: (J) saving, or attempting to save, life or property at sea; 9(g)(1)(A)*No carrier liability for loss or damage from* a deviation to save or attempt to save life or property at sea	5.5(a) The carrier is not liable for damage, loss or delay cause by a deviation to save or attempt to save life or property at sea …

Responsibilities and exclusions	**Hague/Hague-Visby**	**Hamburg**	**Nordic Code**	**'COGSA 1999'**	**CMI ISC outline instrument (November 2000)**
B. Carriers' defences and exclusions (ctd) *2. External issues* a) Force majeure	IV(2) *Carrier not* responsible for loss or damage arising or resulting from: (c) perils, dangers and accidents of the sea or other navigable waters (d) act of God (e) act of war (f) act of public enemies (g) arrest or restraint of princes, rulers or people, or seizure under legal process (h) quarantine restrictions … (j) strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general (k) riots and civil commotions	5(1) … - unless the carrier proves that he … took all measures that could reasonably be required to avoid the occurrence and its consequences.	275 … - unless the carrier shows that the loss was not due to his or her personal fault or neglect …	9(c)(1) *Carrier not* responsible for loss or damage … from: (A) perils, dangers and accidents of the sea or other navigable waters (B) an act of God (C) an act of war (D) an act of public enemies (E) the arrest or restraint of princes, rulers or people, or seizure under legal process (F) quarantine restrictions (H) strikes, lockouts, stoppage, or restraint of labor from whatever cause, … except that this paragraph does not relieve a carrier from responsibility for its own acts (I) riots or civil commotions	(see footnote to page 1)

Responsibilities and exclusions	Hague/Hague-Visby	Hamburg	Nordic Code	'COGSA 1999'	CMI ISC outline instrument (November 2000)
B. Carriers' defences and exclusions *2. External issues* (ctd) b) General	IV(2) *Carrier not* responsible for loss or damage arising or resulting from: (q) any other cause arising without the actual fault or privity of the carrier …, *the burden of proof to be on the carrier*	5(1) … - unless the carrier proves that he … took all measures that could reasonably be required to avoid the occurrence and its consequences.	275 … - unless the carrier shows that the loss was not due to his or her personal fault or neglect …	9(c)(1) *Carrier not* responsible for loss or damage … from: (O) any other cause arising without the … fault or privity of the carrier claiming the exception under this paragraph, … *the burden of proof to be on the carrier* see 9(d)(1)	(see footnote to page 1)
3. Shippers' and goods' issues					
	IV(2) *Carrier not* responsible for loss or damage arising or resulting from: (i) act or omission of the shipper or owner of the goods … (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods (n) insufficiency of packing (o) insufficiency or inadequacy of marks	5(1) … - unless the carrier proves that he … took all measures that could reasonably be required to avoid the occurrence and its consequences.	275 …- unless the carrier shows that the loss was not due to his or her personal fault or neglect …	9(c)(1) *Carrier not* responsible for loss or damage … from: (G) an act or omission of the shipper or owner of the goods … (K) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods (L) insufficiency of packing (M) insufficiency or inadequacy of marks	(see footnote to page 1)

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ANNEX E

Comparison of –

Limits of Liability,

Periods of Notice Set for Notification of Loss or Damage, and

Timebars for the Initiation of Legal Proceedings

Under Main Cargo Liability Regimes

	Hague	Hague-Visby 1979	Hamburg	Nordic Code (references are to the Norwegian Maritime Code of 24 June 1994)	US COGSA		CMI ISC outline instrument (November 2000)
					1936	'1999'	
Question J: liability limits							
Minimum limit for goods lost or damaged – per package or unit (of cargo), or	£100 sterling (gold)[94] *IV(5), IX*	666.67 SDRs[1] *IV(5)(a,c,d)*	835 SDRs[1] *6(1)(a), 26*	667 SDRs[1] *280,281*	US $500[1] *4(5)*	666.67 SDRs *9(h)(1&2)*	(not yet decided)
per kilogram of gross weight – whichever is higher	–	2 SDRs[1] *IV(5)(a&d)*	2.5 SDRs[1] *6(1)(a), 26*	2 SDRs[1] *280*	–	2 SDRs *9(h)(1)*	(not yet decided)
Minimum limit for goods delayed	–		2½ x freight payable for goods delayed 1 x freight payable under the contract – whichever the lower, and subject to maximum payable for loss of goods *6(1)(b&c), 26*	(as for goods lost and damaged – see above) *280*	–		(for economic loss, or mixed economic loss and physical damage) [.. times the freight] payable for goods delayed *5.4.2*

Under the **CMR Convention** a road carrier's liability for loss or damage to goods is limited to 8.33 SDRs per kilogram (or to a higher value if declared by the sender in the consignment note); and for loss as a result of delay to the amount of the carriage charges (*articles 23(3&5) and 24*).
Under the **Warsaw Convention** an air carrier's liability in the carriage of cargo is limited to 17 SDR's per kilogram (*article 22(2)(b)*).
The liability limits in the recently negotiated **CMNI Convention** governing the carriage of goods by inland waterways reflect those in the Hague-Visby rules *(article 20)*.

[94] Figures may be increased by agreement between the parties to the contract.

	Hague	Hague-Visby 1979	Hamburg	Nordic Code (references are to the Norwegian Maritime Code of 24 June 1994)	US COGSA		CMI ISC outline instrument (November 2000)
					1936	'1999'	
Question L: Period of notice for <u>notification of loss or damage</u>							
1. Where loss or damage to goods is apparent	before or at the time of the removal of the goods into the custody of the person entitled to delivery *III(6)*	not later than the working day after the day when the goods were handed over to the consignee *19(1)*	(as Hague/Hague-Visby) *288*	(as Hague) *3(6)*	(as Hague/ Hague-Visby) *12*	(as Hague/Hague-Visby) *5.9.1*	
2. Where loss or damage to goods is **not** apparent	within 3 days of the removal of the goods into the custody of the person entitled to delivery *III(6)*	within 15 consecutive days after the day when the goods were handed over to the consignee *19(2)*	(as Hague/Hague-Visby) *288*	(as Hague) *3(6)*	(as Hague/ Hague-Visby) *12*	(as Hague/Hague-Visby, but 3 days to be <u>working</u> days) *5.9.1*	
3. Where economic loss from delay is claimed	–	within 60 consecutive days of delivery *19(5)*	(as Hamburg) *288*	–		within 21 consecutive days of delivery *5.9.2*	

Under the **CMR** and **CMNI Conventions** the period of notice is, for <u>case 1</u>, before or at the time of delivery (as Hague/Hague-Visby); for <u>case 2</u>, within 7 working days of delivery; and for <u>case 3</u>, within 21 days of delivery *(CMR article 30(1&3); CMNI article 23(3-5)).*
Under the **Warsaw Convention** the period of notice is, for <u>cases 1 and 2</u>, within 14 days of delivery; and for <u>case 3</u>, within 21 days of delivery *(article 26(2)).*

	Hague	Hague-Visby 1979	Hamburg	Nordic Code (references are to the Norwegian Maritime Code of 24 June 1994)	US COGSA		CMI ISC outline instrument (November 2000)
					1936	'1999'	
Question M: timebar on <u>legal proceedings</u>?							
for initial proceedings	within 1 year after delivery of goods or of date when goods should have been delivered *III(6)*		within 2 years after delivery of goods or of date when goods should have been delivered *20(1&2)*	(as Hague/Hague-Visby) *501(7)*	(as Hague) *3(6)*	(as Hague/ Hague-Visby) *13(a&b)*	[undecided] *13*
for recourse proceedings	–	according to national law, but not less than 3 months from settlement of initial claim or institution of initial proceedings *III(6bis)*	according to national law, but not less than 90 days from settlement of initial claim or institution of initial proceedings *20(5)*	1 year after settlement of initial claim or institution of initial proceedings *501*	–	Within 3 months of judgement or settlement *13(c)*	[undecided] *13*

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