IV. INTERNATIONAL LEGISLATION ON SHIPPING

Report of the Working Group on International Legislation on Shipping on the work of its third session, held in Geneva from 31 January to 11 February 1972 (A/CN.9/63* and Add.1**)

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* 29 February 1972.
** 17 March 1972.

Introduction

1. The Working Group on International Legislation on Shipping was established by the United Nations Commission on International Trade Law at its second session held in March 1969. The Working Group was enlarged by the Commission at its fourth session and now consists of the following 21 members of the Commission:[1] Argentina, Australia, Belgium, Brazil,

[1] The Working Group was enlarged from its original membership of seven.

Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Zaire.

2. The Working Group at its second session (22 to 26 March 1971) made several recommendations concerning topics and methods of work, including a recommendation that the subject of "bills of lading" should be considered by the Commission.[2] These recommendations were considered and approved by the Commission in a resolution at its fourth session.[3]

3. In accordance with paragraph 3 of that resolution, the Working Group on International Legislation on Shipping held a meeting on 6 April 1971, during the fourth session of the Commission. At this meeting the Working Group unanimously adopted a decision setting forth specific steps to carry forward its work.[4]

4. The Working Group held its third session in Geneva from 31 January to 11 February 1972 and considered the subjects assigned to it.

5. Nineteen members of the Working Group were represented at the session.[5] The session was also attended by observers from Iran and Mexico and the following intergovernmental and international non-governmental organizations: United Nations Conference on Trade and Development, Economic Commission for Europe, European Insurance Committee, Inter-Governmental Maritime Consultative Organization, International Institute for the Unification of Private Law (UNIDROIT), Baltic and International Maritime Conference, International Chamber of Commerce, International Chamber of Shipping, International Union of Marine Insurance.

6. The Chairman of the Working Group was Mr. Nagendra Singh (India). The Chairman and a Vice-Chairman, Mr. Gervasio Colombres (Argentina), had been elected at the meeting of the Working Group on 6 April 1971 for a term to continue through the third session of the Working Group. The Vice-Chairman was unable to attend the session. The Working Group, by acclamation, elected the following officers:

Second Vice-Chairman: Mr. Stanislaw Suchorzewski (Poland)

Rapporteur: Mr. Richard St. John (Australia).

7. The documents placed before the Working Group were:

(*a*) Provisional agenda and annotations (A/CN.9/WG.III/WP.5);

(*b*) Report by the Secretary-General, entitled "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/WG.III/WP.4 (vols. I, II and III), hereinafter cited as report of the Secretary-General);

(*c*) Replies to the questionnaire on bills of lading and studies submitted by Governments for consideration by the Working Group (A/CN.9/WG.III/WP.4/Add.1 (vols. I and II));

(*d*) Report by the UNCTAD secretariat; bills of lading (TD/B/C.4/ISL/6);

(*e*) Report of the UNCTAD Working Group on International Shipping Legislation on its third session held at the Palais des Nations, Geneva, from 5 to 18 January 1972 (TD/B/C.4/ISL/12).

8. The Working Group adopted the following agenda:

1. Opening of the session
2. Election of the Rapporteur
3. Adoption of the agenda
4. Consideration of the substantive items selected by the Working Group at its meeting on 6 April 1971
5. Future work
6. Date of the fourth session of the Working Group
7. Adoption of the report

9. The Working Group decided to use the report of the Secretary-General on the "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/WG.III/WP.4) as its working document. The report of the Secretary-General is annexed to this report in an addendum. In response to the Working Group's decision concerning the programme of work (para. 3, *supra*), the report of the Secretary-General examined the following subjects:

I. The period of carrier's responsibility (before and during loading; during and after discharge) [part one of the report of the Secretary-General]

II. Responsibility for deck cargoes and live animals [part two of the report of the Secretary-General]

III. Clauses of bills of lading confining jurisdiction over claims to a selected forum [part three of the report of the Secretary-General]

IV. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier [part four of the report of the Secretary-General]

10. The Working Group considered the above subjects in the order in which they were presented in the report of the Secretary-General; this report will also consider these subjects in that order.

I. The period of carrier's responsibility (before and during loading; during and after discharge)

11. The Working Group considered the question of the period of the carrier's responsibility on the basis of part one (paras. 7-41) of the Secretary-General's report. The report noted that the scope of the Hague

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[2] Working Group on International Legislation on Shipping, report on the work of its second session, 22-26 March 1971 (A/CN.9/55); UNCITRAL Yearbook, volume II: 1971, part two, III.

[3] Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971) (hereinafter referred to as UNCITRAL report on the fourth session (1971)), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 18* (A/8417), para. 19; *ibid.*, part one, II, A.

[4] UNCITRAL, Report on fourth session (1971), paras. 22-23; *ibid.*

[5] In accordance with paragraph 2 of the resolution adopted at the fourth session of the Commission, Mr. Krzysztof Dabrowski (Poland), Chairman of the UNCTAD Working Group on International Shipping Legislation, was invited to the session but was unable to attend.

Rules[6] determined the area of protection afforded shippers against clauses in bills of lading relieving carriers of some or all of the responsibility for loss or damage to cargo. It was pointed out that under article I (e) of the Rules the period of applicability was defined as extending from the time goods were "loaded on" until they were "discharged from" the ship, and that under article VII the Rules did not apply to the loss or damage of goods "prior to the loading on and subsequent to the discharge from the ship . . .".

12. The Secretary-General's report analysed two problems concerning the operation of the provisions of the Hague Rules cited above:[7] (1) doubt as to whether the Rules apply to loss or damage occurring during loading and unloading operations; and (2) the fact that the Rules do not cover loss or damage occurring prior to loading or subsequent discharge even while the goods are in the charge or control of the carrier or its agents. With respect to the first of these problems, the report (para. 26) suggested a draft amendment designed to clarify the application of the Hague Rules to loading and unloading operations. With respect to the second problem, the report (paras. 37 and 39) set forth alternative amendments designed to extend the scope of the Hague Rules to periods, before loading and after discharge, while the goods were in the possession of or in the charge of the carrier.

13. In plenary sessions of the Working Group, general support was expressed for the proposal that the period of application of the Hague Rules should be extended beyond that specified in the existing articles I (*e*) and VII. It was generally agreed that the Hague Rules should be applied with respect to the periods before loading and after discharge during which cargo is in the custody or charge of the carrier or his agents. However, it was thought that the period of responsibility under the Hague Rules should not begin prior to the carrier's custody at the port of loading and should not continue beyond the port of discharge. The Working Group requested a drafting party to develop a draft text reflecting the consensus that had been reached, and it was generally agreed that the text proposed in paragraphs 37 and 39 of the Secretary-General's report could serve as a basis for the drafting party's work.

14. The drafting party decided on a revision of article I (*e*) and related provisions in article III (2) of the Hague Rules. These draft provisions, and comments concerning corresponding amendments that might be needed if the revised article I (e) is adopted, were set forth in a report which was submitted by the drafting party.[8] That report, with minor amendments made by the Working Group,[9] is as follows:

Report of the Drafting Party: Period of Responsibility

1. Drafting Party No. 1 has considered textual revision of the 1924 Brussels Convention to reflect the views on policy expressed in the discussion of the Working Group with respect to the period of carrier's responsibility. The Drafting Party recommends the following definition of the period of responsibility:

[Revision of article I (*e*) "Carriage of goods"][10]

(i) "Carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage, and at the port of discharge.

(ii) For the purpose of paragraph (i), the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:

(*a*) by handing over the goods to the consignee; or

(*b*) in cases when the consignee does not receive the goods, by placing them at the disposal of the consignee in accordance with the contract or with law or usage applicable at the port of discharge; or

(*c*) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.

(iii) In the provisions of paragraphs (i) and (ii), reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

2. The language of article III (2) should be conformed to the revision of article I (*e*). The Drafting Party recommends the following revision. (The opening phrase, which now appears in the Convention, is put in square brackets to note that this reference to article IV may have to be reconsidered after the Working Group has taken action on the rules on liability in article IV.)

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[6] International Convention for the Unification of Certain Rules relating to Bills of Lading (also known as the Brussels Convention of 1924), League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764. The substantive provisions of this Convention are often referred to as the Hague Rules.

[7] As was noted in paragraph 7 of the report, these problems and the other problems taken up by the Working Group at this session were raised in the documentation and discussions at meetings of the UNCTAD Working Group on International Shipping Legislation (TD/B/C.4/86) and the UNCITRAL Working Group on International Legislation on Shipping (A/CN.9/55; UNCITRAL Yearbook, vol. II: 1971, part two, III. They were also raised in replies to questionnaires and studies transmitted to the Secretary-General prior to and during the preparation of the Secretary-General's report.

[8] A/CN.9/WG.III(III)/CRP.14.

[9] The amendments made by the Working Group are the following: (*a*) in paragraph (ii) (b) of the revised article I (e), brackets around the words "or usage" were removed by the Working Group; (*b*) in paragraph (iii), the word "the" was added immediately before the word "agents", and the word "or" was substituted for the word "and" immediately after the word "agents". The last amendment was made in order to make it clear that the words "acting pursuant to the instructions" referred only to "other persons".

[10] The brackets around this and following headings are intended to indicate that no decision has as yet been taken as to what form the new rules shall take.

[Revision of article III (2)]

[Subject to the provisions of article IV] the carrier shall properly and carefully take over, load, handle, stow, carry, keep, care for, discharge and hand over the goods in his charge.

3. It is noted that certain other provisions of the 1924 Brussels Convention may call for reconsideration because of the decision with respect to the period of carrier's responsibility reflected in paragraph 1. Thus, consideration should be given to the revision or possible deletion of article VII.[11]

4. Other provisions which may need attention in the light of the recommendation made in paragraph 1 above, include article III (6) and article IV (2). It is recommended that the question of such conforming amendments be considered in connexion with the Working Group's substantive review of these and related provisions.

5. One representative expressly reserved his position regarding subparagraph (ii) (*c*) of article I (*e*) as modified.

Consideration of the report of the Drafting Party

15. The Working Group reviewed carefully this report of the Drafting Party, and took the following decisions:

(*a*) To accept the definition of the period of responsibility as set forth in relation to article I (*e*) above:

(*b*) To accept the revision of article III (2) of the Hague Rules, as set out in paragraph 2 of the Drafting Party's report, in order to conform that article to the revision of article I (*e*);

(*c*) To delete article VII of the Hague Rules on the ground that this article was inconsistent with the above revision (article I (*e*)) and that, in view of the revision of article I (*e*), no further provision was necessary;

(*d*) To accept paragraph 4 of the Drafting Party's report, which suggests that other provisions (including article III (6) and IV (2)) may need attention in light of the revision of article I (*e*).

16. Two representatives expressly reserved their positions regarding subparagraph (ii) (*c*) of the revised article I (*e*).

17. Some representatives expressed reservations concerning the deletion of article VII.

18. It was proposed, with the support of a number of representatives, that the following new article be added to the Hague Rules:

"Subject to the provisions of article V there shall be no liability on the carrier for loss or damage to goods at the port of loading, during the carriage of goods or at the port of discharge except in accordance with these Rules."

[11] As will be noted in paragraph 15 (*c*) below, the Working Group considered this matter and decided to delete article VII, subject to reservations by some representatives.

The Working Group decided that consideration of this proposal should be deferred.

19. Some representatives, while noting that the revisions of articles I (*e*) and III (2) constituted improvements over the present Hague Rules, indicated that these revisions could be further improved. Some of these delegations suggested that the structure of the amended article I (*e*) was confusing in that the distinction between (i) private warehouses or other private intermediaries and (ii) public port authorities or customs warehouses was not made sufficiently clear.

20. One representative noted that the proposed revision was incomplete since it left to one side the régime of the responsibility of the stevedore-warehouseman.[12] This representative referred to his country's national law which has unified the responsibility of stevedore-warehousemen and carriers and makes the former exclusively liable towards the person (carrier or shipper) who has requested his services. This representative also observed that this law had regulated satisfactorily the problems relating to loss or damage to goods while they are under the care of the stevedore-warehouseman. In States where the responsibilities of stevedore-warehousemen and of carriers are not unified, these difficulties will persist; however, he concluded that pending such unification the new rules on the period of responsibility of the carrier in the draft proposal for revised articles I (*e*) and III (2) would constitute a helpful improvement in the Hague Rules.

21. Some representatives considered that in the opening sentence of paragraph 1 (ii) of the Drafting Party's report the words "at the port of loading" should be added after the words "taken over the goods", and the words "at the port of discharge" should be added following the words "has delivered the goods". Several representatives proposed that the word "usage" should be deleted from paragraph 1 (ii) (*b*) of the Drafting Party's report. One representative questioned whether the provisions in paragraph (ii) of article I (*e*), as revised, were sufficiently broad to cover a case in which one carrier discharged goods, in the course of transit, when the goods were subsequently reloaded onto another ship. Another representative suggested that a shorter alternative solution to the problem of article I (*e*) would be to alter article VII to make it specifically prohibit clauses in bills of lading which exempted carriers from liability before loading and after discharge. On the other hand, another representative observed that bill of lading clauses that were inconsistent with the Rules would be invalid under article III (8), which presumably would be retained in any revision of the Convention.

II. Responsibility for deck cargoes and live animals

22. The Working Group gave consideration to problems presented by the fact that the definition of "Goods" in article 1 (*c*) of the Hague Rules excludes "live animals and cargo which by the contract of carriage is stated as being carried on deck and is so

[12] "Manutentionnaire" in the French text.

carried". Separate consideration was given to the exclusion of (*a*) deck cargo and (*b*) live animals.

A. DECK CARGOES

23. The report of the Secretary-General discussed three problems that have arisen as a result of the exclusion of deck cargoes:[13]

(1) Carriers might escape liability for losses or damage to deck cargoes resulting from causes wholly unrelated to any special risks that might exist in the carriage of such cargoes on deck;

(2) Freight containers, which could be carried as safely on deck as below deck, were not covered by the Rules when they were stated to be carried on deck; and

(3) It was not clear whether cargoes stowed above the main deck but within certain types of protective enclosures were "deck cargo" for purposes of the Hague Rules' exclusion.

The report suggested amendments addressed to these problems.[14] The Working Group took the discussion and draft amendments contained in the report as the basis for its discussion of "deck cargoes".

24. In plenary sessions of the Working Group, widespread support was expressed for removing the exclusion of deck cargo from the definition of "goods" in article I (*c*), so that the provisions of the Hague Rules should apply to cargo carried on deck. Some representatives expressed the view that if this action were taken a provision should be added to the Hague Rules relieving the carrier of liability for loss or damage resulting from the special risks inherent in deck carriage. Other representatives thought that there was no need for a special provision of this kind. In their view a general standard of carrier's responsibility based upon the principle of fault could apply to deck cargo as well as to other cargo. A carrier would only be responsible for loss or damage to deck cargo if he failed to take the protective measures reasonably required in relation to such cargo.

25. Following discussions by the Working Group, this subject was referred to the Drafting Party. The Drafting Party agreed on an amendment to article I (*c*) and made a number of other recommendations and observations which were included in its report to the Working Group.[15] This report, with minor amendments made by the Working Group,[16] is as follows:

Report of the Drafting Party: Deck Cargo

1. Drafting Party No. 1 has considered textual revision of the 1924 Brussels Convention to reflect the views on policy expressed in the discussion of the Working Group with respect to the exclusion of deck cargoes from the definition of "Goods" contained in article I (*c*). The Drafting Party recommends the following definition of "Goods":

[*Revision of article I* (c) *"Goods"*]

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever [except live animals].

2. The Drafting Party further recommends that the following provision be placed before the Working Group:

[*Possible addition to article IV*]

[In respect of cargo which by the contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in or incident to such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention.][17]

It was felt by the Drafting Party that the question of inclusion of this provision should be decided in connexion with the consideration of rules of liability in article IV of the Convention. In considering the provision quoted above, the Working Group should take note of the following suggestions which were made by various members of the Drafting Party:

(*a*) That the words "incident to" be deleted from the text;

(*b*) That the phrase "which by the contract of carriage is stated as being . . . and is so carried" be deleted, so that the clause would read as follows:

"In respect of cargo carried on deck", etc.;

(*c*) That the provision be modelled upon article 17, paragraph 4, of the Convention on the Contract for the International Carriage of Goods by Road (CMR) done at Geneva on 19 May 1956. This Convention states in part:

". . . . The carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

"(*a*) Use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note; . . .".

3. The Drafting Party agreed that it was not necessary to define the term "deck cargo", as had been suggested in paragraph 66 of the Secretary-General's report.

4. The Drafting Party considered that further provisions on deck cargo were needed and agreed that such provisions should reflect the following principles:[18]

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[13] The report of the Secretary-General discussed this subject at paragraphs 42 to 66.

[14] The suggested draft amendments are found in paragraphs 58, 60, 63 and 66 of the report of the Secretary-General.

[15] A/CN.9/WG.III(III)/CRP.19.

[16] The amendments made by the Working Group are the following: (*a*) the language of paragraph 3 was revised on the ground that the original wording was ambiguous; and (*b*) in paragraph 4 (*a*) the words "with usage", which had originally followed immediately after the word "shipper", were deleted, and the words "and possibly with usage" were added at the end of the subparagraph.

[17] As noted in paragraph 28 below, the Working Group did not reach agreement on this provision, and considered that it should be taken up at a future session of the Working Group.

[18] As noted in paragraph 29 below, some representatives expressed reservations about this paragraph.

(*a*) The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, or with statutory requirements, and possibly with usage.

(*b*) Any agreement between the carrier and the shipper to the effect that the goods can or may be carried on deck must be reflected in a statement in the bill of lading.

(*c*) If the bill of lading does not contain the statement referred to in paragraph (*b*) above, it shall be presumed that the carrier and shipper have not entered into such an agreement, but as against the shipper, the carrier shall be entitled to prove and invoke the true agreement.

The Drafting Party also agreed that the following principles should be given further consideration:

(*d*) If an agreement with the shipper that cargo shall be carried on deck is not reflected in the bill of lading, then the carrier shall not be entitled to invoke such agreement against a consignee who has acquired the bill of lading in good faith.

(*e*) If goods are carried on deck in breach of the principles referred to in paragraph (*a*) above, then the carrier shall be liable for all losses direct and indirect of on-deck storage.

Members of the Drafting Party expressed views both in favour and against the principles referred to in paragraphs (*d*) and (*e*) above. The Drafting Party recommended that these questions be given further consideration in order that a decision might be taken at the next session of the Working Group.

Consideration of the report of the Drafting Party

26. The Working Group reviewed the report of the Drafting Party, and accepted the revision of article I (*c*) of the Hague Rules as set out above.

27. The Working Group took note of paragraphs 2-4 of the Drafting Party's report.

28. Views were expressed both for and against the draft provision presented in brackets in paragraph 2 of the report under the heading "possible addition to article IV". This provision would have the effect of relieving the carrier from liability for loss or damage resulting from the special risks associated with on-deck carriage. Some representatives objected to the future consideration of this provision on the ground that deck cargo should be included within the Hague Rules on the same footing as all other cargo, and that the question should not be reopened. On the other hand, other representatives felt that a provision such as the "possible addition to article IV" should be included in the Hague Rules, and that its inclusion should be considered at a future session of the Working Group. Some representatives considered that this effect would in any case follow from the general rules of liability, provided that these rules were based on fault; these representatives concurred with the view expressed by the Drafting Party that this proposal should be considered in connexion with the rules of liability in article IV.

29. Some representatives stated that the principles set out in paragraph 4 of the Drafting Party's report would be relevant only if a provision containing special rules regarding the carrier's responsibility for deck cargo were subsequently added to the Hague Rules. On the other hand, one representative noted that these provisions are not related to the issue of liability for deck cargo but rather to the requirement that the carrier insert in the bill of lading a statement that the goods are or may be carried on deck in accordance with an agreement with the shipper. The legal effect of the failure of the carrier to insert such a statement in the bill of lading would be that such carriage of goods on deck would constitute a breach of contract.[19]

B. Live animals

30. As was noted above, the Working Group also considered the problems related to the exclusion of "live animals" from the definition of "goods" in article I (*c*) of the Hague Rules. The Secretary-General's report (paras. 64-74) pointed out that as a result of this exclusion the Hague Rules give no protection for loss or damage to live animals, and presented alternative approaches to resolving this problem.

31. Several representatives favoured the inclusion of live animals within the scope of the Hague Rules, but also noted that it would be appropriate to include a provision relieving carriers of liability for loss or damage resulting from the special risks involved in the carriage of animals. Two of these representatives proposed provisions which would take account of those special risks, and which are set out below:

(*a*) "Live animals, whether carried on deck or below deck, shall be considered as 'goods' within the meaning of this article, if it is proved that damage or loss resulted exclusively from unseaworthiness of the ship or from careless action by the carrier."[20]

(*b*) (To be added to article I (*c*))—"However, with respect to the carriage of live animals, all clauses relating to liability and compensation arising out of the risks inherent in such carriage shall be permitted."[21]

32. Some other representatives who favoured the inclusion of live animals within the scope of the Hague Rules felt, however, that the provisions of article IV

[19] The following proposal designed to achieve such objectives was submitted by one representative:

"1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, with usage or with statutory requirements.

"2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired the bill of lading in good faith.

"3. Where the goods have been carried on deck contrary to the provisions of paragraph 1, the carrier shall be liable for loss of or damage to the goods which result solely from the carriage on deck in accordance with the provisions of [article 4, paragraph 5, as amended by the 1968 Additional Protocol]. The same shall apply when the carrier in accordance with paragraph 2 of this article is not entitled to invoke an agreement for carriage on deck."

[20] A/CN.9/WG.III(III)/CRP.3.

[21] A/CN.9/WG.III(III)/CRP.4.

(2) were sufficient to protect carriers against any special risks inherent in the carriage of animals.

33. Several other representatives indicated their opposition to the inclusion of live animals within the scope of the Hague Rules. They thought that difficulties in ascertaining the cause of loss or damage to live animals would lead to dispute ("friction") between carriers and cargo owners if live animals were included. They suggested that the carriage of live animals should be regulated, if at all, in separate rules. However, they did not see the problem as an important one in practice. On the other hand, other representatives did regard the problem as important and saw no reason why shippers of live animals should be without any protection for loss, without regard to whether the loss resulted from special risks resulting from such carriage.

34. In view of the lack of agreement on the approach to be followed in dealing with live animals, the Working Group decided to defer a decision on the subject. Some representatives indicated that they would need more information in order to decide upon an appropriate approach to the problem. The observer from UNIDROIT suggested that the Commission might find it appropriate to request UNIDROIT to prepare a study on the rules which should apply to the carriage of live animals.

III. Clauses of bills of lading confining jurisdiction over claims to a selected forum

CHOICE OF FORUM CLAUSES

35. The Working Group considered part three, sections A, B and C, of the report of the Secretary-General (paras. 75-125), which look up problems presented by clauses in bills of lading providing that claims arising from the contract may only be asserted in a designated forum. The report noted that the place specified for suit in the bill of lading is often so inconvenient to cargo owners as to impede the fair presentation and adjudication of claims. The 1924 Brussels Convention (Hague Rules) contains no provision addressed to this question. The report summarized existing legal rules in the field; it indicated that those rules vary widely among different legal systems and that their impact is in doubt in many systems.

36. Five possible approaches were outlined in this part of the Secretary-General's report. The first approach was not to add any provision on the subject. The second approach called for a provision declaring all choice of forum clauses to be invalid. The third approach envisaged a provision setting out general criteria for the effectiveness of choice of forum clauses. The fourth approach, which was embodied in draft proposal A,[22] called for a provision specifying several alternative places before which a claim may be brought. The fifth approach, which was embodied in draft proposal B,[23] would give effect to choice of forum clauses in the contract so long as they set forth at least the alternative places for suit specified in the statute.

37. In the discussion of the subject by the Working Group there was general support for the insertion of a provision in The Hague Rules regulating choice of forum clauses. A few representatives, however, suggested that a separate protocol containing the provision on choice of forum would be desirable because it would make it possible for States to adopt the rules on carrier responsibility contained in The Hague Rules even if they were opposed to a provision on jurisdiction. Most of the representatives who spoke favoured the approach taken in draft proposal A in the Secretary-General's report, subject to certain amendments and additions.

38. After the discussion of this subject by the Working Group, a drafting party was requested to develop a provision reflecting the consensus reached in the plenary sessions.

39. The Drafting Party decided that a provision on choice of forum clauses should be added to the Hague Rules. The draft provision was set forth in a report which was submitted to the Working Group. That report, with certain amendments made by the Working Group, is as follows:

Report of the Drafting Party: Jurisdiction Clauses, Choice of Forum

1. Drafting Party 1 considered the addition to the 1924 Brussels Convention of a provision to reflect the views on policy expressed in the discussion of the Working Group with respect to choice of forum clauses.

2. The Drafting Party agreed to base its work on the provisions in draft proposal A in paragraph 113 of the report of the Secretary-General, in accordance with the views expressed in the Working Group. It was also agreed that the proposal contained in CRP.11[24] should be used as the basis for style of drafting.

3. The Drafting Party recommends the following provision on choice of forum clauses:

[*Proposed draft provision*]

A. (1) In a legal proceeding arising out the contract of carriage the plaintiff, at his option, may bring an action in a contracting State within whose territory is situated:

(*a*) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or

(*b*) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(*c*) The port of loading; or

(*d*) The port of discharge; or

(*e*) A place designated in the contract of carriage.

[22] Report of the Secretary-General, para. 113.
[23] *Ibid.*, para. 125.
[24] A/CN.9/WG.III(III)/CRP.11.

(2) (*a*) Notwithstanding the preceding provisions of this article an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph A for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(*b*) All questions relating to the sufficiency or otherwise of the security shall be determined by the court at the place of the arrest.

B. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

C. (1) Where an action has been brought before a court competent under paragraph A or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought.

(2) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement shall not be considered as the starting of a new action.

(3) For the purpose of this article the removal of an action to a different court within the same country shall not be considered the starting of a new action.

D. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

Notes on the proposed draft provision

4. The attention of the Working Group is drawn to the following matters:

(*a*) *Paragraph A (1)* (e): Some representatives reserved their position.

(*b*) *Paragraph A(2)*: Consideration should be given to the relationship between this provision and the International Convention for the Unification of certain Rules relating to the arrest of sea-going ships (Brussels 1952) which also contains rules relating to jurisdiction.

(*c*) *Paragraph B*: The second sentence is based on article 4 of the Convention on the Jurisdiction of the Selected Forum in the case of International Sale of Goods (1958).

(*d*) *Paragraph C(1)*: The Drafting Party also considered the inclusion of the provision contained in article 1 (3) of the International Convention on certain rules concerning civil jurisdiction in matters of collision (Brussels, 1952).

Consideration of the report of the Drafting Party

40. The Working Group considered the above-quoted report of the Drafting Party. Many representatives stated that they assumed that the provision on choice of forum clauses that was being considered was a preliminary draft, and that this provision would be subject to review. On this assumption, the Working Group approved the report, subject to the comments which are set out below. These comments are presented in the order in which the provisions appear in the proposed draft provision.

41. *Paragraph A. General structure.* Paragraph A(1) provides a plaintiff with five possible places for bringing an action. The first four, in subparagraphs (*a*) to (*d*), are independent of any contract provision. The fifth possible place, provided by subparagraph (*e*), would be available if designated in the contract of carriage, but the contract may not eliminate any of the choices set forth in paragraphs (*a*) to (*d*). The provision, it will be noted, applies to any legal proceedings arising out of the contract of carriage; the "plaintiff" to which this provision applies could be either the cargo owner or the carrier.

42. One representative suggested that the word "plaintiff" in paragraph A(1) of the draft provision be bracketed to reflect his position that paragraphs (*a*) through (*d*) should be applicable only to shippers and consignees as their interests may appear.

43. Another aspect of paragraph A that led to comment was the opening provision that a plaintiff may bring an action in a contracting State "within whose territory is situated" one of the places listed in the five subparagraphs (*a*) to (*e*). Thus the action need not be brought at the "place" of business or at the "port" of loading or of discharge. Some representatives proposed a change in this approach; under one formulation the words "in a contracting State within whose territory is situated" would be replaced by the following words: "in a following place in a contracting State". It was considered by these representatives that the present formulation of the provision which referred to the territory of a State did not sufficiently specify where an action should be brought and might result in the bringing of an action in an inconvenient forum, especially with respect to large States. In opposition to this proposed change it was noted that the concept of "place" was vague, and in relation to paragraphs (*c*) and (*d*) the tribunal located in the port may not be the competent one. It was further noted that in many legal systems the problem was minimized by rules on the appropriate court for suit (*venue*), and that as a practical matter plaintiffs will bring their actions in a court where the evidence may conveniently be presented rather than in a place remote from the transaction.

44. With respect to the second line of paragraph A(1) of the proposed draft provision, a few repre-

sentatives stated that the word "contracting" introduced an element which deserved careful examination. It was observed that this element might defeat the underlying purpose of the draft provision which was to give the claimant a choice of jurisdictions in which to bring suit; consideration should thus be given to its deletion.

45. With respect to paragraph A(1) (*b*) of the proposed draft provision, one representative indicated a preference for the deletion of the word "agency", and added that the insertion of this word could create the risk of actions being brought in places unduly remote from the place were the damage occurred. Another representative stated that clause (*b*) is superfluous and increases unduly the number of places available to the claimant.

46. With respect to paragraph A(1) (*e*) of the proposed draft provision, several representatives expressed reservations, and some expressed the view that this clause should be deleted. These representatives indicated further that they could support a provision permitting the parties by contract to add a place for suit to the choices specified in (*a*) to (*d*) only if such a choice provided by contract were available to parties interested in the cargo, and not to the carrier. It was indicated that such a distinction was made because the contract of ocean carriage was a contract of adhesion which was normally prepared by carriers; the Hague Rules should permit only forums freely chosen by the parties.

47. With respect to paragraph A(2) of the draft provision, other representatives referred to the note on this provision in paragraph 4 (*b*) of the Drafting Party's report on the subject and indicated that this was a provision which might give rise to difficulties for States parties to the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships (Brussels, 1952), and that it would be better to delete it, or at any rate to place it in brackets. One representative further stated that this paragraph was unacceptable since it would result in an unjustified extension of the number of competent jurisdiction available to claimants. He observed that this paragraph covered substantive claims made on the basis of the arrest of a ship and not only the provisional and protective measures set out in the second sentence in paragraph B of the draft provision. This latter provision, it was suggested, strengthened the view that paragraph A(2) is meant to confer jurisdiction for purposes of presenting claims in places where the ship may be arrested.

48. The Chairman of the Drafting Party set out the view of the Drafting Party on the relationship of paragraph A(2) to the second sentence of paragraph B. He stated that the second sentence of paragraph B makes it clear that the proposed draft provision was not meant to confer the right of arrest of ships; this right is left to national laws. Paragraph A(2)(*a*) provides only that once a ship is arrested (in accordance with national law) an action may be brought under the circumstances prescribed in this paragraph, and subject to the removal and security provisions set forth therein.

49. One representative suggested that any provision on jurisdiction clauses should be based on the principle of the autonomy of the wills of the parties, and therefore such a provision should recognize as valid any forum agreed to by the parties. This provision might designate alternative competent courts in cases where the parties have not agreed to a forum in the bill of lading. On the other hand, in view of the potential difficulties in finding a balanced approach to this subject, and in view of the complexities of the procedural aspects of the problem, it was suggested by the same representative that an alternative solution might be that no provision on jurisdiction clauses be included in the Hague Rules.

Arbitration clauses

50. The Working Group considered part three, section D, of the Secretary-General's report (paras. 127-149) which takes up arbitration clauses. The 1924 Brussels Convention (Hague Rules) contains no provision on arbitration. It was noted in the report that regulation of choice of forum clauses by a new provision in the 1924 Brussels Convention could result in a more widespread insertion by carriers of arbitration clauses in bills of lading in an attempt to control the place for presentation of claims.

51. A number of possible alternatives are suggested in the report. Alternative (*a*) would call for no change in the existing legal rules. Alternative (*b*) would call for a provision declaring arbitration clauses to be ineffective. Alternatives (*c*) and (*d*) which are embodied in draft proposals C and D[25] would call for a provision specifying alternative places where arbitration may be brought. Alternative (*e*), which is embodied in draft proposal E,[26] relates to the application of the rules of the 1924 Brussels Convention in arbitration proceedings.

52. In plenary sessions of the Working Group there was general support for the view that the Hague Rules should include a provision on arbitration clauses with special reference to the place where the proceedings may be held. It was also stated by most representatives that any provision on arbitration should assure that the Hague Rules would be applied in such arbitration proceedings. In this connexion many representatives supported the approach in draft proposal E of the report of the Secretary-General (para. 147), which provides: "The contract of carriage may contain a provision for arbitration only if that provision states that this Convention shall be applied in the arbitration proceedings."

53. Three draft proposals were put forward and each received support from some representatives.

54. One of these draft proposals reflected the view of several representatives that the approach to arbitration clauses should be the same as the one taken by the Working Group with respect to choice of forum clauses. (See alternative A in the report of the Secretary-General, para. 113.) This approach called for a provision which would permit the insertion of an arbi-

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[25] Report of the Secretary-General, paras. 136, 141.

[26] *Ibid.*, para. 147.

tration clause in the bill of lading, but which would give the plaintiff the right to choose his arbitral forum from a limited number of places. This draft proposal[27] reads as follows:

1. In legal proceedings arising out of the contract of carriage, provision may be made in the contract for arbitration proceedings in accordance with an arbitration clause. These proceedings may take place, at the option of the plaintiff, in a contracting State within whose territory is situated:

(*a*) The principal place of business of the carrier or the carrier's branch or agency through which the contract of carriage was made; or

(*b*) The place where the goods were taken in charge by the carrier; or

(*c*) The place designated in the contract for delivery of the goods to the consignee; or

(*d*) The place designated in the contract of carriage [or selected by the person or body designated in the arbitration clause].

2. The arbitration clause shall state that the designated arbitrator must apply this Convention; otherwise, such clause shall be null and void.

3. After a dispute has arisen, the parties may enter into an agreement selecting the territory of any contracting State as the place of arbitration [or any person or body in a contracting State]. The parties may agree that the arbitrator shall act as an *amiable compositeur*.

55. Another draft proposal presented in two alternatives reads as follows:

*Alternative I**

Notwithstanding the provisions of the preceding article [. . . dealing with jurisdictional matters . . .] arbitration clauses in a contract of carriage shall be allowed provided the designated arbitration shall take place within a contracting State and shall apply the [substantive] rules of this Convention.

*Alternative II***

Notwithstanding the provisions of the preceding article [. . . dealing with jurisdictional matters . . .] arbitration clauses in a contract of carriage shall be allowed provided it has been thereby stipulated that the arbitral body or arbitrators designated in the contract:

(*a*) shall apply the [substantive] rules of this Convention, and

(*b*) shall hold the [arbitration] proceedings within a contracting State at one of the places referred to in the [said] article [. . .] or at the place chosen by such arbitral body or arbitrators.[28]

56. A third proposal presented to the Working Group would confine recourse to arbitration to cases where the parties agreed to arbitration after the dispute arose. This proposal states as follows:[29]

Notwithstanding the provisions of the preceding paragraph, after the occurrence of an event giving rise to a claim the parties may agree on a jurisdiction where legal action may be commenced or submit the case to arbitration for a final decision in accordance with the rules of this Convention.

57. The Working Group was unable, within the time available at this session, fully to consider these various proposals. It was therefore decided to defer further consideration of this subject until the next meeting of the Working Group.

IV. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and the carrier

58. Part four of the report of the Secretary-General (paras. 150-269) responded to the request that the Secretary-General prepare a report "analysing alternative approaches to the basic policy decisions that must be taken in order to implement the objectives, set forth in paragraph 2 of the UNCTAD resolution and quoted in paragraph 1 of the Commission's resolution,[30] with special reference to establishing a balanced allocation of risks between the cargo owner and the carrier". Section B of part four of the report (paras. 152-177) summarized the law on the bases of liability and the present burden of proof scheme under the Hague Rules. Section C (paras. 178-214) described and analysed certain major factors, or policy considerations, that should be weighed in formulating the rules as to carrier liability for cargo loss or damage. Section D (paras. 215-230) compared the rules on liability and burden of proof established by international conventions on carriage of cargo by air, by rail and by road. The final section of part four, section E (paras. 231-269), considered the pertinent provisions of the Hague Rules in the light of the above policy considerations and considered possible amendments to the Rules that would implement these considerations.

59. Section E of the report of the Secretary-General drew attention to three possible approaches to substantive responsibility: (1) strict liability, regardless of fault, for loss or damage of cargo while in the custody of the carrier (paras. 232-234); (2) simplified standards for liability and burden of proof based on other international conventions governing carriage of cargo (para. 236); (3) modification of specific substantive provisions of the Hague Rules, e.g. article IV (2) (*a*) (paras. 240-245) and article IV (2) (*b*) (para. 246). Section E also analysed in detail the complexities and uncertainties that had developed in connexion with

* Cf. art. 32 of the Warsaw Convention (para. 134 of the Secretary-General's report) and draft proposal E (para. 147 of the report).

** Cf. art. 32 of the Warsaw Convention (para. 134 of the Secretary-General's report) and draft proposals D and E (paras. 141 and 147 of the report).

[27] A/CN.9/WG.III(III)/CRP.17.

[28] A/CN.9/WG.III(III)/CRP.18.

[29] A/CN.9/WG.II(III)/CRP.21.

[30] UNCITRAL, Report on fourth session (1971), para. 19; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

burden of proof under the Hague Rules and in paragraph 269 set forth a draft proposal for amendment to the Hague Rules to simplify and strengthen the Rules on this question.

60. Most representatives who spoke on the subject agreed that the liability scheme in the Hague Rules should be revised to reflect a more balanced allocation of risks between carriers and shippers. These representatives also agreed that the rules on liability and burden of proof should be simplified.

61. The Working Group focused its discussion on the three alternative approaches to substantive responsibility and on the simplified rules on burden of proof set forth in the Secretary-General's report.

62. *Responsibility not based on negligence.* The first alternative approach considered by the Working Group was to place responsibility upon the carrier for safe delivery of cargo, subject only to limited exceptions such as fault of the shipper—an approach sometimes referred to as "strict liability". It was the general view of the Working Group that the imposition of strict liability on the carrier would not provide an acceptable solution to the problem of ocean carrier liability. Several representatives stated that the adoption of such a liability principle might cause an increase in insurance premiums and thus a rise in ocean freight rates. Other representatives thought that strict liability was inappropriate in view of the special characteristics of ocean transport.

63. On the other hand, some representatives favoured an approach which would make the carrier fully responsible for the arrival of the goods in a satisfactory state unless be proves a fault of the shipper, inherent vice in the goods, or case of *force majeure* which consists in an event that is unforeseeable, external to the carrier and cannot be overcome by the carrier or his servants. Under this approach the system of exemptions would be simplified, and the responsibility would be placed on a clearer and firmer basis.

64. *Conformity with approach of other international conventions.* The second alternative approach was conformity of standards of responsibility for ocean carriers to the approach of international conventions governing other types of transport—by air (the Warsaw Convention), by rail (CIM) and by road (CMR). Some representatives stated that the liability scheme of the other transport conventions deserved the Working Group's close attention. On the other hand, caution was expressed against uncritical application of the solutions provided in those conventions, because ocean transport was different in nature and had different requirements from other modes of transport. However, harmonizing the bases of liability of the transport conventions was accepted as a desirable goal to the extent that this would be practical; in this connexion, attention was drawn to the fact that combined transport encounters practical difficulties because of the differences between the liability of ocean carriers and other types of carriers.

65. *Specific provisions on liability.* The Working Group focused most of its discussion on the exemptions from liability for fault of the agents or servants of the carrier contained in article IV (2) (*a*) (navigation and management of the ship) and article IV (2) (*b*) (fire). Many representatives who spoke on the subject stated that the exception in article IV (2) (*a*) should be deleted. On the other hand some representatives expressed doubts about the necessity of the total deletion of this exception, and suggested that the exception with respect to navigation might be more readily justified than the exception with respect to management of the ship. Several representatives stated that the exception in article IV (2) (*b*) should be deleted. In the view of some other representatives the deletion of this exception would have the effect of placing strict liability for fire on the carrier since it might be difficult or impossible to establish that fire did not result from a lack of due care.

66. It was felt by some representatives that it was necessary to examine in more detail the effects of deleting the various exemption clauses in article IV (2) of the Hague Rules. They referred to the lack of data on the effects that a shift in the allocation of risks would have on freight and insurance.

67. *Burden of proof.* Many representatives stated that rules on burden of proof under the Hague Rules were complex and unclear, and thus interfered with the efficient and just adjustment of claims. In the view of many representatives the rule on burden of proof proposed in paragraph 269 of the Secretary-General's report formed a sound basis for discussion and should be adopted by the Working Group as a broad basis for its future considerations. They noted that under this proposal, once the shipper proved specified preliminary facts on which he had information (see paragraph 269, article IV (2) (*a*) (1-5)), the burden of proof would shift to the carrier as to all other matters (see paragraph 269, article IV (2) (*b*)). These representatives observed that only the carrier had reasonable access to information concerning events occurring during the voyage; the proposal consequently made a fair allocation of the burden of proof. A number of representatives suggested that the language in the first paragraph of the draft proposal should be cast in positive form.

68. Some representatives expressed reservations about the above approach to burden of proof. Others indicated that further consideration should be given before a decision could be taken concerning such a change in existing relationships that a simplification of the rules on burden of proof would result from the adoption of a system of full responsibility whereby the carrier would have to overcome the presumption against him.

69. Some representatives expressed the view that in considering the revision of the Hague Rules UNCITRAL should confine itself to legal questions and should not re-examine policy considerations based on economic and commercial aspects that had been taken into account by the UNCTAD Working Group on International Legislation on Shipping, since UNCTAD has a major responsibility in the economic and commercial aspects of shipping. Other representatives observed that UNCITRAL, in shaping its recommendations on the precise provisions of the revised Rules, should take fully into account the considerations reflected in the UNCTAD Working Group and any

further facts elicited in the course of UNCITRAL's examination of the subject, because this would be necessary in order to form appropriate judgements on the various questions arising when formulating particular draft texts.

70. In conclusion, most representatives were of the view that further work should proceed along the following lines:

(*a*) Retention of the principle of the Hague Rules that the responsibility of the carrier should be based on fault;

(*b*) Simplification and strengthening of the above principle by (e.g.) the removal or modification of exceptions that relieved the carrier of responsibility for negligence or fault of his employees or servants (see articles IV (2) (*a*) and (*b*);

(*c*) Simplification and unification of the rules on burden of proof; to this end careful consideration should be given to the proposal in paragraph 269 of the report of the Secretary-General.

71. It was noted that many representatives had reservations or doubts concerning some of the foregoing principles and that other representatives felt that further information was needed before final decisions could be taken. It was therefore agreed that the above should be considered further.

Future work

72. The Working Group noted that it had been unable to take final action on all of the subjects assigned for consideration at the present session. In view of the urgency attached to the expeditious completion of the pending work on bills of lading, most representatives expressed the view that it would be advisable to hold a special session for the completion of the topics assigned to the present session. At this special session, priority should be given to the basic question of the carrier's responsibility. It was suggested that an appropriate time for the special session would be the autumn of 1972, and that such a session preferably should be scheduled for two weeks. It was agreed that a final decision on the holding of such a session should be taken at the fifth session of UNCITRAL.

73. The Working Group also considered what new topics should be taken up in addition to those that have been assigned for the present session. It was decided that at the next regular session the Working Group should take up the remaining topics listed in the resolution adopted by UNCITRAL at its fourth session.[31] It was agreed that emphasis should be given to those topics that relate particularly to the basic question of the carrier's responsibility (see para. 72, above).

74. It was further decided that the Secretary-General should be requested to prepare a report setting forth proposals, indicating possible solutions, with respect to the above topics, and to circulate this report to members of the Working Group and to observers in time for its consideration in advance of the next regular session of the Working Group.

75. To provide material needed in the preparation of the above-mentioned report, the Secretary-General was requested to invite comments and suggestions from Governments and from international and intergovernmental organizations active in the field. To the same end, members of the Working Group were invited to prepare studies and proposals and to transmit them to the Secretary-General.

76. For consideration at the next regular session, the Secretary-General was also requested to prepare a report identifying any related problem areas in the field of ocean bills of lading not specifically named in the list adopted by UNCITRAL at its fourth session.

[31] UNCITRAL, Report on fourth session (1971), par. 19, *ibid.*

Annex

RESPONSIBILITY OF OCEAN CARRIERS FOR CARGO—BILLS OF LADING: REPORT OF THE SECRETARY-GENERAL

INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its fourth session approved a programme of work for the examination of rules and practices relating to the responsibility of ocean carriers for cargo in the context of bills of lading.[1] This programme of work was developed by the UNCITRAL Working Group on International Legislation on Shipping which was established by the Commission at its second session[2] and by an enlarged Working Group which was established by the Commission at its fourth session.[3] As will be seen, this programme was developed in the light of recommenda-

[1] Report of the United Nations Commission on International Trade Law on the work of the fourth session (1971), *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17* (A/8417) (herein cited UNCITRAL, report on the fourth session (1971)), chap. II, paras. 10-23; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

[2] UNCITRAL Working Group on International Legislation on Shipping, report on its second session (22-26 March 1971) (A/CN.9/55) (herein cited UNCITRAL Working Group, report on second session (1971)); UNCITRAL Yearbook, vol. II: 1971, part two, III. This report set forth recommendations on the field for inquiry and the general objectives of further work in this area.

[3] The enlarged Working Group met in the course of the Commission's fourth session and developed a plan for specific steps to implement the programme of work. The Commission approved this plan. UNCITRAL, Report on the Fourth Session (1971), paras. 22 and 23; UNCITRAL Yearbook, vol. II: 1971, part one, II, A. A fuller account of the historical background appears in the above-cited reports of UNCITRAL, and of the Working Group.