Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules

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One assumption common to most international commerce is that uniformity serves efficiency.[1] Numerous conventions covering the carriage of goods have sought this objective.[2] Several international conventions are currently in force, governing international ocean transport,[3] international air transport,[4] European road transport,[5] and European rail transport.[6] These conventions provide international legal uniformity for their particular mode of transport, but where cargo is transferred from one mode to another, a different legal regime controls.[7]

To illustrate, assume an English manufacturer sells goods to buyers in the United States and agrees to deliver them to the buyer's warehouse (point to point delivery). The carriage will consist of a road carrier to get the goods from the factory to the railway, the railways to get the goods to the port of loading, a shipping company to ship the goods to the United States, and finally domestic rail and road carriers. Liability for damage during each one of these modes is covered by a

1. *See* Massey, *Prospects for a New Intermodal Legal Regime: A Critical Look at the TCM*, 3 J. MAR. L. & COM. 725, 726 (1972). *See also* Giles, *Combined Transport*, 24 INT'L & COMP. L.Q. 379, 380 (1975).

2. Massey, *supra* note 1, at 726.

3. International Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, Aug. 25, 1924, 51 Stat. 233 (1937), T.S. No. 931 [hereinafter cited as Hague Rules]. The United States became a party to this Convention on December 29, 1937, and has implemented it under the Carriage of Goods by Sea Act [COGSA], 46 U.S.C. §§ 1300 to 1315 (1976).

4. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 [hereinafter cited as Warsaw Convention].

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

6. International Convention Concerning the Carriage of Goods by Rail, Oct. 25, 1952, 241 U.N.T.S. 336 [hereinafter cited as CIM].

7. Massey, *supra* note 1, at 726. Compare this lack of uniformity with United States Interstate Commerce Act, 49 U.S.C. §§ 1-27, 301-327, 901-923, 1001-1022 (1976), a uniform legal regime for all surface transport in the United States without regard to mode.

different convention. The sender-seller must engage a forwarding agent to make all necessary arrangements, which include several contracts of carriage with several carriers. Where the goods become lost or damaged, the shipper can seek redress from the individual carriers, but where the stage at which the loss or damage occurred cannot be determined, there is no remedy for the shipper.[8] This problem is compounded with the advent of containerization.

CONTAINER REVOLUTION

The wide-spread use of containers for transporting goods has been termed "inter-modal transport"[9] or "containerization."[10] This novel concept involves transferring, handling, stowing, discharging, and delivering hundreds of packages simultaneously and mechanically by means of large reusable permanent metal containers, container ships, special container handling equipment, and container terminals.[11] These containers are generally transported via several modes of transportation from an inland point of departure to an inland point of destination.[12]

The development of containerization has been spurred by inefficiency in conventional shipping procedures.[13] Formerly, individual

8. Giles, *supra* note 1, at 379. In Europe, a sender of packages is more fortunate. A Universal Postal Convention established in 1875 created a "universal postal territory." Once the sender presents the packet to his local post office and pays the fee, the liability for the packet rests with the postal authorities, and they must try to discover where the casualty occurred. If it can be ascertained in which postal area responsibility lies, then that postal administration refunds the sender's fee to the sender's original postal administration which in turn forwards the fee to the sender. But where discovery leads nowhere, all the postal authorities share the liability pro rata. *Id. See* Universal Postal Convention, Oct. 3, 1957, 364 U.N.T.S. 1.

9. "Inter-modal" refers to the use of more than one mode to carry goods. Thus, if goods are shipped by trailer truck the trailer may be transferred to a railroad, a ship, or to an air carrier for part of the transportation. A trailer on a railroad flatcar is sometimes called piggyback or T.O.F.C. (Top of Flat Car). A trailer on a ship is sometimes called fishback. A container transferred from truck to railroad is sometimes referred to as C.O.F.C. (Container on Flat Car). S. SORKIN, HOW TO RECOVER FOR LOSS OR DAMAGE TO GOODS IN TRANSIT, APP J-3 (1977).

10. "Containerization" enables carriers to put all cartons and packages going to a particular destination into one huge container which is lifted on and off trucks, trains, ships, and planes by special machinery. S. SORKIN, *supra* note 9, at APP J-2. This process reduces handling, pilferage, paperwork, and turn around time of carriers. *Id.*

The "container revolution" has been called one of the most important technological developments in the transportation of goods by sea since steam replaced sail. *See* Simon, *The Law of Shipping Containers*, 5 J. MAR. L. & COM. 507, 507 (1974). Total U.S. ocean foreign trade carried by all carriers increased from about 50 million tons in 1970 to 56 million tons in 1976—an increase of 12%. H. Tombari, *Trends in Oceanborne Containerization and Its Implications for the U.S. Liner Industry*, 10 J. MAR. L. & COM. 311, 314 (1979). On the other hand, containerized cargo carried by all flags jumped from less than eight million tons to over 17 million tons in the same four-year period—an increase in total containerized cargo of over 124%. *Id.* Thus, carriage of containerized cargo in U.S. foreign trade was growing about ten times faster than foreign trade itself. *Id.* Containerization has had a major impact on ocean carriage but a minor impact on inland carriers. *See* N.Y. Times, July 11, 1972, at 70, col. 1 (citing a study done for the Maritime Administration).

11. Simon, *supra* note 10, at 507.

12. Thompson, *International Carriage by Container*, 1 J. WORLD TRADE L. 434, 434 (1967).

13. *Id.* The high productivity of inter-modal shipping systems permits American operators

packages were loaded and unloaded individually, causing inefficiency in the use of port facilities and services.[14] But with the use of containers, large numbers of packages can be quickly and efficiently loaded or unloaded from the ships,[15] reducing ships' port time[16] and increasing efficiency and speed of shipping generally.[17]

When shipping internationally with containers, damage or loss to the goods is generally discovered by the consignee (buyer) only upon

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to compete effectively against foreign operators. MARITIME ADMINISTRATION, DEP'T OF COMMERCE, IS IT TIME FOR A CHANGE?: PROCEEDINGS OF A SYMPOSIUM ON CARGO INSURANCE AND TRANSPORTER'S LIABILITY 1 (1973) [hereinafter cited as SYMPOSIUM]. The United States has already invested $7 billion in this concept and has the largest inter-modal fleet in the world. *Id.* Containers are purchased or leased by carriers and are about 8 feet high, 8 feet wide, and vary in length from 40 feet to 8 feet. Simon, *supra* note 10, at 510. One standard size container is that used by American Airlines aboard the Boeing 747; it measures 8 feet by 10 feet, has a maximum gross weight of 15,000 pounds, and a volume of 620 cubic feet. *See* 76 DISTRIBUTION WORLDWIDE, July 1977, at 23.

14. *See* Thompson, *supra* note 12, at 434.

15. Special container ports are in operation throughout the world, with terminals equipped with special cranes to permit carriers to move containers to and from huge container depot areas. The port of Antwerp, Belgium has a container area of over 250 acres, 76 DISTRIBUTION WORLDWIDE, July 1977, at 94; Chicago, 25 acres, *id.* at 97; Houston, 75 acres, *id.* at 102-03; Hong Kong, 220 acres, *id.* at 102; Marseilles, France, 80 acres, *id.* at 107; and Los Angeles, 262 acres, *id.* at 104.

16. Thompson, *supra* note 12, at 434. At present, the average cargo ship spends up to half its time in port. *Id.* Container ships at special terminal ports can now be loaded or unloaded much faster. *Id.*

17. The efficiency of dealing with container-sized loads instead of individual packages is dramatized by the following example. Before containerization, a shipment of 300 cartons of shoes would have been delivered loose to a carrier's pier by truck or rail. They would be individually unloaded and stored in the carrier's warehouse to await the arrival of the ship. This work is done piecemeal, in very small lots or by the use of pallets. When the vessel arrives, the 300 cartons, again in small lots, are manually brought alongside ship on a forklift, then manually loaded into slings or on special pallets and hoisted into the ship's hold. These cartons are then stacked individually in the compartment of the ship. Additionally, wooden fences would have to be constructed to prevent the packages from moving or toppling when the ship pitches and rolls at sea. Upon arrival the cartons are unloaded in much the same manner.

Containerization would require the use of a single, reusable metal container loaded with the 300 cartons. It would be delivered to the pier and placed either in an enclosed shed or in a "farm area" of the terminal awaiting arrival of the ship. The container is loaded by cranes into specially built vertical steel cells within the ship, which hold the containers in place. What formerly required laborious manual handling is now accomplished quickly and efficiently, saving labor and reducing claims payments. There is less risk of damage to the cargo because now it is handled fewer times manually and the packages are protected in the metal shells. Ships spend less time in port, and freight rates are reduced accordingly. Simon, *supra* note 10, at 510-12.

Alternative methods of moving containers are employed. One system involves the use of roll-on-roll-off (ro-ro) container ships. The container is attached to a trailer with chassis and wheels affixed. The trailer is then wheeled on and off the ship. This method allows for the trailer to be delivered directly to the dock, rolled aboard the ship at port, and rolled off the ship at the point of debarkation. The trailer is then reattached to the motor carrier for delivery to the consignee. S. SORKIN, *supra* note 9, § 1.13[1]. One ro-ro vessel, the *Seaspeed Arabia*, is 80 feet in width and 500 feet in length. It is capable of being loaded with 20-foot and 40-foot containers, stacked two high, by three special lift trucks in less than three hours. This ship has a special stabilization system that cuts roll to 30 degrees. The *Seaspeed Arabia* has a gross weight of 21,700 tons, the largest ro-ro vessel in the world. 76 DISTRIBUTION WORLDWIDE, August 1977, at 38.

Another system is the cellular container ship. Generally, standard containers, either 20 or 40 feet long, are lifted by special cranes or mechanical lifting devices from the trailer chassis or railroad flatcar and loaded aboard the ship. S. SORKIN, *supra* note 9, § 1.13[2]. Lighter Aboard Ship (LASH) container ships have a floating container or box in which the container can be floated out to the mother container ship, lifted by crane into the belly of the ship, and at destination unloaded into the water and floated to the dock. *Id.* § 1.13[3].

final delivery, and it is frequently difficult to determine where or when the loss or damage occurred and which carrier is responsible.[18] Clearly, one carrier or one party should assume responsibility for loss or damage in intermodal transportation.[19] Efficient operation of international trade would be more readily achieved by the use of a single document providing for thorough, door-to-door transit, eliminating the need for numerous consignment notes and bills of lading.[20]

This Note will examine an attempt made through a draft convention to deal with liability problems brought about by combined transport. An alternative scheme is proposed for container transport, utilizing the liability schemes of existing conventions covering international transportation of goods where possible and suggesting another liability scheme where these conventions are not applicable. Policy considerations are analyzed to determine an appropriate liability standard for containerized transportation where present conventions are not applicable. This system, incorporating present conventions where possible and using an alternative scheme to govern liability where necessary, would serve as an appropriate vehicle for a future draft convention for combined transport.

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18. *See* Aetna Ins. Co. v. General Terminals Trf. & Storage, Inc., 225 So. 2d 72 (La. Ct. App. 1969). In this case, merchandise was packed into 11 containers in Florence, Italy, which were trucked to Leghorn, an Italian seaport, and loaded aboard the carrier's vessel which issued a bill of lading acknowledging receipt of the containers in apparent good order. One month later the vessel delivered the containers, in the same apparent good order and condition, to the co-defendant who had been hired to truck the containers from the piers to the plaintiff's warehouse. When the containers were finally opened, damage to the goods was discovered. *Id.* at 73. In an action against the trucking company and the steamship company, judgment was for the defendants and the appellate court affirmed. *Id.* at 74.

In order to recover a claim against a carrier for damage to, or loss of, goods in transit the consignee must prove: (1) receipt of the goods by the carrier in good condition; (2) the damaged condition or the loss of the goods when delivered; and (3) the amount of the loss. *See* The Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (1976). The court in *Aetna Ins. Co. v. General Terminals* recognized that evidence regarding the condition of goods in shipments originating in distant ports, together with their custody and transportation, is difficult to obtain and that the carrier's receipt or bill of lading may in some cases establish a prima facie case of receipt by the carrier in good order and condition. 225 So. 2d at 74. But where the goods are containerized and where the damage is of the kind that could have been present without being observable from the exterior of the containers when they were delivered to the carrier, the bill of lading relates only to the containers themselves and not their contents. Under these circumstances, the court required the consignee to offer further evidence of the good condition of the contents upon receipt by the carrier. *Id.*

19. S. SORKIN, *supra* note 9, § 3.16[2]. The need for such responsibility becomes apparent when one considers a shipper in Chicago who contacts a carrier in New York to ship goods by sea to La Havre and from there by rail to Paris. In the event the goods were lost when being transported by rail to Paris, a single carrier is responsible for the entire carriage, thereby avoiding litigation in France. Also, in shipping via container, there is often difficulty in determining at what stage the loss or damage occurred and without such proof the shipper is left with no redress. *See* Aetna Ins. Co. v. General Terminals Trf. & Storage, Inc., 225 So. 2d 72, 74 (La. Ct. App. 1969); Giles, *supra* note 1, at 379. Fairness favors placing the risk on a carrier responsible for the entire carriage, who would be in a better position to prevent the loss, than on the shipper who loses control over the goods upon their delivery to the carrier.

20. *See* S. SORKIN, *supra* note 9, §§ 3.15-3.16[1].

A. Short History of the TCM and the ICC Uniform Rules

The draft Convention for Combined Transport of Goods (known by its french initials TCM for *Transports Combinés de Marchandises*) was conceived in commercial circles as an answer to some of the problems of cargo liability posed by developing trends in cargo handling—particularly containerization.[21] The basic draft Convention emerged from work done by the *Comité Maritime International* [CMI], the Inland Transport Committee of the Economic Commission for Europe [ECE], and the International Institute for the Unification of Private Law [UNIDROIT].[22] A final draft was agreed upon during a round table in Rome sponsored by UNIDROIT in 1970.[23] This draft became the subject of meetings jointly sponsored by the Intergovernmental Maritime Consultive Organization [IMCO] and the ECE.[24] After its modification, the draft was submitted to the preparatory committee for the 1972 Geneva UN/IMCO Container Conference. The draft failed to win approval at the Container Conference, the declared reason being fear on the part of developing countries that containerization represented a capitalistic menace.[25] Fortunately, much of the effort that went into the draft was not wasted. In 1973, the International Chamber of Commerce [ICC] developed the *Uniform Rules for a Combined Transport Document*, which incorporated much of the

21. Massey, *supra* note 1, at 726-28, 730. The present text of the convention can be found at 3 J. MAR. L. & COM. 617 (1972).

22. Massey, *supra* note 1, at 725. The embryo of the TCM began in 1956, after the European Road Convention [CMR] was drafted. The CMR attempted to deal with unlocated damage where the cargo passed through several modes of transport by making the carriers liable for unlocated damage occurring within the scope of the Convention. *Id.* at 727. UNIDROIT established a committee to extend the principles of the CMR to other modes of transport. This committee worked through 1965, at which time CMI undertook to examine the maritime aspects of combined transport. *Id.*

23. *Id.* at 725. The ECE decided to convene a meeting to fuse the several attempts at developing rules for combined transport—the objective being uniformity. As a result, the draft espoused by the CMI, the "Tokyo Rules," which only applied to combined transport where one mode was by sea, and the UNIDROIT draft based upon the CMR were combined into the "Rome Draft." *Id.* at 727-28.

24. *Id.* at 728. To enable all interested parties in the United Nations to examine the draft convention, a total of four meetings were held jointly by the IMCO and the ECE beginning in November 1970. The last meeting, in November 1971, produced what is now referred to as the "IMCO/ECE Draft." *Id.*

25. McGilchrist, *In Perspective—International Chamber of Commerce Uniform Rules for a Combined Transport Document*, 1 LLOYD'S MAR. & COM. L.Q. 25, 25-26 (1974). Developing countries contend that the present international regimes favor the carrier insofar as liability is concerned. Zamora, *Carrier Liability for Damage or Loss to Cargo in International Transport*, 23 AM. J. COMP. L. 391, 395 (1975). Not surprisingly, the developed countries own a disproportionate share of international carriers, primarily in ocean transport. *Id.* Developing countries are now pressing for reforms that will transfer some liability back to the carrier. *Id.* As yet, however, no common position from developing countries has emerged concerning reform in carrier liability. Instead, developing countries feel that the United Nations Conference on Trade and Development [UNCTAD] Secretariat must consider the effects of alternate regimes before any particular regime is accepted. *Id.* at 395-96 n.15a. In general, the developing countries wish to avoid accepting any regime that would ensure the control of inter-modal traffic and rates by multinational shipping powers. *Id.*

TCM.[26] The ICC felt that the absence of an international convention applicable to multi-modal transport, which resulted in a maze of different documents for combined transport, had to be remedied.[27] Uniformity through rules was in the best interests of commercial activity until a convention could be approved.

Basically the Rules provide for a "start to finish" document termed a "combined transport document."[28] This document is to be issued by

26. Giles, *supra* note 1, at 380-81; *see* Zamora, *supra* note 25, at 936. The ICC Uniform Rules for a Coined Transport Document (1975) are reprinted in International Chamber of Commerce, *Uniform Rules for a Combined Transportation Document*, 2 LLOYD'S MAR. & COM. L.Q. 148 (1976) [hereinafter cited as Introduction]. In drafting the rules, the ICC had the participation of many of those concerned with the original round table meetings, and who viewed the rules as satisfying a commercial need. Wheble, *The International Chamber of Commerce Uniform Rules for a Combined Transport Document*, 2 LLOYD'S MAR. & COM. L.Q. 145, 145 (1976).

27. Wheble, *supra* note 26, at 145. Documentary practices and procedures have evolved in the past and are unsuited to present conditions. One procedural barrier is the requirement for negotiable bills of lading serving as documents of title, principally for use in letter of credit financing. Mapp, *Documentary Problems in Intermodal Transport*, 12 J. WORLD TRADE L. 514, 519 (1978). To be a negotiable document of title, the bill of lading must be made out "to order" and the carrier can only deliver the goods to the holder of an "order" bill. *Id.* The carrier must retain the goods until presented with the bill of lading, which forms the basis of the bank's security in letter of credit transactions. *See* B. KOZOLCHYK, LETTERS OF CREDIT IN THE AMERICAS § 4.04[2], at 137 (1966). However, high speed container ships can cross the Atlantic in three days, which is faster than airmail. Mapp, *supra* at 519. Thus, the carrier would be forced to hold the goods in warehouses until the consignee can obtain an original bill of lading that he can present to the carrier. *Id.* This delay negates the advantages of container shipping.

The Uniform Customs and Practice for Documentary Credits (ICC Publication No. 290 (1974) [hereinafter cited as UCP] have made certain adjustments to the problems created by the advent of containerization with respect to documentary credits. The UCP allows bills of lading covering containerized cargoes. *Id.* art. 19(b)(iii). They can be "short form," *id.* art. 19(b)(ii), or "through" bills of lading, *id.* art. 19(b)(i). They will be acceptable even though they may not indicate that the goods are stored below deck, but they cannot show that the goods are actually stored on deck. *Id.* art. 22. This change is a recognition that an appreciable portion of containers are carried on deck. The 1962 version of the UCP prohibited banks from accepting bills of lading showing the stowage of goods on deck, unless specifically authorized in the credit. 1962 UCP art. 20.

The carrier need not verify the accuracy of the shipper's statement about the goods, and shipping documents with the words "said to contain" or "shipper's load and count" are acceptable to the banks. 1974 UCP art. 17. However, the bill of lading must still be an "on board" bill though this can be by way of notation. *Id.* art. 20. The "on board" bill of lading provides the necessary security banks require in letter of credit financing. See KOZOLCHYK, *supra* § 4.04[2], at 138.

One may question whether negotiable bills of lading are entirely necessary in the age of containerization. It has been estimated that only 15% of the goods carried in containers between Europe and the United States actually require negotiable bills of lading. Mapp, *supra* at 521. The carrier simply delivers the goods to a named consignee. Where letter of credit financing is involved, nonnegotiable bills of lading are still feasible with respect to certain customers. The National Committee on International Trade Documentation states that some banks have altered their application forms so that selected importers can choose between direct consignment or "to order" of the bank. *Id.* Where the security afforded by negotiable documents of title is required, one possible technique is to appoint the bank as receiver of the goods. *Id.* at 531. Another possibility is the use of data printout machines to produce negotiable documents. *Id.* at 530. A code could be transmitted so that only one printout would be considered the original, thus affording banks adequate security for letter of credit financing. *Id.*

28. International Chamber of Commerce, Introduction, Uniform Rules for a Combined Transport, Document (1975) (ICC Publication No. 298), reprinted in Introduction, *supra* note 26, at 148-56. Rule 2 defines "Combined Transport Document" [CT document] as a document evidencing a contract for the performance and/or procurement of performance of combined transport of goods and bearing on its face the heading "Negotiable combined transport document issued subject to Uniform Rules for a Combined Transport Document (ICC Publication No.

someone who might provide part of the transport or might act as a freight forwarder for part or all of the transport by others.[29] The Uniform Rules refer to the person (including any corporation, company, or legal entity) issuing the combined transport document as the combined transport operator [CTO].[30] This combined transport operator would be acting as principle for the shipper and would be responsible as principle for loss or damage wherever it occurred during the course of the whole combined transport.[31]

The ICC adopted the Uniform Rules to govern the combined transport document [CT Document].[32] The Rules may be given legal effect by their incorporation into a private contract, the combined transport contract, evidenced by the CT Document.[33] Since the Rules are applied by private contract, the liability for loss or damage must be governed by the applicable conventions or national laws for the particular mode of transportation where the loss or damage can be deemed to have occurred.[34] This procedure is referred to as the "network system."[35] Most important for containerized shipping, the ICC Rules also establish a separate liability system where the loss or damage is "concealed" and cannot be attributed to a particular mode of transport.[36]

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298)." *Id.* at 150.

As a result of the 1974 revision of the Uniform Customs and Practices for Documentary Credits, CT Documents are quite acceptable for letter of credit purposes. It is noteworthy that with a CT Document, there is no necessity for "shipped on board" transportation documents, *id.* art. 23(b), though bills of lading, however, require the "shipped on board" notation, *id.* art. 20(a).

29. Wheble, *supra* note 26, at 148.

30. *See* Rule 2(b), Introduction, *supra* note 28, at 150.

31. *Id.* at 148. Rule 5 provides as follows:

> By the issuance of the CT document the CTO:
>
> (a) undertakes to perform and/or in his own name to procure performance of the combined transport—including all services which are necessary to such transport—from the time of taking the goods in charge to the time of delivery, and accepts responsibility for such transport and such services to the extent set out in these Rules;
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> (b) accepts responsibility for the acts and omissions of his agents or servants, when such agents or servants are acting within the scope of their employment, as if such acts and omissions were his own;
>
> (c) accepts responsibility for the acts and omissions of any other person whose services he uses for the performance of the contract evidenced by the CT document;
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> . . . .
>
> (e) assumes liability to the extent set out in the Rules for loss of or damage to the goods occurring between the time of taking them into his charge and the time of delivery, and undertakes to pay compensation as set out in these Rules in respect of such loss or damage;

Introduction, *supra* note 26, at 151-52.

32. *Id.* at 149.

33. *Id. See* Rule 1, *id.* at 149-50.

34. *Id.*

35. *See* Massey, *supra* note 1, at 743-44. If the goods are sent by sea, for example, the shipper is guaranteed his Hague Rights against the CTO, although the actual carrier is a shipping company, a sub-contractor of the CTO. See note 31 *supra.*

36. Introduction, *supra* note 26, at 149. This system preserves—on the economic level—a fair balance between interests of the powerful shippers and various carriers. It avoids any conflict between rules for combined transport and existing national laws relating to other modes of transport, which cannot be set aside by contract. Mankabady, *Some Legal Aspects of the Carriage of Goods by Container*, 23 INT'L & COMP. L.Q. 317, 334 (1974). Moreover, if the location of loss or

The network system forms the basis of this Note's proposed liability scheme.

PROPOSED LIABILITY SCHEME

The liability scheme to govern combined transport proposed by this Note employs the two-tier liability scheme adopted by the old TCM Draft Convention and incorporated into the present ICC Rules.[37] The first tier, as in the old TCM Draft and the ICC Rules, involves the use of existing international conventions presently governing international transport of goods.[38] In fact, the network system retains the same systems of liability that would govern if the shipper had contracted separately with each carrier and provider of services.[39] The CTO would be liable under the network system only where the damage or loss can be "located," that is, determined to have occurred during a particular stage of the combined transport.[40] Thus, if damage occurs during carriage and it is known on which leg the incident occurred, the liability of the CTO will be the same as that which would have been borne by the carrier under that transport mode's convention in force when the accident occurred.[41] The network system of the old TCM Draft had to be incorporated into the ICC Uniform Rules to allow them to operate where the existing conventions and national laws could not be set aside by contract.[42] The second tier of this proposed liability scheme involves a separate liability regime to cover the loss or damage when it is "concealed" and cannot be determined to have occurred during a particular stage of the combined transit. This second tier is developed after treatment is given to the network system.

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damage is known, it is difficult to see why the shipper should be allowed to rely on rules differing from the relevant existing rules of liability. *Id.*

37. *See* note 26 *supra.*

38. *See* text & notes 3-6 *supra.*

39. *See* text & note 41 *infra.*

40. McGilchrist, *supra* note 25, at 26. The stage where the damage occurred is difficult to prove. If the damage resulted from sea water, the stage is quickly determined. In cases where the cause of loss is less obvious, documents exchanged between carriers at the end of one and the beginning of the next stage could provide evidence. The claimant has the burden of proving the particular stage where the damage occurred, which would require the CTO's assistance. This assistance is to his benefit because without such determination, the CTO will be unable to claim redress from anyone. Giles, *supra* note 1, at 386.

41. McGilchrist, *supra* note 25, at 26. For example, the CIM Convention would apply to rail carriage and the Hague Rules would apply to ocean carriage. See text & notes 3-6 *supra.*

42. Giles, *supra* note 1, at 386. Where the casualty occurs during a sea voyage, the CTO must claim compensation from the actual carrier under the Hague Rules, and it is only equitable that his liability to the shipper correspond with the liability of the carrier to him. The shipper is therefore placed in the position in which he would have been had he himself contracted with the sea carrier, and the CTO is assured that he need pay the consignor no more than he himself receives. *Id.*

A. Tier I: Standard of Liability for Located Damage

The network system is basically the application of the appropriate convention where the loss or damage is caused during a particular mode of transportation. Following is an analysis of four conventions covering international transportation, each of which therefore belongs in the network system, and each of which in essence forms part of this Note's proposed liability scheme for combined transport.

1. Carriage of Goods by Sea Act

In the early part of United States maritime history the carrier of goods by water was, with limited exception, absolutely liable to the cargo owner for any damages or delay occasioned in the ocean transport.[43] By the late nineteenth century, however, the established rule was that a carrier would be held liable only upon a showing of fault.[44]

The Harter Act,[45] enacted in 1893, limited the carrier's ability to exempt himself from liability.[46] It made null and void agreements or provisions in bills of lading[47] or other shipping documents that would

43. As stated by the Court in The Propeller Niagara v. Cordes, 67 U.S. (21 How.) 7 (1858):

> Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.

Id. at 23. *See also* New Jersey Steam Nav. Co. v. Merchant Bank, 47 U.S. (6 How.) 344, 365-67 (1848).

44. *See* Liverpool & Great Western S.S. Co. v. Phoenix Ins. Co., 129 U.S. 397, 441 (1889). Express exceptions in the bills of lading could modify the limits of liability and exonerate a carrier from responsibility for damage or loss resulting from one of the excepted clauses, including the negligence of his employees. J. Kimball, *Shipowner's Liability and the Proposed Revision of the Hague Rules*, 7 J. MAR. L. & COM. 217, 221 (1975). The carrier could not, however, exonerate himself for his negligence. Liverpool & Great Western S.S. Co. v. Phoenix Ins. Co., 129 U.S. 397, 439-41 (1889). By 1900, statutory limitation of liability was common to American law. A shipowner was excepted from liability for loss of goods in certain events and was given the right to limit his liability for loss caused by casualties occurring without his personal fault, independently of any exceptions listed in the issued bill of lading. Crutcher, *The Ocean Bill of Lading—A Study of Fossilization*, 45 TUL. L. REV. 697, 707 (1971). *See* 46 U.S.C. §§ 181-189 (1976) (originally enacted as the Limited Liability Act, 9 Stat. 635 (1851)) (restricting liability of carrier for exceptionally valued articles, restricting liability for loss by fire, and limiting liability for other misfortunes occurring without his personal fault).

45. 46 U.S.C. §§ 190-196 (1976) (originally enacted as the Harter Act, 27 Stat. 445 (1893)).

46. The act was intended to balance the competing interests of the shippers and the ocean carriers. The Harter Act's purpose was enunciated by the court in The Willdomino, 300 F. 5 (3d Cir. 1924), *aff'd sub nom.* S.S. Willdomino v. Citro Chem. Co., 272 U.S. 718 (1927).

> The law however, recognized the right of the carrier to limit in many particulars its common-law liability by special agreement or stipulations in the bill of lading . . . . To meet the ever increasing attempts further to limit the liability of the vessel and her owners by inserting in bills of lading stipulations against losses arising from unseaworthiness, bad stowage, negligence, and other causes of liability by which the common-law responsibility of carriers by sea was being frittered away the Harter Act . . . was passed. It was designed to fix the relations between the cargo and the vessel and to prohibit contracts restricting the liability of the vessel in certain particulars.

Id. at 9-10 (citations omitted). *See* Encyclopedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 11 (2d Cir. 1969).

47. A bill of lading serves three important functions: (1) document of title; (2) receipt of the

operate to relieve ocean carriers from liability for negligence.[48] The Act effected two important changes in common law liability. First, with respect to unseaworthiness, it permitted the carrier to include in bills of lading exceptions to the absolute warranty and substitute in its place the duty to use due diligence to make the vessel seaworthy.[49] Second, the Harter Act provided that if the shipowner exercised due diligence to make the vessel seaworthy, he would not be held liable for loss or damage resulting from errors in navigation or management of the vessel.[50]

The compromise represented by the Harter Act[51] was adopted on the international level and codified in the Hague Rules.[52] In 1936, the United States enacted the Carriage of Goods by Sea Act [COGSA][53] which substantially follows the Hague Rules.[54] The United States has also enacted legislation, the Limitation of Liability Act,[55] that permits the shipowner to limit his liability.[56]

The Hague Rules, and COGSA, fix the responsibilities of the carrier. The carrier is bound before and at the beginning of the voyage to exercise due diligence to provide a seaworthy vessel[57] and to properly

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goods; and (3) contract of carriage. It is the document that establishes the carrier's liability. *See* A. KNAUTH, THE AMERICAN LAW OF OCEAN BILLS OF LADING 115-31, 373 (4th ed. 1953).

48. S. SORKIN, *supra* note 9, at § 1.04[4].

49. Kimball, *supra* note 44, at 222; *see* Crutcher, *supra* note 44, at 709-10. *See also* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 3-27, at 151-52 (2d ed. 1975). Under the general maritime law, the carrier warranted to the shipper that the ship was seaworthy. *See* The Caledonia, 157 U.S. 124, 130 (1895). This concept required proper manning, equipping, supplying, and fitness to receive and care for the cargo. G. GILMORE & C. BLACK, *supra* at 150-51; *see* The Silva, 171 U.S. 462, 464 (1898).

50. Crutcher, *supra* note 44, at 710.

51. See note 46 *supra*.

52. International Convention for the Unification of Certain Rules Relating to Bills of Lading, *done* Aug. 25, 1924, 120 L.N.T.S. 155 (1931-32) [hereinafter cited as Hague Rules]. *See* G. GILMORE & C. BLACK, *supra* note 49, § 3-24, at 143-44.

53. 46 U.S.C. §§ 1300-1315 (1976).

54. G. GILMORE & C. BLACK, *supra* note 49, § 3-24, at 143-44. For a detailed comparison, see Dep't of State, *Comparison of the Carriage of Goods by Sea Act of the United States of America, Approved April 16, 1936, and the Bills of Lading Convention Concluded at Brussels, August 25, 1924*, in A. KNAUTH, *supra* note 47, at 168. At present, 80% of the world's seaborne trade is carried on vessels subject to the Hague Rules. Sassoon, *Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparison*, 3 J. MAR. L. & COM. 759, 760 (1972).

55. 46 U.S.C. § 183-196 (1976).

56. Under the present statute, the shipowner may not be held responsible to cargo claimants in excess of the amount or value of his interest in the vessel and her pending freight

> for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, or damage or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners . . . .

46 U.S.C. § 183(a) (1976). In addition, the "loss of life" sections of the Act require the setting up of a fund of $60 per ton of the gross tonnage of the vessel to be available for the payment of death or bodily injury claims. *Id.* § 183(b)-(f). *See* Kimball, *supra* note 44, at 226-28; Hague Rules, *supra* note 52, art. 5, at 165.

57. "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport." The Silva, 171 U.S. 462, 464 (1898). See note 49 *supra*.

load, stow, carry, care for, and discharge the goods carried.[58] The Rules stipulate that any provision in the bill of lading purporting to limit these duties of the carrier is void.[59] The bill of lading may, however, enlarge the liabilities of the carrier.[60]

In addition to requiring affirmative duties on the part of the carrier, the Hague Rules also set out a broad list of exceptions to carrier's liability which substantively could be reduced to the following: (1) fault of the shipper or consignee, (2) inherent vice of the goods, (3) *force majeure*, and (4) due diligence.[61]

Moreover, the Hague Rules limit the extent to which a carrier may be held liable for loss or damage. Under the Hague Rules, the amount of liability is not to exceed one hundred pounds sterling per package or

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58. Article 3 of the Hague Rules states:

(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.

(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 . . . .

Hague Rules, *supra* note 52, at 167.

59. *Id.* art. 3, at 165. Compare this with 46 U.S.C. § 1303(8) (1976) (using the same language). *See* The S.S. Asturias, 40 F. Supp. 168, 170 (S.D.N.Y. 1941), *aff'd sub nom.* Wessels v. S.S. Asturias, 126 F.2d 999 (2d Cir. 1942) (exceptions in bill of lading relieving carrier from liability for condensation damage were null and void).

60. Hague Rules, *supra* note 52, art. 5, at 169. See 46 U.S.C. § 1305 (1976). The Hague Rules establish minimum standards, not maximum ones. Crutcher, *supra* note 44, at 731.

61. Hague Rules, *supra* note 52, art. 4(2). Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:

(*a*) 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.

(*b*) Fire, unless caused by the actual fault or privity of the carrier.

(*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.

(*i*) Act or omission of the shipper or owner of the goods, his agent, or representative.

(*j*) Strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general.

(*k*) Riots and civil commotions.

(*l*) Saving or attempting to save life or property at sea.

(*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defects, quality, or vice of the goods.

(*n*) Insufficiency of packing.

(*o*) Insufficiency or inadequacy of marks.

(*p*) Latent defects not discoverable by due diligence.

(*q*) Any other cause arising without actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

See 46 U.S.C. § 1304(2)(a)-(q) (1976) (using same language).

unit.[62] Similarly, COGSA provides that the amount of liability is not to exceed the lesser of the value of the damage actually sustained or $500 per package, or in the case of goods not shipped in packages, per customary freight unit.[63]

Once the shipper has made out a prima facie case against the carrier by showing that the goods were delivered by the carrier in a damaged condition,[64] the burden of proof is upon the carrier to bring the loss within an exception established by law or by the contract of affreightment.[65] If he succeeds, then the shipper must show that the carrier did not exercise due diligence in choosing a seaworthy vessel and that the unseaworthiness caused the damage.[66] If the carrier can show he exercised due diligence in securing a seaworthy ship, then the shipper must prove the carrier was negligent in manning or equipping the ship, or in loading or unloading the ship.[67] Again, the carrier must then prove the exercise on his part of due diligence.[68]

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62. Hague Rules, *supra* note 52, art. 4(5), at 167. Each of the conventions discussed in this Note includes a clause limiting the amount of the carrier's liability. The limits are calculated according to units of weight (per kilogram). Only in the Hague Rules is the limit calculated by "package or unit." Zamora, *supra* note 26, at 414-15. To counteract the fluctuation in the value of the pound sterling and to bring the Hague Rules in line with the other conventions, a protocol known as the Hague/Visby Rules was adopted at the 1967 Brussels Diplomatic Conference on Maritime Law. *Id.* at 415. The Hague/Visby Rules would allow a contracting party to substitute a standard based on the gold franc of a fixed weight. *Id.* at 416. Furthermore, the Hague/Visby Rules propose limiting the amount of liability per package *or* per weight. *Id.*

63. 46 U.S.C. § 1304(5) (1976). Containers present a special problem and the courts are still undecided as to whether to designate the containers as "packages" or to designate the contents of the containers as packages. The court of appeals in Leather's Rest, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971), held that where 99 bales of leather were placed by the carrier in a large metal container, the limit of $500 liability per package for the one container as shown by the bill of lading, insofar as it was an attempt to limit liability to $500 for the loss of the entire 99 bales, was invalid under COGSA. *Id.* at 815-16. The court reasoned as follows:

> we cannot escape the belief that the purpose of § 4(5) of COGSA was to set a reasonable figure below which the carrier should not be permitted to limit his liability and that "package" is thus more sensibly related to the unit in which the shipper packed the goods and described them than to a large metal object, functionally a part of the ship, in which the carrier caused them to be "contained."

Id. at 815. *But see* Royal Typewriter v. Kulmerland, 483 F.2d 645 (2d Cir. 1973) where a different panel of the same court held that where 350 cartons of adding machines packed in cartons and stored in a large metal container were stolen, the reusable metal container—not each carton—was the "package" and consequently the carrier's liability for the negligent loss of adding machines worth $29,000 was only $500. *Id.* at 649. For a vigorous critique of this change of position in the second circuit, *see* S. Simon, *supra* note 10, at 507, 520. More recently, a well-reasoned opinion, Matsushita Elec. Corp. of America v. S.S. Aegis Spirit, 414 F. Supp. 894 (W.D. Wash. 1976), held that the individual cartons stored in the large containers were packages within the meaning of COGSA. *Id.* at 907-08. *See* Simon, *Container Law: A Recent Reappraisal*, 8 J. MAR. L. & COM. 489, 491 (1977).

64. *See* Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426, 429 (2d Cir. 1962); Kimball, *supra* note 44, at 225-26.

65. *See* G. GILMORE & C. BLACK, *supra* note 49, at 183-85.

66. *See* Director General of India Supply Mission v. The Maru, 459 F.2d 1370, 1372 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

67. Hague Rules, *supra* note 52, art. 4(1), at 167; G. GILMORE & C. BLACK, *supra* note 49, at 183-85.

68. Hague Rules, *supra* note 52, art. 4(1), at 167; G. GILMORE & C. BLACK, *supra* note 49, at 183-85. Before the perils of the sea and the acts of God exceptions apply, the carrier must prove lack of negligence. Kimball, *supra* note 44, at 226.

2. *Carriage by Road*

Where the transportation is to take place by road transit, the governing convention is the Convention on the Contract for the International Carriage of Goods by Road [CMR] which came into force in 1961.[69] This convention applies to every contract for the carriage of goods by road in vehicles for reward between two countries, at least one of which is a contracting party to the convention. It applies irrespective of the place of residence and nationality of the parties.[70]

The liability of the carrier is set forth in article 17 and article 18 of the CMR.[71] In general, the carrier is liable for the total or partial loss or damage of the goods occurring between the time the carrier takes over the goods and the time of delivery, as well as for any delay in delivery.[72] Article 17 lists certain defenses[73] and provides that the carrier is relieved from liability if the loss, damage, or delay was caused by the wrongful act or neglect of the claimant, by inherent vice of the goods,[74] or through circumstances the carrier could not avoid and the consequences of which he was unable to prevent.[75] The burden of

69. 399 U.N.T.S. 189 (1961) [hereinafter cited as CMR]. The following countries have either ratified the Convention or have acceded to it: Austria, Belgium, Denmark, Spain, Finland, France, Federal Republic of Germany (including Berlin), Hungary, Italy, Luxembourg, Norway, Netherlands, Poland, Portugal, East Germany, Rumania, Sweden, Switzerland, Czechoslovakia, Yugoslavia, and the United Kingdom. Donald, *CMR—An Outline and Its History*, 4 LLOYD'S MAR. & COM. L.Q. 420, 421 (1975).

70. Donald, *supra* note 69, at 421.

71. *See* Zamora, *supra* note 26, at 433. See text & notes 72-76 *infra*.

72. CMR, *supra* note 69, art. 17(1), at 204. The carrier is also liable for defective conditions in a vehicle, whether owned or leased by him. *Id.* art. 17(3), at 204-06.

73. Subject to certain sections of article 18, article 17(4) provides that the carrier is relieved from liability when the loss or damage arises from the special risks inherent in one of the following circumstances:

a. Use of an open unsheeted vehicle, when their use has been expressly agreed and specified in the consignment note;
b. The lack of or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;
c. Handling, loading, storage or unloading of the goods by the sender, the consignee, or persons acting on behalf of the sender or consignee;
d. The nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin;
e. Insufficiency or inadequacy of marks or numbers on the packages;
f. The carriage of livestock.

74. Ulster-Swift Ltd. v. Taunton Meat Haulage Ltd., 2 LLOYD'S REP. 502 (1975), involved a contract for the shipment of pigs between plaintiff, the owner, and defendant, the carrier responsible for shipment from Northern Ireland to Basle, Switzerland. On Sept. 23, 1970, the carcasses were loaded onto a refrigerated trailer; but on Sept. 28, when the trailer arrived at Basle, the carcasses were found to have spoiled. The plaintiff claimed damages from defendants who contended that the loss was caused by inherent vice and that they were relieved from liability under art. 17 of the CMR. The court held that "the sole cause of damage was excessive temperature which, . . . occurred during the transit and it could not be ascribed to inherent vice." *Id.* at 506.

75. CMR, *supra* note 69, art. 17(2), at 204. The "unavoidable circumstances" exception was inserted in the CMR (as well as the CIM) to replace the traditional concept of *force majeure*, rendered the carrier liable for all external, nonhuman forces, such as perils of the sea and acts of God. *See* Zamora, *supra* note 26, at 434. Few national courts have been called on to interpret the

proving nonliability rests with the carrier.[76]

The carrier's liability is calculated by reference to the value of the goods at the place and time at which they were accepted for carriage.[77] Liability for total or partial loss is the lesser of their value at origin plus freight, customs duties, and other expenses, or twenty-five germinal francs per kilogram,[78] equivalent to about eight and one-half dollars per kilogram.[79]

3. International Transport by Rail

The governing convention for transport by rail is known as the International Convention Concerning the Carriage of Goods by Rail [CIM].[80] The liability scheme for the carrier is essentially that of the CMR Convention.[81] The railroad is liable for delay, for total or partial loss, and for damage caused between the time of acceptance and the time of delivery.[82] The railroad is to be relieved of liability if the loss, damage, or delay was caused by fault of the cargo owner, inherent vice of the goods, or through circumstances which the railroad could not avoid and the consequences of which it was unable to prevent.[83] The

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exception, but the German Supreme Court has held that the exceptions under art. 17 do not affect the absolute nature of the carrier's liability. *Id.*

76. CMR, *supra* note 69, art. 18(1), at 206.

77. *Id.* art. 23(1), at 210.

78. *Id.* A "franc" means a gold franc weighing 10/31 of a gram and being of millesimal fineness 900. *Id.* art. 23, at 210. This amount may be increased by a declaration of value, *id.* art. 24, at 210-11, or by a special interest in delivery, *id.* art. 26, at 212, both of which require the payment of surcharge.

79. Zamora, *supra* note 26, at 436. In the case of delay, if the claimant proves that damage has resulted therefrom, the carrier shall pay compensation for such damage not exceeding the carriage charge. CMR, *supra* note 69, art. 23(5), at 210. Where there is more than one carrier and the carriage is governed by a single contract, each carrier is responsible for the performance of the whole operation, provided he has accepted the goods and consignment note. *Id.* art. 34, at 218. An action may be brought against the first carrier, the last carrier, or the carrier who was performing that portion of the carriage during which the event causing the loss, damage, or delay occurred. *Id.* art. 36, at 220. Carriers also agree to be responsible for the acts and omissions of their servants and agents if within the scope of employment. *Id.* art. 3, at 192-94. When the vehicle containing the goods is carried over part of the journey by sea, rail, inland waterway, or air—if the goods are not unloaded from the vehicle—the Convention still applies. *Id.* art. 2, at 192. This application is conditioned by the proviso that if any loss is caused by an event that could only happen during another mode of transport the carrier's liability is to be determined by the convention covering that mode of transportation. *See* text & notes 3-6 *supra.*

80. 241 U.N.T.S. 336 (1956) [hereinafter cited as CIM]. This convention was signed by the contracting countries October 25, 1952, and is also referred to as the Berne Convention. Thompson, *supra* note 12, at 450. A revised convention, dated February 25, 1961, came into force January 1, 1965. *Id.* at 450-51. The convention has been ratified or acceded to by Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, Finland, France, Greece, Hungary, Iran, Italy, Liechtenstein, Luxembourg, Morocco, Netherlands, Norway, Poland, Rumania, Spain, Sweden, Switzerland, Syria, Turkey, United Kingdom, and Yugoslavia. *Id.* at 451 n.45.

81. *See* Zamora, *supra* note 26, at 433. See text & notes 72-76 *supra.*

82. CIM, *supra* note 80, art. 27(1), at 423.

83. *Id.* art. 27(2), at 423. The "unavoidable circumstances" standard was intended to replace the *force majeure* standard in the original convention. Zamora, *supra* note 26, at 425. See discussion note 75 *supra.*

burden is on the carrier to establish his nonliability.[84] Broadly speaking, therefore, the railway's liability is absolute, mitigated by certain exceptions and limitations.[85]

Under the CIM, railroads are liable only to the extent that the goods have diminished in value.[86] With regard to loss or damage, liability cannot exceed one hundred francs per kilogram, approximately thirty-three dollars,[87] in addition to carriage charges, customs duties, and other expenses paid in respect to the missing goods.[88]

4. Warsaw Convention

The basic legal regime governing international carriage of cargo by air is the Convention for the Unification of Certain Rules Relating to International Carriage by Air [Warsaw Convention].[89] The original Warsaw Convention presumes liability of the air carrier when cargo is lost or destroyed during carriage.[90] The carrier is also liable for delay in carriage.[91] Liability attaches unless the carrier can prove that neither he nor his agents, servants, or representatives were at fault.[92] The maximum limit of liability is fixed at 250 Poincaré gold francs per kilogram,[93] approximately sixteen and one-half dollars per kilogram.[94]

5. Retention of the Network System

The Uniform Rules for a Combined Transport Document estab-

84. CIM, *supra* note 80, art. 28(1), at 425.

85. Thompson, *supra* note 12, at 452. An interesting provision of the convention is article 62, concerning liability in respect of rail-sea traffic. It provides that the rail carrier will be liable for damage occuring during this combined transit unless he can prove that the loss occurred during the sea leg *and* fits into an exemption. The carrier shall not avoid liability if the shipper proves the damage occurred due to the wrongful act or neglect of the carrier, master, pilot, or one of the carrier's servants.

86. Thompson, *supra* note 12, at 455. The goods shall be valued at the place and time at which they were accepted for carriage. CIM, *supra* note 80, art. 31, at 427, 429.

87. Zamora, *supra* note 26, at 427. See note 78 *supra* for a discussion of the gold franc.

88. CIM, *supra* note 80, art. 31, at 427-29. Damages for delay in delivery are limited to the amount of the freight charges. Thompson, *supra* note 12, at 455. Additionally, a provision in the convention provides that no action may be brought under the convention other than under contract. CIM, *supra* note 80, art. 40, at 435.

89. 137 L.N.T.S. 11 (1933) [hereinafter cited as Warsaw Convention]. On June 1, 1973, 100 nations were parties to the Warsaw Convention. Fitzgerald, *Proposed Convention on the International Combined Transport of Goods: Implications of International Civil Aviation*, 11 CAN. Y.B. INT'L L. 166, 172 n.11 (1973). This convention was amended by the Hague Protocol (1955) and supplemented by the Guadalajara Convention. *Id.* at 172-73.

90. Warsaw Convention, *supra* note 89, art. 17, at 23, art. 20, at 25.

91. *Id.* art. 19, at 25.

92. *Id.* art. 20(2), at 25. The convention provides that the carrier is liable unless "he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." *Id.* art. 20(1), at 25. This provision is equivalent to the general defense of art. 4(2) (8) of the Hague Rules, except that those Rules list 16 separate additional defenses.

93. Warsaw Convention, *supra* note 89, art. 22(2), at 25 of the convention and art. 22(2)(a) of the amended convention.

94. Zamora, *supra* note 26, at 443.

lish a liability scheme based on the network system where the damage is "located."[95] In essence, this is the liability scheme propounded by the TCM Draft Convention.[96] However, before a realistic evaluation of tier one of the proposed system to govern the international shipment of containers can be made, an analysis of the criticism of the rule's liability scheme as it existed during the TCM drafting stage is necessary.

What was to become the Uniform Rules' liability system was vigorously opposed by Australia, Canada, and the United States during the IMCO/ECE meetings considering the TCM Draft Convention.[97] This opposition centered on the continued use of the "network system" instead of a uniform liability system.[98] The United States particularly objected to the network system, stressing the need to simplify the legal regime which was only complicated by retention of the network system.[99] In addition, the United States was opposed to the fault system of liability.[100]

Instead, the United States suggested a strict liability system.[101] Only in cases where the loss or damage was the fault of the shipper or consignee or where it was caused by the inherent vice of the goods would the combined transport operator be relieved from liability, and in such cases the CTO would have the burden of establishing the defense.[102] The belief was that this system would save unnecessary litigation because the plaintiff and the CTO would not have to go to court to determine where and when the loss had occurred.[103] The United States also believed that under such a strict liability scheme, the shipper would not have to provide cargo insurance, thus reducing insurance costs ultimately borne by the shipper.[104]

Another system was proposed by Australia, Canada, Norway, and Sweden under which the network system was eliminated and a stricter standard of liability than fault was to apply.[105] This proposal contained the defenses of fault of the consignor and consignee, inherent vice of the goods, nuclear incident, error of navigation, and fire.[106]

95. Introduction, *supra* note 26, at 148-49; *see* Rule 13, *id.*, at 154-55.
96. See text & notes 21-26 *supra*.
97. *See* Massey, *supra* note 1, at 744-45.
98. *Id.*
99. *Id.* at 744 & n.50; IMCO Doc. CTC IV/5/ Annex III.
100. Massey, *supra* note 1, at 745.
101. *See id.*
102. *Id. See also* Fitzgerald, *supra* note 89, at 179.
103. Fitzgerald, *supra* note 89, at 179.
104. *See id.*
105. *See id.* at 178. This system would have eliminated the negligence or due diligence standard and replaced it with the more stringent "caused by circumstances which the CTO could not avoid and the consequences of which he was unable to prevent." Massey, *supra* note 1, at 745-46.
106. Massey, *supra* note 1, at 746.

A third alternative was proposed by the French whereby the network system was to be retained, but a strict liability system was to apply to the CTO where the damage was "concealed."[107] The French proposal, by retaining the network system, would prevent conflict between the TCM Convention and other conventions.[108] The French suggested that by imposing stricter liability where the damage was "concealed" yet retaining the network system where damage was "located," uniformity would slowly emerge, thus producing a stricter liability regime while avoiding strife with existing conventions and national laws in the process.[109]

The network system is a desirable regime to retain. The problem intrinsic to containerized transit is determining where damage has occurred.[110] Where this determination is possible there is no need for another liability scheme to be established because the present conventions, which have been developed and interpreted by court decisions, lend a certain security to the various modes of international transportation.[111] There would be added costs incurred in changing to a uniform liability system, such as for new forms and documents, as well as the costs of litigation over interpretation of the new regime.[112] Additionally, due to the exigencies of each particular mode of transportation, different levels of liability have been set for each by the respective conventions.[113]

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107. *Id.*

108. Fitzgerald, *supra* note 89, at 178. The Uniform Rules for a Combined Transport Document effect the same result through Rule 13. Those rules are reprinted in 2 LLOYD'S MAR. & COM. L.Q. 148 (1976).

109. *See* Massey, *supra* note 1, at 746. During the Joint IMCO/ECE meetings dealing with the TCM Draft, the members held informal votes on the desirability of the several alternative liability systems proposed. Voting for the regime of liability that should apply if the damage occurred during an identified mode of transport, the network system gathered 19 votes, while a uniform liability system gathered 11 votes. On the assumption that the network system would be adopted, the original network system of the TCM Draft Convention gathered 7 votes, while the French proposal gathered 18 votes. *See* Fitzgerald, *supra* note 89, at 179.

110. See text & note 18 *supra.*

111. As one commentator has written:

> An old law albeit far from perfection, may be preferable to a new law when its interpretation has been analyzed in detail by the courts during a considerable time. This is more so when we are confronted with uniform rules which may be subject to widely differing interpretations in the various countries. . . . A change in the law, unless such as to definitely simplify the system of liability, will have dramatic negative effects for a number of years, until a substantial new body of jurisprudence is formed. Until such time, the small advantages that some changes might bring about would almost certainly be outnumbered by the disadvantages of the lack of a body of jurisprudence. Deformity may arise and only in the long run will it disappear.

G. Righetti, *From Radical Revolution to Questionable Reformation*, 2 LLOYD'S MAR. & COM. L.Q. 192, 194-95 (1977).

112. *See* Massey, *supra* note 1, at 747.

113. COGSA, for example, sets its limit for carrier liability at $500 per package or customary freight unit. 46 U.S.C. § 1304(5) (1976). The CMR (road) has set its liability limit at 25 francs per kilogram, *see* note 78 *supra*, while the CIM (rail) has set its limit at 100 francs per kilogram, *see* note 88 *supra.* For air shipment, on the other hand, the limit of liability is set at 250 gold francs per kilogram. See note 93 *supra.*

These differences can be analyzed using a concentration of risk, value, and incidence of loss approaches. Liability limits are lowest where there is the highest concentration of cargo value aboard one vessel in relation to its loss experience. Thus it only seems reasonable that the liability limits be set lower for a container ship carrying 2,000 containers than for a truck carrying one.[114] Under a uniform liability system, the cost of combined transport would rise if the liability for damage occurring at sea were to be set at, for example, the level of liability applicable to the CMR or CIM.[115]

A better reason for the retention of the network system is that the combined transport operator's liability to the consignor or consignee should not exceed his right of recourse against the actual carrier.[116] However, under a uniform system of liability, the level of compensation would necessarily be set arbitrarily. If the damage were to occur at sea, the CTO would be liable to the cargo owner on the basis of a uniform level of liability that may be higher than the shipowner's liability under the Hague Rules. The CTO would then be unable to recover the difference from the negligent sub-carrier who would be contracting with the CTO under the Hague Rules, since they are mandatory under domestic legislation.[117] Finally, on a practical level, the Rules were required to retain a network system and the distinction between the known and unknown stage where the damage occurred in order to bypass the existing transport conventions and national laws which cannot be set aside by contract.[118] The network system is therefore essential to a workable liability convention governing containerized transportation.

114. *See* McGilchrist, *supra* note 25, at 27. *See also* note 115 *infra*. The better loss record of the airlines compared to other carriers would also account for the higher liability limit contained in the Warsaw Convention. *See* note 152 *infra*. Note that if the Hague liability limits governing a container ship were changed to the limits contained in the Warsaw Convention, a ship accident could put a carrier out of business. *See* text & note 152 *infra*. It is therefore reasonable to set lower limits where a high concentration of risk is involved. This would not work a hardship on a shipper, as he would procure cargo insurance to cover the full value of the goods shipped. *See* text & notes 148-49 *infra*.

115. This result becomes apparent when one considers the liability limits in English pounds sterling. Under the CIM the liability is £ 14,000 per ton, under the CMR it is £ 3,500 per ton, and under the Hague Rules it is £ 850 per ton under the 1968 Brussels Protocol. McGilchrist, *supra* note 25, at 27. Under a uniform liability system, in place of a network system, equity would seem to require that the level of liability be set at that level imposed by the Hague Rules; otherwise the extent of liability might be catastrophic due to the high concentration of risk.

116. Massey, *supra* note 1, at 747.

117. McGilchrist, *supra* note 25, at 27. In such a circumstance, the CTO would be forced to acquire additional insurance to insure for the responsibilities of the sub-carriers, to the extent these are less than the duties owed by the CTO to the shipper. *See* Massey, *supra* note 1, at 747. Note that the Carriage of Goods by Sea Act is made applicable to ocean carriage to or from the United States. *See* 46 U.S.C. § 1300 (1976).

118. *See* Giles, *supra* note 1, at 386.

B. Tier II: Standard of Liability for Unlocated Damage

The network system is desirable and necessary where the loss or damage is known to have occurred during a particular stage of transportation.[119] Nevertheless, presumably many instances will occur in containerized transportation where the consignee will discover damaged cargo upon opening the container, but no indication or clue as to its cause or place of occurrence will be determinable.[120] In any proposed system or convention to govern containerized shipping, a liability regime has to be developed to cover instances when such "unlocated" damage is discovered. Both the TCM and the Uniform Rules adopted, in essence, the liability scheme of the Hague Rules to govern occurrences of "unlocated" damage.[121] However, basic policy

119. See text & notes 112-18 *supra*.

120. See text & note 18 *supra*.

121. The Uniform Rules adopted the liability scheme of the TCM document. Giles, *supra* note 1, at 385; McGilchrist, *supra* note 25, at 25. The TCM in turn adopted the liability scheme of the Hague Rules, Massey, *supra* note 1, at 739, for cases where the stage of transport during which the loss or damage occurred is not determinable. Article 11 of the Uniform Rules provides that the CTO is liable for loss or damage to goods when the stage of transport in which the loss or damage occurred is unknown. Compensation is to be calculated by reference to the value of such goods at the time and place they are delivered, or should have been delivered, to the consignee. Introduction, *supra* note 26, art. 11(a), at 153. The value of the goods is to be determined according to current commodity prices, or if there is no such price, according to the current market price. If neither price exists, value is determined by reference to the normal value of goods of the same kind and quality. *Id.* art. 11(b). Compensation shall not exceed 30 francs per kilogram of gross weight of the goods lost or damaged. *Id.* art. 11(c). However, compensation may exceed 30 francs per kilo of gross weight if the consignor, with the consent of the CTO, has declared a higher value for the goods and such higher value has been stated in the CT document, in which case such higher value shall be the limit. *Id.* The CTO shall not, in any case, be liable for an amount greater than the actual loss to the person entitled to make the claim. *Id.* art. 11. The Rules thus provide a limit of liability in proportion to the magnitude of the risk involved. Rule 11(c) fixes the CTO's maximum liability at 30 gold francs per kilo gross weight, roughly similar to the extent of liability under the Hague Rules, but less than half that of rail and air carriers where the respective limits are 100 and 250 francs. Giles, *supra* note 1, at 387.

Rule 12 establishes the defenses to liability, which draw upon the philosophy and language of the Hague Rules. Massey, *supra* note 1, at 740. Specifically, Rule 12 provides that the CTO is not liable where the loss or damage was caused by:

a. Act or omission of the consignor or consignee;
b. Insufficiency or defective condition of the packing or marks;
c. Handling, loading, storage, or unloading of the goods by the consignor or consignee or agent thereof;
d. Inherent vice of the goods;
e. Strike, lockout, or restraint of labour, the consequences of which he could not prevent by the exercise of due diligence;
f. *Any course or event which the CTO could not avoid and the consequences of which he could not prevent by the exercise of reasonable diligence*;
g. A nuclear incident.

Introduction, *supra* note 26, at 153-54 (emphasis added).

The burden of proving that the loss or damage was due to one or more of the above causes or events shall rest upon the CTO. *Id.* Rule 12, at 153-54. When the CTO establishes that the loss or damage could be attributed to one or more causes or events specified in (b) through (d) above, the presumption is that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of these causes or events. *Id.* This shifting of the burden of proof, requiring in certain cases the injured party to prove the CTO is not entitled to a defense, runs directly counter to common law principles that a party wishing to avail himself of a defense has the burden of proof on that issue. *See* Massey, *supra*

considerations involving the allocation of risk between cargo owner and carrier must be taken into account to determine the appropriate standard of carrier liability for second-tier "unlocated" loss or damage.

1. Policy Considerations for Determining an Appropriate Carrier Liability Standard for Unlocated Loss or Damage

This section analyzes policy considerations that should be examined in determining the appropriate allocation of risk and responsibility for second-tier carrier liability. These policy considerations will be discussed under the sub-headings of optimum level of care, insurance and risk allocation, and friction.

a. *Optimum Level of Care.* Any liability scheme proposing rules of carrier liability for cargo should encourage the carrier to set and maintain an optimum level of care. At issue is whether an increase in legal liability for loss or damage to goods will result in a more desirable degree of care by carriers.[122] Any increase in the level of care given to goods shipped by a carrier may be equated with a greater expenditure of funds by the carrier.[123] The Secretary General of the United Nations has described the optimum level of care equation as follows:

> It seems a reasonable assumption that each higher level of care will cost more and save less damage than the preceding one. This is likely since presumably carriers will employ the less expensive and more productive measures first. Accordingly, the optimum level of care will be that where the costs of attaining the last level of care are just exceeded by the savings. Or to put it another way, to achieve the optimum level carriers would stop raising their standard of care just before their *marginal* costs exceeded the savings that will occur as a result of these costs.[124]

In determining the optimum level, reference must be made to differing rules of liability that would promote such a level. The first standard of care to be examined is fault liability. The standard based on

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note 1, at 742-43. Rule 12 therefore provides great opportunities for CTO's to claim relief from liability, throwing the loss back on the consignors or consignees. *See id.* at 743.

Rule 14 provides that the CTO is to pay compensation for delay only when the stage of transport where a delay occurred is known, and only to the extent that there is liability under any international convention or national law. The amount of compensation shall not exceed the amount of the freight for that stage of transport, provided that this limitation is not contrary to any applicable international convention or national law.

122. *See* Secretary General, *Responsibility of Ocean Carriers for Cargo-Bills of Lading*, 3 UNCITRAL Y.B. ¶ 180, at 291 (1972) [hereinafter cited as Secretary General].

123. The reason for this increase is self-evident in the case of expenditure of funds for safety devices, better navigation and communication equipment, and sounder ship construction, which presumably will reduce loss and damage during shipment.

124. Secretary General, *supra* note 122, ¶ 182, at 291-92. Such a standard of conduct would minimize the cost of shipping, resulting in net savings in terms of efficiency, relative to any lesser or higher standard of care, and consequently is the optimum standard. *Id.* at 292.

negligence requires the exercise of reasonable care.[125] There may be, however, forces tending to restrict this standard of care from reaching the optimum level, such as the carrier's ability to settle claims.[126] Additionally, under any fault standard, the normal practice of the industry generally governs; one who follows normal industry practice will generally not be considered to be at fault.[127] Thus, the carrier may hesitate to spend money on improving his level of safety via a new navigational device where it is not yet the practice of the industry, since the carrier may escape liability even where he fails to implement such an improvement.[128]

As opposed to a fault standard, strict liability[129] on the carrier for all loss or damage to cargo regardless of fault, assuming no fault on the part of the shipper, would tend to promote an optimum level of care.[130] To prevent $100,000 of loss, the carriers would be willing to spend $100,000 on preventive measures.[131] However, carriers would not spend more on preventive measures than they would stand to lose in the absence of such measures. As such, the optimum level of care is

125. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, at 145-49 (4th ed. 1971).

126. The carrier may be able to settle certain claims for less than the full value. This would appear to be the case where the results of litigation are unpredictable, which is the case where a negligence standard is involved. Under a strict liability standard the carrier is more likely to be held liable. *See* J. O'CONNELL & R. HENDERSON, TORT LAW, NO FAULT AND BEYOND 50 (1975). To the extent that a carrier could regularly settle certain types of claims for 75¢ for each $1.00 of loss, he could only be expected to spend 75¢ to raise his level of care enough to save $1.00 of loss. A lower than optimum degree of care will result. Secretary General, *supra* note 122, ¶ 184, at 292. However, even where strict liability is imposed, the litigants could still be induced to settle for smaller recoveries. The desire of the claimant to avoid litigation and attain an immediate recovery would induce him to settle for less than his original claim. These same forces could also cause out of court settlements under a fault system. However, under a strict liability regime the claimant's chances of recovery appear better than under a negligence standard, and for this reason, he may be able to exact a larger settlement. To this extent, the level of care required for a carrier to avoid strict liability would exceed the due care required to avoid liability under a negligence standard. It must be noted, however, that due care considerations do not enter into a determination of liability under a strict liability approach. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965). What is meant by level of care under a strict liability approach, therefore, is the level of care necessary to prevent a mishap that would result in liability by the shipowner.

127. *See* W. PROSSER, *supra* note 125, § 33, at 166-68; Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147, 1147-51 (1942). *But see* Morrison v. Kansas City Coca-Cola Bottling Co., 175 Kan. 212, 221, 263 P.2d 217, 224 (1953) (negligence may exist although the conduct pursued or the methods adopted were in accordance with those customarily pursued or adopted).

128. Secretary General, *supra* note 122, ¶ 185, at 292. However, this argument is subject to the practical consideration that a carrier will strive to keep his customers, and to this end will employ recent innovations in shipping technology. Additionally, insurance premiums reflect loss experience, and there is, therefore, a natural desire on the part of the carrier to utilize new methods and technology to decrease chances of loss or damage to ship or cargo. *See id.*; text & notes 130-31 *infra*.

129. Strict liability, as used by container commentators in the United States, assumes an exception where the loss or damage was the fault of the shipper or consignee or where it was caused by the inherent vice of the goods. *See* Massey, *supra* note 1, at 745; Secretary General, *supra* note 122, ¶ 202, at 294.

130. *See* Secretary General, *supra* note 122, ¶ 187, at 292.

131. *See id.* Of course, carriers will not be able to determine with precision what measures to adopt to balance their marginal expenditures with damage prevention, as required under the optimum level of care standard. However, the carrier would still strive for the optimum level of care in spite of its empirical uncertainty. *Id.*

reached, and this principle would therefore appear to work best in a strict liability atmosphere.[132]

b. *Insurance and Risk Allocation.* Insurance considerations permeate the analysis of risk allocation between carrier and cargo.[133] These considerations must be borne in mind when determining the appropriate scheme for carrier liability. When goods are shipped by sea, provisions are usually made for two types of insurance coverage, liability insurance for the carrier and cargo insurance for the shipper.[134] However, because insurance rates are based on the number and amount of claims paid, the burden of loss falls either on carrier or cargo interests through insurance premiums.[135] Change in the liability rules reallocating the burden of some specific loss on carrier or cargo interests will ultimately be reflected by an increase or decrease in the respective insurance premiums of carrier or cargo owner. As the loss record of the carrier or cargo interest improves, there is a corresponding decrease in the insurance rates.[136]

The question then becomes which of the various bases of liability is desirable from the standpoint of insurance. The suggestion has been made that under the present fault system of liability in maritime shipping, there is a duplication of cost in providing both liability and cargo

132. *Id.*

133. *See* Kimball, *supra* note 44, at 229-30.

134. The insurance coverage of the carrier who has no property interest in the goods is intended to indemnify him against liabilities to those persons who do have a property interest in the goods. *Id.* at 230. Since most marine insurance does not provide for third-party liability, shipowners had to form mutual protection and indemnity clubs (P & I clubs) to provide for the risk. *Id.* In the majority of the P & I clubs, the financial liability of the members is unlimited, so the members are co-responsible to each other with everything they own. *Id.* at 231. *See generally* Buzbee, SYMPOSIUM, *supra* note 13, at 54-59. Traditional marine insurance provides protection to cargo owners against loss to their cargo at sea. *See* Caband, *Cargo Insurance*, 45 TUL. L. REV. 988, 988-89 (1971).

The purchase of insurance accounts for a significant portion of the overall cost of transporting goods, when viewed as a direct transportation cost. The cost of insurance as a percentage of the overall transportation expense has been reputed to range between 1.47-2.97% for liability insurance and 2.66-45.09% for cargo insurance, depending on the terms of shipment, the nature of the goods, and the distance involved between the point of shipment and destination. OFFICE OF FACILITATION, U.S. DEP'T OF TRANSPORTATION, SECOND PROGRESS REPORT ON THE U.S. DEP'T OF TRANSPORTATION CARGO LIABILITY STUDY 11-18 (1974). Further, data provided by 13 steamship companies for the year 1970 shows that the net cost of insurance and paying cargo claims was 2.05% of revenues, or $13,592,131. *Id.* at 78.

135. Secretary General, *supra* note 122, ¶ 190, at 293.

136. *Id.* ¶ 191, at 293. Cargo insurance will reimburse the shipper even though the carrier is liable, since it is usually easier to collect from one's insurer than from one's carrier. *See* Maloney, SYMPOSIUM, *supra* note 13, at 38. When this happens, the cargo insurer is subrogated to the claim of the cargo interest against the carrier. Accordingly, even though a shipper continues to collect from his cargo insurer after a change in law making the carrier liable for a specific category of loss, cargo insurance rates would continue to fall. These rates would fall because the shipper's insurance company's experience would improve—not because of fewer claims against them on the part of shippers seeking quick recovery, but because cargo insurers could reimburse themselves for more losses through subrogation against the carrier's liability insurer. Secretary General, *supra* note 122, ¶ 192, at 293.

insurance.[137] Under a strict liability scheme, the claim is made that there would be no duplication of cost because the carrier would be solely liable and there would be no need for the shipper to purchase additional cargo insurance.[138]

This claim is incorrect since liability insurance is not necessarily a duplication of direct cargo insurance.[139] Cargo insurance and liability insurance serve different functions, and absent a liability scheme whereby the carrier's liability for loss would always be uncontroverted and coextensive with the loss suffered by the cargo owner, each is essential to international trade.[140] In addition, there is no overlap in risk bearing under the system of subrogation.[141]

Under the rationale of strict liability, the carrier would be the sole policy holder.[142] His insurance rates would go up, reflected in increased freight rates, but this increase would be offset in the shipper not being required to purchase cargo insurance.[143] However, it is not clear that the cost decrease in eliminating the need of the shipper to purchase cargo insurance would outweigh the increase in freight cost due to the increase in carrier's liability.[144] When the carrier is subject to strict liability, the total insurance cost will increase due to the concentration of risk. This increase will result because it costs more to insure one risk

137. Kimball, *supra* note 44, at 243-44.

138. *Id.*

139. Buzbee, SYMPOSIUM, *supra* note 13, at 54. Because there is a difference between property insurance and liability insurance, those who talk of "double insurance" do so as a misnomer:

> There is no such thing as double insurance unless you apply the term to two property policies or two liability policies on the same exposure. There's no "double insurance" on your car because you buy property insurance to cover the fender when you run into the tree, and liability insurance to provide for when you run into the other fellow's automobile. You get two policies but you've got two different risks.

Spitz, SYMPOSIUM, *supra* note 13, at 88.

140. Kimball, *supra* note 44, at 245. Furthermore, one commentator has stated that P & I insurance

> cannot replace property insurance in providing absolute and unconditional security to banks and other credit institutions as regards safe arrival, or full indemnity for lost or damaged cargo. . . . The bill of lading accompanied by a cargo insurance policy constitutes a negotiable set of documents representing the cargo to its full agreed value. No merchant or bank would be willing to acquire in their stead a pending liability claim with all its inherent uncertainties.

Spitz, SYMPOSIUM, *supra* note 13, at 88.

141. Spitz, SYMPOSIUM, *supra* note 13, at 88. With subrogation, the cargo owner recovers only once and is ultimately reimbursed only once, either by the cargo insurer or by the carrier's insurer. *Id.*

142. See text & notes 148-52 *infra*.

143. *See* Massey, *supra* note 1, at 243-44.

144. *See* Kimball, *supra* note 44, at 249-50. The costs of liability insurance are proportionately higher than those for cargo insurance. *Id.*; UNCTAD Secretariat, International Intermodal Transport Operations, Addendum, 7, 12 U.N. Doc. TD/B/Add. (1974). Over the long run, any increase in the liability of the carrier, whether as to cause of damage or per package limit, will produce an increase in premiums of from 30% to 50% in excess of the actual cost of the additional claims for which the carrier becomes liable. Buzbee, SYMPOSIUM, *supra* note 13, at 58. Therefore the imposition of strict carrier liability would probably not reduce the total cost of insuring goods in transit. *Id.*

than the same value split up among several smaller risks.[145] Additionally, shippers with minimal loss experience could not benefit through lower premiums where, under a strict liability approach, carriers' premiums are based on the aggregate shipper loss experience.[146] Also, under a single insurance system, cargo owners would lose the benefits of direct contact with insurers.[147]

Although in theory strict or absolute liability would facilitate implementation of a single insurance arrangement, there are reasons why a cargo owner would want to purchase insurance. First, the carrier may be insolvent or carry inadequate insurance.[148] The carrier's liability under existing conventions or even a uniform liability regime would not in every case be coextensive with the loss suffered by the cargo owner.[149] Another problem with the strict liability approach is that the period of time in which the carrier has possession and control of the goods is limited. The shipper would want to insure his property during the time when the carrier has no responsibility for the cargo.[150] Most importantly, under strict liability the carrier is not usually responsible for negligent acts of the shipper, or inherent vice of the goods, and in such situations the shipper would want to have adequate protection.[151]

145. The remarks of Mr. Spitz during the symposium are very instructive on this point:

> Anybody in the underwriting business knows that the more you put value in one place, the more you have the risk of a big loss, therefore, the insurance premiums for the big risk is [*sic*] more than the insurance premium for the same amount of value split up in various places because the possibility of all the premium loss at one time is greater and that costs more money. Now, the more responsibility that's put on the ocean carrier, the more he's going to have to pay for the concentration of risk.

Spitz, SYMPOSIUM, *supra* note 13, at 88.

146. Cargo insurance premiums are based primarily on two major areas of experience, loss from major casualties beyond the control of the shipper and loss experience of the individual account. The first would include fire, sinking, collision, and stranding. This major casualty cost is a minimum charge or operating base to be spread over the underwriter's entire book for all shippers facing the same risk. The second cost factor is the preventable loss experience which is clearly to the shipper's advantage to minimize. As this factor changes so does the premium charged to the shipper. *See* Mack, SYMPOSIUM, *supra* note 13, at 8. Where the carrier would be liable for all loss, a careful shipper would lose premium savings if the general loss experience of the other shippers dealing with the carrier is high because the carrier's premium rates will be based on his shippers' loss experience. Thus the shipper will lack direct incentive to exercise care.

147. Kimball, *supra* note 44, at 247. The shipper would lose advantages of working with one insurer on all shipments by all carriers to all destinations. *See* Mack, SYMPOSIUM, *supra* note 13, at 5-13. Additionally, the shipper would lose rate advantages for expertise and experience. Kimball, *supra* note 44, at 247; *see* McDowell, *Containerization: Comments on Insurance and Liability*, 3 J. MAR. L. & COM. 503, 507 (1972). Finally, as discussed above, an increase in carriers' liability would increase the cost of liability insurance, which in turn would result in higher freight rates. *See* text & note 144 *supra*.

148. *See* Secretary General, *supra* note 122, ¶ 199, at 293.

149. The liability limitation of the Hague Rules, for example, limits a carrier's liability to 100 pounds sterling per package or unit. See text & notes 62-63 *supra*. There is in addition an over-all limit on shipowner's liability. In the United States in claims relating to property loss, that limiting amount is the value of the ship and freight pending at the conclusion of the voyage during which the loss occurs. United States Limitation of Liability Act, 46 U.S.C. §§ 183-183(c) (1976); *see* text & notes 55-56 *supra*.

150. *See* Secretary General, *supra* note 122, ¶ 122, at 294.

151. *Id.* Although losses due to inherent vice are not generally covered by an "all risk" cargo insurance policy, there are many commodities known to have inherent causes of loss that under-

A final reason for a shipper to also obtain insurance is that there are limits to the amount of liability insurance certain insurers will provide. Currently, liability insurers offer coverage up to $100 million per ship per accident, which may not cover all claims which arise when a huge container ship is lost.[152] With the carriers and shippers each securing insurance for their respective risks, the rationale for a strict liability scheme is undercut. For the above reasons, it is apparent that under either a fault or strict liability system, there is little motivation on the part of the shipper to risk not insuring his interests.

c. *Friction.* In addition to the policy considerations involved in the promotion of an optimum level of care and in the allocation of the burden of risk and insurance, the costs involved in administering claims must also be analyzed. This last factor is called "friction" and refers to investigation, arbitration, and litigation of claims, arranging the subrogation of claims, other legal work in connection with claims, and other such matters.[153] Friction is economically wasteful and undesirable. The only way to do away with friction entirely is to avoid all claims and litigation concerning loss and liability to cargo. In theory, the best way to reduce friction is to make the rules of liability simple and clear.[154] A rule making the carrier strictly liable would reduce friction by restricting litigation on the issue of carrier liability.[155] Alterna-

writers are willing to insure against under certain controls and conditions. An example of such risks would be spontaneous combustion of coal. The cargo insurer might grant insurance against fire and spontaneous combustion on condition that a surveyor find the sulphur content, moisture content, and rate of volatility are below certain maximum percentages. However, a carrier under strict liability would not be in a position to negotiate special terms or agreements relative to insurance. He must apply his contract of carriage uniformly with all shippers and does not have the opportunity to resolve the question in favor of the shipper through increased freight rates. *See* Maloney, SYMPOSIUM, *supra* note 13, at 38-39.

152. *See* McGilchrist, *Limitation of Liability—At Sea and in the Air*, 3 LLOYD'S MAR. & COM. L.Q. 256, 261 (1975). The point is further shown by reference to an oil pollution statute in Florida. FLA. STAT. ANN. §§ 376.011 to 376.21 (West 1973). This statute imposed virtually unlimited liability upon the shipowner for pollution along the Florida coastline. Insurers told shipowners that they could not provide cover and some traders decided they could not continue trading in the state. When this trend became apparent, the legislation was remodelled. McGilchrist, *supra* at 261. Airlines, however, can obtain liability coverage of $250 million per accident. Why this disparity? McGilchrist suggests that the loss record of the airlines is better than that of the maritime industry. *Id.* at 262. The sounder reason for the higher capacity of insurance companies to provide liability coverage for the airlines rests generally on lower per incident liability exposure. Frequently, maritime loss results from the collision between two or more ships. Thus, the maritime insurers are faced with a ship accident loss capacity involving two ships. Therefore their actual experience and the lower theoretical exposure to risk possibly accounts for the higher cover capacity for the airlines. *Id.* See text & note 114 *supra.*

153. Secretary General, *supra* note 122, ¶ 205, at 294.

154. *Id.* ¶ 207, at 295. As the liability rules become simpler there is a corresponding decrease in the opportunity for litigation of carrying liability. A fault principle, however, invites litigation. *Id.*

155. *See* Secretary General, *supra* note 122, ¶ 233, at 299. However, even under a strict liability scheme friction would still be present. Issues such as whether the damage was due to the shipper's fault or inherent vice of the goods, presumably not rendering the carrier liable even though strictly liable for loss would still give rise to litigation. *See id.* ¶¶ 233-35, at 299.

tively, liability schemes reducing exceptions to carriers' liability would likewise cause a reduction in friction.

2. *Alternative Liability Approaches*

Having analyzed in the previous sections different policy considerations to determine the appropriate risk allocation between shipper and carrier, it is now necessary to examine the possible alternative liability approaches. The scheme of carrier liability is the mechanism for allocating the risk of cargo loss and damage between cargo owner and carrier. In considering implementation of the foregoing policy considerations, two alternative approaches require consideration for determination of the second tier of carrier liability.

a. *Strict Liability.* Strict liability—assuming exceptions for inherent vice of the cargo and fault of the shipper—has much to recommend it.[156] It would tend to promote the optimum level of care,[157] and excess costs due to litigation and administrative costs (friction) would probably be lower than under a fault standard.[158] However, there are policy considerations as well as practical reasons mitigating against adoption of a strict liability standard.

The most critical weakness of the strict liability system is that it would not eliminate the need to obtain cargo insurance.[159] Also, making carriers strictly liable would make the steamship companies cargo insurers.[160] With strict liability, the carrier would have to provide adequate protection for the shipped goods. This would require the carrier to obtain cargo insurance and the premium would be reflected in increased freight rates.[161] Full coverage may not always be the express wish and may even be contrary to the best interest of the shipper.[162] This problem could be avoided in part by the shipper declaring a lower value for the goods, thus enabling the shipper to assume some of the risk in exchange for lower cargo rates. But to the extent coverage would be necessitated by the carrier, the shipper would lose freedom of choice respecting selection of insurers and consequently would lose the benefits of direct contact with insurers.[163]

Also, increasing the carrier's liability will result in an overall increase in the cost of insurance,[164] because the cost of liability insurance

156. See text & notes 129 *supra.*
157. Secretary General, *supra* note 122, ¶ 233, at 299. See text & notes 130-32 *supra.*
158. Secretary General, *supra* note 122, ¶ 233, at 299.
159. Kimball, *supra* note 44, at 245; *see* McDowell, *supra* note 147, at 507.
160. *See* Poor, *A New Code for the Carriage of Goods by Sea*, 33 YALE L.J. 133, 135 (1923).
161. *Id.*
162. *Id.*
163. Secretary General, *supra* note 122, at 299 n. 192. See text & notes 146-47 *supra.*
164. See text & notes 143-46 *supra.*

is proportionately higher than that of cargo insurance.[165] Seen in this light, a strict liability scheme may not be in the best interests of the shipping community. It was in fact rejected by the United Nations Commission on International Trade Law [UNCITRAL] working group as a basis for an acceptable alternative to the Hague Rules.[166] Due to the inadequacies of the strict liability approach the following scheme of liability is proposed.

b. *Simplified Standard of Liability and Burden of Proof.* The suggested liability standard to govern unlocated damage is an outgrowth of the work done by UNCITRAL to revise the present Hague Rules. In February 1975, UNCITRAL adopted a final text of a Draft Convention[167] of the Carriage of Goods by Sea Act. This text is intended to cover all aspects of bills of lading now governed by the Hague Rules and to establish a new liability system with respect to loss of or damage to cargo.[168] The revised Hague Rules dealing with carrier liability are based on two principles: (1) the carrier's responsibilities should be affirmative in nature, yet the carrier should not be held strictly liable; and (2) there should be a unified rule on burden of proof.[169] UNCITRAL believed that simplification of the liability standard by removing ambiguities in the Hague Rules as to burden of proof and by reducing the number of exceptions to the carrier's liability would facilitate claims resolution and reduce the associated costs of litigation.[170]

The provision relating to carrier liability as proposed in the Draft Convention is as follows:

> Article 5. General Rules
>
> 1. The carrier shall be liable for loss, damage, or expense 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, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[171]

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165. Kimball, *supra* note 44, at 250.

166. *Id.* at 244. Although the objectives of a strict liability system were seen by the UNCITRAL Working Group as a desirable goal, the weaknesses of the approach precluded its acceptance by the group. *Id.*

167. Draft Convention on the Carriage of Goods by Sea, U.N. Doc. A/CN.9/105 Annex (1975) [hereinafter cited as Draft Convention].

168. *See* U.N. Press Release L/2159 (Oct. 1, 1974); Report of the Working Group on the work of its seventh session, U.N. Doc. A/CN.9/96 (1974), both *cited in* Kimball, *supra* note 44, at 219.

169. *See* Report of the Working Group on the work of its fourth (special) session held in Geneva from September 25 to October 6, 1972, U.N. Doc. A/CN. 9/74, at 10 (1972).

170. *See* Secretary General, *supra* note 122, ¶ 214, at 295-96; text & notes 153-55 *supra.*

171. Text of the Draft Convention on the Carriage of Goods by Sea, *reprinted in* 7 UNCITRAL Y.B. 194 (1976). Other provisions deal with liability in case of fire, *id.* art. 5(4), liability resulting from measures to save life and property at sea, *id.* art. 5(6), and comparative negligence, *id.* art. 5(7).

The duties of the carrier under present articles 3(1) and 3(2)[172] remain unchanged.[173] The theme of the proposed article is to expand the carrier's liability to encompass damage and loss situations for which he is not responsible under the present Hague Rules.[174] The most drastic change is that the carrier's exemptions under present article 4(2)(a) dealing with negligence and navigation of the ship are eliminated.[175] Under the present Hague Rules three major causes of loss in maritime transport are: failure to provide a seaworthy ship, failure to properly care for the cargo, and negligence in navigation and management of the ship.[176] Yet the lines between these categories are not clear, and the result of the differentiation is unnecessary friction in the form of litigation, with the shipper arguing the loss was occasioned by an unseaworthy ship and the carrier claiming the loss was caused by an error in management of the ship.[177] Cases where the questions of seaworthiness and errors in management and navigation are not both at issue are unusual.[178] By eliminating the carrier's exoneration for negligence of the master or crew, it will no longer be necessary to decide whether the fault involved negligent care of cargo or management of the ship. If negligent, the carrier will be liable in either case, thus friction will be reduced.

The proposed article also eliminates the exhaustive list of exceptions under article 4(2). The historical exceptions to carrier liability, inherent vice of goods, act of God, perils of the sea, fault of the shipper, and *force majeure*, are all cases where the carrier is not at fault, and thus have no independent significance outside the general rule that the carrier would be held responsible only where he is at fault.[179]

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172. See note 58 *supra*.

173. The carrier's affirmative duty to exercise due care in performing his obligations under the contract of carriage includes providing a seaworthy vessel and properly loading, stowing, and discharging the cargo. *See* fourth (special) session report, *supra* note 169, at 11.

174. Kimball, *supra* note 44, at 236.

175. *Id.* See text & notes 50-51 *supra*.

176. Secretary General, *supra* note 122, ¶ 241, at 300. An analysis of ship casualties for the period 1969-74 indicates that 83% of collisions and 54% of vessel strandings were caused by human error. American Hull Insurance Syndicate, Annual Report of the Manager 2 (1974). Although it is not known what percentage of cargo loss is attributable to errors in management or navigation, it may safely be assumed that the number is similarly substantial. Kimball, *supra* note 44, at 251.

177. *See, e.g.*, The Milwaukee Bridge, 26 F.2d 327, 330, (2d Cir.), *cert. denied*, 278 U.S. 632 (1928) (washing down of leaking sulfuric acid drums with water, increasing corrosive power of acid and damaging flour in hold below, held to be error of "management"). *Cf.* Armco Int'l Corp. v. Rederi A/B Disa, 151 F.2d 5, 8-9 (2d Cir. 1945) (stowage of leaky acetic acid drums near iron plates held to be error in duty owed to cargo).

178. *See* Secretary General, *supra* note 122, ¶ 241, at 300.

179. Kimball, *supra* note 44, at 237. The provision relating to fire would also be eliminated. Presently, the carrier is only liable for loss or damage caused by fire through his own fault. See 46 U.S.C. § 1304(2)(b) (1976); text & note 61 *supra*. This situation is contrary to the general rule that the carrier is legally responsible for the negligence or fault of its employees, excepting the management or navigation of the ship. Here, it is necessary to distinguish between the negligence of the carrier and that of its employees. At present the negligence of the carrier's employees will not

Another means of reducing friction is by adjusting the burden of proof, a device for determining the winner of a dispute where either there is not enough evidence to know what occurred or when the evidence presented is closely balanced.[180] The burden should be placed on the party most likely to have knowledge of the facts and on the party that is in the best position to prevent the loss or damage.[181] Both of these considerations indicate that the burden should fall on the carrier.[182]

The proposed article dealing with burden of proof requires the carrier to prove that "he, his servants and agent took all measures that could reasonably be required to avoid the occurrence and its consequences."[183] The proposed article retains the present requirement that the claimant prove a causal connection between the occurrence causing the loss or damage and the negligence of the carrier or his agents.[184] The intent of this proposed rule is to establish a presumption of fault on the part of the carrier or his agent which the carrier must overcome by proving the exercise of reasonable care.[185] The cargo owner must make out a prima facie case by showing that the goods were delivered to the carrier in a better condition than when received by the consignee.[186] The carrier then has the burden of showing due care.[187] With the specific exceptions excluded, the carrier could no longer avoid liability by proving the loss was caused by negligence for which he was not responsible.[188] The carrier in essence has an affirmative duty of proving that he and his agents exercised due care.

Under the proposed revision, the Hague Rules also establish a scheme for comparative negligence.[189] The carrier can reduce the por-

necessarily result in carrier liability; the fault must be that of the carrier itself. Secretary General, *supra* note 122, ¶ 164, at 289. However, it seems reasonable to exclude this exception as the carrier will be in a better position than the shipper to guard against the negligence of its employees causing fires, and in eliminating potential causes of fire. Thus the optimum standard of care would be promoted. *Id.*

180. Secretary General, *supra* note 122, ¶ 256, at 302. *See* MCCORMICK, MCCORMICK ON EVIDENCE § 336, 784 n.4. (2d ed. 1972)

181. Secretary General, *supra* note 122, ¶ 256, at 302.

182. When the loss occurs at sea, the carrier will be in a better position than the shipper to know where and how the loss occurred. Additionally, placing the burden of proof on the carrier will tend to impose strict carrier liability. Although the basis of liability is negligence, if the burden of proof rests upon the carrier and he fails to meet this burden he will be held liable whether negligent or not. This effect of strict liability would in turn promote an optimum level of care on the part of carriers. Finally, placing the burden of proof squarely on the carrier for all matters occurring while cargo is in its possession (with sharply delineated exceptions) would be clearer than the present set of rules and would therefore tend to reduce friction. *Id.* at 303.

183. Draft Convention, *supra* note 167, art. 5(1).

184. Kimball, *supra* note 44, at 238. *See* Director General of India Supply Mission v. S.S. Maru, 459 F.2d 1370, 1374 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

185. Secretary General, *supra* note 122, ¶ 246, at 301; Kimball, *supra* note 44, at 238.

186. Kimball, *supra* note 44, at 239.

187. *Id.*

188. See text & notes 64-65 *supra.*

189. Draft Convention, *supra* note 167, art. 5(7). See note 171 *supra.*

tion of loss he must bear if he can prove that in addition to negligence on his part there was a concurring cause of loss or damage for which he is not liable.[190] Under this proposed rule, the shipowner has the burden of proving that a concurrent cause of loss was a cause over which he or his agents had no control.[191] This rule maintains the principle, consistent with paragraph one of the proposed draft article,[192] that the carrier bear the responsibility of proving what the cause of the loss was and his relationship thereto.[193]

CONCLUSION

The foregoing considerations suggest that the standard of liability and burden of proof contained in the revised Hague Rules should be adopted for a liability scheme to govern containerized transportation where the damage is "unlocated." In view of the desirability of retaining the network system and in view of the possible costs to be saved in administration and litigation by adopting a stricter liability system, the French proposal—retaining the network system while imposing a stricter regime of liability where the damage was unlocated—is a desirable approach. In the absence of a convention, the Uniform Rules provide some uniformity in the combined transport arena. However, the proposed revision of the Hague Rules, which would provide a stricter liability for a carrier at sea, should be adopted by the ICC for a revised version of the Uniform Rules for a Combined Transport Document, where the damage is unlocated. Yet the network system should be retained for damage that is located. This alternative scheme should then serve as a model for a future draft convention on combined transport.

190. Draft Convention, *supra* note 167, art. 5(7). Under the present Hague Rules, the carrier need only prove that the casualty was caused by an act falling within one of the listed exceptions to shift the burden of proving fault to the shipper. See text & notes 65-68 *supra*.

191. Kimball, *supra* note 44, at 239.

192. See text & note 171 *supra*.

193. Kimball, *supra* note 44, at 239.

IN MEMORIAM

This issue of the Arizona Law Review is dedicated to David G. Gourley III, a fellow student and writer for the Review, who was killed in an accident while returning to school for the spring semester of 1979.