

UNCITRAL
Consolidated Official Reports
On the Preparation of
the United Nations Convention on Contracts for the International
Carriage of Goods
Wholly or Partly by Sea
(“The Rotterdam Rules”)

Note for Users

This text is a consolidation of the official reports* of the United Nations Commission on International Trade Law (UNCITRAL) and its Working Group III (Transport Law) on the preparation of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“The Rotterdam Rules”) from 2002 to 2008 (the ninth to the twenty-first sessions of Working Group III and the forty-first session of UNCITRAL). This consolidation provides a complete legislative history of the Convention. Each section begins with the final text of each article, followed by the relevant excerpts of the reports (organized chronologically) of each intergovernmental negotiating session at which that article was considered. To assist readers, this document also includes a table of concordance of chapter and article numbers that indicates how the numbering in the various iterations of the Convention** relates to the numbering in the final text. In the case of articles that were not included in the final text, the table shows the last version of the article prior to its deletion.

The text of each article appears in a box at the beginning of each section. Articles appearing in a bold, double-lined text box are those that form the final text of the Rotterdam Rules. The articles in italics that appear in a single-lined text box are the last versions of articles that were deleted.

*The reports included are those of the ninth through twenty-first sessions of Working Group III (A/CN.9/510, A/CN.9/525, A/CN.9/526, A/CN.9/544, A/CN.9/552, A/CN.9/572, A/CN.9/576, A/CN.9/591 and Corr.1, A/CN.9/594, A/CN.9/616, A/CN.9/621, A/CN.9/642, and A/CN.9/645, respectively), and of the forty-first session of the Commission (A/63/17).

**The previous iterations of the Convention can be found in the following documents: A/CN.9/WG.III/WP.21, A/CN.9/WG.III/WP.32, A/CN.9/WG.III/WP.56, A/CN.9/WG.III/WP.81, A/CN.9/WG.III/WP.101, and Annex 1 of A/CN.9/645.

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Table of Concordance of Chapter and Article Numbers

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Chapter 1. GENERAL PROVISIONS	1	1	1	1	1	1	1
Definitions	1	1	1	1	1	1	1
contract of carriage	1(1)	1(1)	1(1)	1(1)	1(a)	1(a)	1.5
volume contract	1(2)	1(2)	1(2)	1(2)	1(b)	-	-
liner transportation	1(3)	1(3)	1(3)	1(3)	-	-	-
non-liner transportation	1(4)	1(4)	1(4)	1(4)	1(c)	-	-
carrier	1(5)	1(5)	1(5)	1(5)	1(d)	1(b)	1.1
performing party	1(6)	1(6)	1(6)	1(6)	1(e)	1(e)	1.17
maritime performing party	1(7)	1(7)	1(7)	1(7)	1(f)	-	-
[non-maritime performing party]	-	-	Deleted	1(8)	1(g)	-	-
shipper	1(8)	1(8)	1(8)	1(9)	1(h)	1(d)	1.19
documentary shipper	1(9)	1(9)	1(9)	1(10)	-	-	-
[consignor]	-	Deleted	1(10)	1(11)	1(i)	1(c)	1.3
holder	1(10)	1(10)	1(11)	1(12)	1(j)	1(f)	1.12
consignee	1(11)	1(11)	1(12)	1(13)	1(k)	1(i)	1.2
right of control	1(12)	1(12)	1(13)	1(14)	1(l)	1(g)	1.18
controlling party	1(13)	1(13)	1(14)	1(15)	1(m)	1(h)	1.7
transport document	1(14)	1(14)	1(15)	1(16)	1(n)	1(k)	1.20
negotiable transport document	1(15)	1(15)	1(16)	1(17)	1(o)	1(l)	1.14
non-negotiable transport document	1(16)	1(16)	1(17)	1(18)	1(p)	1(m)	1.16
electronic communication	1(17)	1(17)	1(18)	1(19)	1(q)	1(n)	1.8
electronic transport record	1(18)	1(18)	1(19)	1(20)	1(r)	1(o)	1.9
negotiable electronic transport record	1(19)	1(19)	1(20)	1(21)	1(s)	1(p)	1.13
non-negotiable electronic transport record	1(20)	1(20)	1(21)	1(22)	1(t)	1(q)	1.15
issuance	1(21)	1(21)	1(22)	1(23)	1(u)	-	-
transfer	1(22)	1(22)	1(22)	1(23)	1(u)	-	-
contract particulars	1(23)	1(23)	1(23)	1(24)	1(v)	1(r)	1.6
goods	1(24)	1(24)	1(24)	1(25)	1(w)	1(j)	1.11
ship	1(25)	1(25)	1(25)	1(26)	1(x)	-	-
container	1(26)	1(26)	1(26)	1(27)	1(y)	1(s)	1.4
vehicle	1(27)	-	-	-	-	-	-
freight	1(28)	1(27)	1(27)	1(28)	1(z)	1(t)	1.10
domicile	1(29)	1(28)	1(28)	1(29)	1(aa)	-	-

Chapter or Article in Final Text (Square brackets around chapter or article title indicate the last version prior to deletion.)	Final Text	Annex to A/CN.9/645	WP.101	WP.81	WP.56	WP.32	WP.21
[time and place of receipt]	-	-	-	Deleted	1(bb)	-	-
[time and place of delivery]	-	-	-	Deleted	1(cc)	-	-
competent court	1(30)	1(29)	1(29)	1(30)	-	-	-
Interpretation of this Convention	2	2	2	2	2	-	-
Form requirements	3	3	3	3	3	5	2.3
Applicability of defences and limits of liability	4	4	4	4	4	21	6.10
Chapter 2. SCOPE OF APPLICATION	2	2	2	2	3	-	3
General scope of application	5	5	5	5	8	2(1), (2), (5)	3.1, 3.2, 3.4
Specific exclusions	6	6	6	6	9	2(3)	3.3.1
Application to certain parties	7	7	7	7	10	2(4)	3.3.2
Chapter 3. ELECTRONIC TRANSPORT RECORDS	3	3	3	3	2	2	2
Use and effect of electronic transport records	8	8	8	8	5	3	2.1
Procedures for use of negotiable electronic transport records	9	9	9	9	6	6	2.4
Replacement of negotiable transport document or negotiable electronic transport record	10	10	10	10	7	4	2.2
[Chapter 4. Period of responsibility]	-	-	Combined with chapter 4	4	4	3	4
Chapter 4. OBLIGATIONS OF THE CARRIER	4	4	4	5	5	4	5
Carriage and delivery of the goods	11	11	11	13	13	10	5.1
Period of responsibility of the carrier	12	12	12	11	11	7	4.1
[Transport beyond the scope of the contract of carriage]	Deleted	13	13	12	12	9	4.3
Specific obligations	13	14	14	14	14	11	5.2
Specific obligations applicable to the voyage by sea	14	15	15	16(1)	16(1)	13(1)	5.4
Goods that may become a danger	15	16	16	15	15	12	5.3
Sacrifice of the goods during the voyage by sea	16	17	17	16(2)	16(2)	13(2)	5.5
Chapter 5. LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY	5	5	5	6	6	5	6
Basis of liability	17	18	18	17	17	14	6.1
[Carrier's liability for failure to provide information and instructions]	-	-	-	Deleted	18	29, 30	7.5, 7.6
Liability of the carrier for other persons	18	19	19	18	19	15(3)	6.3.2(a)
Liability of maritime performing parties	19	20	20	19	20	15(1), (2), (4), (5)	6.3.1, 6.3.2(b), 6.3.3

Chapter or Article in Final Text (Square brackets around chapter or article title indicate the last version prior to deletion.)	Final Text	Annex to A/CN.9/645	WP.101	WP.81	WP.56	WP.32	WP.21
Joint and several liability	20	21	21	20	21	15(6), (7)	6.3.4, 6.3.5
Delay	21	22	22	21	22	16(1)	6.4.1
Calculation of compensation	22	23	23	22	23	17	6.2
Notice in case of loss, damage, or delay	23	24	24	23	24	20	6.9
Chapter 6. ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE	6	6	6	7	7	6	-
Deviation	24	25	25	24	25	23	6.5
Deck cargo on ships	25	26	26	25	26	24	6.6
Carriage preceding or subsequent to sea carriage	26	27	27	26	27	8	4.2
Chapter 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER	7	7	7	8	8	7	7
Delivery for carriage	27	28	28	27	28	25	7.1
Cooperation of the shipper and the carrier in providing information and instructions	28	29	29	28	29	26	7.2
Shipper's obligation to provide information, instructions and documents	29	30	30	29	30(a),(b)	27, 28	7.3, 7.4
Basis of shipper's liability to the carrier	30	31	31	30	31	29, 30	7.5, 7.6
[Material misstatement by shipper]	-	-	-	Deleted	32	-	-
Information for compilation of contract particulars	31	32	32	31	30(c), 32	-	-
Special rules on dangerous goods	32	33	33	32	33	-	-
Assumption of shipper's rights and obligations by documentary shipper	33	34	34	33	34	31	7.7
Liability of the shipper for other persons	34	35	35	34	35	32	7.8
[Cessation of shipper's liability]	Deleted	36	36	35	36	43(2)	9.3(b)
Chapter 8. TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS	8	8	8	9	9	8	8
Issuance of the transport document or the electronic transport record	35	37	37	36	37	33	8.1
Contract particulars	36	38	38	37	38	34	8.2.1, 8.2.2
Identity of the carrier	37	39	39	38	40(3)	36(3)	8.4.2
Signature	38	40	40	39	39	35	8.2.3
Deficiencies in the contract particulars	39	41	41	40	40	36(1), (2), (4)	8.2.4, 8.4.1, 8.4.3
Qualifying the information relating to the goods in the contract particulars	40	42	42	41	41	37	8.3.1
[Reasonable means of checking and good faith]	-	-	-	Combined with 41	42	38	8.3.2
Evidentiary effect of the contract particulars	41	43	43	42	43	39	8.3.3
[Evidentiary effect of qualifying clauses]	-	-	-	Combined with 42	44	40	8.3.4
[Chapter 9. FREIGHT]	-	-	-	-	Deleted	9	9

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[When freight earned]	-	-	-	-	Deleted	41	9.1
[When freight payable]	-	-	-	-	Deleted	42	9.2
[Shipper's liability for freight]	-	-	-	-	Deleted	43(1)	9.3(a)
"Freight prepaid"	42	44	44	43	45	44(1)	9.4(a)
["Freight collect"]	-	-	-	-	Deleted	44(2)	9.4(b)
[Carrier's retention of the goods]	-	-	-	-	Deleted	45	9.5
Chapter 9. DELIVERY OF THE GOODS	9	9	9	10	10	10	10
Obligation to accept delivery	43	45	45	44	46	46	10.1
Obligation to acknowledge receipt	44	46	46	45	47	47	10.2
Delivery when no negotiable transport document or negotiable electronic transport record is issued	45	47	47	46	48	48	10.3.1
Delivery when a non-negotiable transport document that requires surrender is issued	46	48	48	47	-	-	-
[Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued]	-	Deleted	49	48	-	-	-
Delivery when a negotiable transport document or negotiable electronic transport record is issued	47	49	50	49	49	49(a), (b), (c), (d)	10.3.2(a), (b), (c), (d)
Goods remaining undelivered	48	50	51	50	50, 51	49(e), 50	10.3.2(e), 10.4.1
Retention of goods	49	51	52	51	-	-	-
[Notice of arrival at destination]	48(3)	50(3)	51(3)	50(3)	52	51	10.4.2
[Carrier's liability for undeliverable goods]	48(5)	50(5)	51(5)	50(5)	53	52	10.4.3
Chapter 10. RIGHTS OF THE CONTROLLING PARTY	10	10	10	11	11	11	11
Exercise and extent of right of control	50, 1(12)	52, 1(12)	53, 1(13)	52, 1(14)	54	53(a), (b), (c)	11.1(i), (ii), (iii)
Identity of the controlling party and transfer of the right of control	51	53	54	53	56	54	11.2
Carrier's execution of instructions	52	54	55	54	57	55	11.3
Deemed delivery	53	55	56	55	58	56	11.4
Variations to the contract of carriage	54	56	57	56	55	53(d), 54(2)(d), 54(3)(c)	11.1(iv), 11.2(b)(iv), 11.2(c)(iii)
Providing additional information, instructions or documents to carrier	55	57	58	57	59	57	11.5
Variation by agreement	56	58	59	58	60	58	11.6

Chapter or Article in Final Text (Square brackets around chapter or article title indicate the last version prior to deletion.)	Final Text	Annex to A/CN.9/645	WP.101	WP.81	WP.56	WP.32	WP.21
Chapter 11. TRANSFER OF RIGHTS	11	11	11	12	12	12	12
When a negotiable transport document or negotiable electronic transport record is issued	57	59	60	59	61	59	12.1
Liability of holder	58	60	61	60	62	60	12.2
[When no negotiable transport document or negotiable electronic transport record is issued]	-	-	Deleted	61	63	61, 62	12.3, 12.4
Chapter 12. LIMITS OF LIABILITY	12	12	12	13	13	-	-
Limits of liability	59	61	62(1), (3), (4)	62(1), (3), (4)	64(1), (3), (4)	18(1), (3), (4)	6.7
[Limits applicable to non-localized damage]	-	Deleted	62(2)	62(2)	64(2)	18(2)	-
Limits of liability for loss caused by delay	60	62	63	63	65	16(2)	6.4.2
Loss of the benefit of limitation of liability	61	63	64	64	66	19	6.8
[Chapter 14. Rights of suit]	-	-	-	Deleted	14	13	13
[Parties]	-	-	-	Deleted	67	63	13.1
[When negotiable transport document or negotiable electronic transport record is issued]	-	-	-	Deleted	68	64, 65	13.2, 13.3
Chapter 13. TIME FOR SUIT	13	13	13	14	15	14	14
Period of time for suit	62	64	65	65	69	66	14.1
[Commencement of limitation period]	62(2)	64(2)	65(2)	65(2)	70	67	14.2
Extension of time for suit	63	65	66	66	71	68	14.3
Action for indemnity	64	66	67	67	72	69	14.4
[Counterclaims]	62(3)	64(3)	65(2)	65(3)	73	70	-
Actions against the person identified as the carrier	65	67	68	68	74	71	14.5
Chapter 14. JURISDICTION	14	14	14	15	16	15	-
Actions against the carrier	66	68	69	69	75	72	-
Choice of court agreements	67	69	70	70	76	-	-
Actions against the maritime performing party	68	70	71	71	77	-	-
No additional bases of jurisdiction	69	71	72	72	78	74	-
Arrest and provisional or protective measures	70	72	73	73	79	73, 74	-
Consolidation and removal of actions	71	73	74	74	80	-	-
[Lis pendens]	-	-	-	-	Deleted	Variant A, 75	-

Chapter or Article in Final Text (Square brackets around chapter or article title indicate the last version prior to deletion.)	Final Text	Annex to A/CN.9/645	WP.101	WP.81	WP.56	WP.32	WP.21
Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance	72	74	75	75	81	Variant A, 75bis; Variant B, 75	-
Recognition and enforcement	73	75	76	76	-	-	-
Application of chapter 14	74	76	77	77	-	-	-
Chapter 15. ARBITRATION	15	15	15	16	17	16	-
Arbitration agreements	75	77	78	78	Variant A, 82, 84, 85 bis; Variant B, 82	Variant A, 76, 78, 80; Variant B, 76	-
Arbitration agreements in non-liner transportation	76	78	79	79	Variant A & B, 83	Variant A & B, 77	-
Agreement to arbitrate after a dispute has arisen	77	79	80	80	Variant A & B, 86	Variant A, 80 bis; Variant B, 80	-
Application of chapter 15	78	80	81	81	-	-	-
[Convention to govern]	-	-	-	Deleted	Variant A & B, 85	Variant A & B, 79	-
Chapter 16. VALIDITY OF CONTRACTUAL TERMS	16	16	16	19	20	19	17
General provisions	79	81	82	88	94	88	17.1
Special rules for volume contracts	80	82	83	89	95	-	-
Special rules for live animals and certain other goods	81	83	84	90	96	89	17.2
Chapter 17. MATTERS NOT GOVERNED BY THIS CONVENTION	17	17	17	18	19	18	16
International conventions governing the carriage of goods by other modes of transport	82	84	85	84	89	83	-
[Prevalence over earlier conventions]	-	-	-	Deleted	90	84	-
[International conventions governing the carriage of goods by air]	82(a)	84(a)	85(a)	84	-	-	-
Global limitation of liability	83	85	86	85	91	85	16.1
[Chapter 18. General average]	-	-	Combined with chapter 17	17	18	17	15
General average	84	86	87	82	87	81	15.1

Chapter or Article in Final Text (Square brackets around chapter or article title indicate the last version prior to deletion.)	Final Text	Annex to A/CN.9/645	WP.101	WP.81	WP.56	WP.32	WP.21
[Contribution in general average]	-	-	-	Deleted	88	82	15.2
Passengers and luggage	85	87	88	86	92	86	16.2
Damage caused by nuclear incident	86	88	89	87	93	87	16.3
Chapter 18. FINAL CLAUSES	18	18	18	20	21	-	-
Depositary	87	89	90	91	97	-	-
Signature, ratification, acceptance, approval or accession	88	90	91	92	98	-	-
Denunciation of other conventions	89	91	92	83	102	-	-
Reservations	90	92	93	93	99	-	-
Procedure and effect of declarations	91	93	94	94	-	-	-
Effect in domestic territorial units	92	94	95	95	100	-	-
Participation by regional economic integration organizations	93	95	96	96	-	-	-
Entry into force	94	96	97	97	101	-	-
Revision and amendment	95	97	98	98	103	-	-
[Amendment of limitation amounts]	-	Deleted	99	99	104	-	-
Denunciation of this Convention	96	98	100	100	105	-	-

Title and Preliminary Considerations

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

A. Preliminary considerations

22. The Working Group commenced its deliberations with respect to the preparation of a draft instrument on transport law (hereinafter referred to as “the draft instrument”). There was general consensus that the purpose of its work was to end the multiplicity of the regimes of liability applying to carriage of goods by sea and also to adjust maritime transport law to better meet the needs and realities of international maritime transport practices. The Working Group gratefully acknowledged the work already undertaken by the Comité maritime international (CMI) in preparing the draft instrument and the commentary relating thereto. The view was expressed that the draft instrument should take into consideration international conventions currently in force that govern different modes of transport, and that the draft instrument should seek to establish a balance between the interests of shippers and those of carriers.

23. The Working Group decided to commence its work by a broad exchange of views regarding the general policy reflected in the draft instrument, rather than focusing initially on an article-by-article analysis of the draft instrument. To assist in structuring the general discussion, it was agreed that seven themes should be examined, with reference being made in each case to the relevant provisions in the draft instrument. These were: sphere of application (draft article 3); electronic communication (draft articles 2, 8 and 12); liability of the carrier (draft articles 4, 5 and 6); rights and obligations of parties to the contract of carriage (draft articles 7, 9 and 10); right of control (draft article 11); transfer of contractual rights (draft article 12) and judicial exercise of those rights emanating from the contract (draft articles 13 and 14). Upon the suggestion made by one delegation, the Working Group agreed that a further theme should be added regarding the freedom of contract (currently dealt with in draft article 17) for examination as part of the thematic analysis of the draft instrument.

24. It was generally felt at the outset that any new instrument should be drafted bearing in mind possible interactions between the new regime and other transport law conventions that might be applicable. It was also agreed that in preparing any new instrument governing aspects of maritime transport, the need to ensure safety and security should be a paramount consideration. A suggestion was made that the preparation of the draft instrument would be greatly assisted by the production of a table comparing the provisions of the draft instrument with other maritime texts such as the United Nations Convention on the Carriage of Goods by Sea, 1978 (also referred to in this report as “the Hamburg Rules”), the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1924, also referred to in this report as “the Hague Rules”), the Protocol to amend the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1968, also referred to in this report as “the Hague-Visby Rules”), as well as other conventions selected among international instruments in force in the field of road, rail and air transport, such as the Convention on the Contract for the International Carriage of Goods by Road (Geneva, 1956, also referred to in this report as “CMR” or “the CMR”), the Convention concerning International Carriage by Rail (Berne, 1980, also referred to in this report as “COTIF” or “the COTIF”), the Convention for the Unification of certain Rules relating to International Carriage by Air (Warsaw, 1929, also referred to in this report as “the Warsaw Convention”) and the Budapest Convention on the

Contract for the Carriage of Goods by Inland Waterways (Budapest, 2000, also referred to in this report as “CMNI” or “the CMNI”). That suggestion was adopted by the Working Group.

25. The Working Group noted with interest that UNCTAD was currently working on the preparation of a feasibility study on the establishment of a new multimodal transport convention, considering also its desirability, acceptability and practicability.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

B. Preliminary matter: title of the draft instrument

16. The title of the draft instrument as considered by the Working Group was as follows: “Draft instrument on the carriage of goods [wholly or partly] [by sea]”.

17. It was observed that the Working Group might want to consider the extent to which the title should reflect the “maritime plus” (also referred to as “transmaritime”) approach that had emerged at previous sessions of the Working Group as most likely to rally consensus in the preparation of the draft instrument.

18. A suggestion was made that consideration of the title of the draft instrument was premature in light of the future discussions to be held by the Working Group with respect to article 2 “Scope of application” and to the definition of “contract of carriage” in article 1(a). However, support was expressed for the proposal that the Working Group had achieved a level of consensus with respect to the approach to be taken in the draft instrument that was sufficient for the square brackets to be simply removed from the existing title so that the draft instrument would be called the “Convention on the carriage of goods wholly or partly by sea”. Further refinements were suggested. One suggestion was that the word “international” should be added before the word “carriage”, so as to more accurately describe the contents of the instrument and to ensure consistency with existing conventions for the carriage of goods. Another suggestion was that, since the contract of carriage was the essence of the draft instrument, a reference to contracts should be made in the title, which would read “Convention on contracts for the international carriage of goods wholly or partly by sea”. In response to that suggestion, it was pointed out that inclusion of the word “contracts” could be misleading, in that it has been used in the past to describe conventions that, unlike the draft instrument, were more focused on the substantive requirements of the contract itself, such as its formation. Yet another suggestion was that, since UNCITRAL conventions often use the phrase “in international trade”, this phrase should be added to the end of the title. An additional proposal was made to delete the phrase “wholly or partly” currently in square brackets so as to avoid confusion with respect to multimodal instruments. Support was voiced for the contrary view that the inclusion of language indicating both the sea carriage aspect and other possible modes of transport was necessary in order to provide an accurate description of the subject matter of the convention.

19. The Working Group heard support for a number of different variations on the above proposals. While consensus on a specific title was not reached, support was expressed for the view that the title of the draft instrument should reflect its focus on maritime transport, as well

as the possible coverage of other modes of transport. The Working Group decided to retain the current title unchanged for the purposes of future discussion.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Title of the draft convention

283. The Working Group was reminded that the title of the draft convention still contained two sets of square brackets and that a definite decision should be taken.

284. In the subsequent discussion, there was wide support for the deletion of the square brackets around the words “by sea”, to distinguish the draft convention from transport by road or rail.

Proposal to remove the words “wholly or partly”

285. It was proposed to remove the words “wholly or partly” from the title of the draft convention, as the draft convention was not a true multimodal convention, but a predominantly maritime convention. It was noted that the wording “wholly or partly” sounded awkward and that no other convention, covering different transport modalities, used such wording. It was also observed that the inclusion of the words “wholly or partly” appeared to make the title cumbersome and that practical reasons required the shortest title possible. Some support was expressed for that proposal.

Proposal to delete the square brackets around the words “wholly or partly”

286. Another suggestion was made to retain the words “wholly or partly” and to remove the square brackets surrounding them, as the title would then better reflect the contents of the draft convention as a maritime plus convention, covering door to door transport. It was noted that the scope of application of the draft convention had been extensively debated and that the decision had been taken for a maritime plus convention. It was further emphasized that it was important to mark the difference between a unimodal and a maritime plus convention in order to distinguish the draft convention from other international instruments. It was added that the length of the title should not be given too much attention, as an international convention was usually referred to by the name of the city in which it had been formally adopted. Broad support was expressed for the proposal to delete the square brackets around the words “wholly or partly”.

Proposal to insert the word “international”

287. The Working Group accepted a proposal to insert the word “international” before the word “carriage”, in order to mirror the international character of the carriage.

Proposal to include the word “contract”

288. Another proposal was made to include the word “contract” after the words “convention on the”, in order to emphasize the essential element of the draft, which was its focus on the

contract of carriage unlike other conventions such as CIM COTIF, which also focused on harmonized technical aspects or the Hague Rules, which only governed carriage where a bill of lading had been issued. It was further noted that the inclusion of “contract” in the title would single out that the draft convention dealt with private international law and not public international law. In addition, it was stated that the inclusion of the word “contract” in the title would reflect the latest practice with respect to international transport conventions.

Conclusions reached by the Working Group regarding the title of the draft convention

289. Subject to the inclusion of the phrase “contract for the international” and the deletion of the square brackets around the words “wholly or partly” and “by sea”, the Working Group approved the title of the draft convention and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Title of the convention

293. The Commission approved the title “Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea” for the draft Convention.

CHAPTER 1. GENERAL PROVISIONS

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(a) General remark

72. It was noted that the order in which definitions were presented in draft article 1 was based on the alphabetic order in the original English version of the document. It was generally agreed that the readability of the draft instrument would be improved if those definitions were arranged according to a more logical structure by first listing the various parties that might intervene in the contractual relationships covered by the draft instrument and then listing the technical terms used in the draft provisions. It was observed that particular attention would need to be given to those definitions that might influence the determination of the sphere of application of the draft instrument.

Article 1(1). Contract of carriage

“Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(f) Definition of “contract of carriage” (draft article 1.5)

83. The view was expressed that the definition was too simplistic and might require a more detailed consideration of the various obligations of the carrier, namely to receive delivery of the goods, to carry them from one place to another and to deliver them at the place of destination. It was also suggested that the definition of the contract of carriage should not only mention the carrier but also the other party involved, i.e., the shipper. As a matter of drafting, it was suggested that the definition of the contract of carriage should not directly refer to the “carrier” but more generally to a “person” (who would become a carrier by virtue of the contract).

84. Another view was that defining the contract of carriage as a contract where the carrier “undertakes” to carry the goods might conflict with the approach taken in draft article 4.3.1, under which the contract of carriage might result in a situation where the carrier would “arrange” for the goods to be carried by another carrier. It was stated that the definition contained in draft article 1.5 was preferable in that respect since it avoided any ambiguity as to the respective roles of a carrier and a freight forwarder. It was pointed out in response that there was no contradiction between defining, on the one hand, the contract of carriage as one where the carriers “undertakes” an obligation, and establishing, on the other hand, that in addition to the initial contract of carriage another contract may be concluded between the initial carrier and a freight forwarder.

85. The discussion focused on the use of the words “wholly or partly”, which had been included to cover carriage preceding or subsequent to carriage by sea if such carriage was covered by the same contract. It was proposed by delegations that favoured limiting the scope of the draft instrument to port-to-port transport that those words should be deleted or placed between square brackets. It was pointed out that keeping those words was more in line with the provisional working assumption made by the Working Group that the draft instrument should be prepared with door-to-door transport in mind. In addition, it was pointed out that if the words “wholly or partly” were deleted, the scope of the draft instrument would be limited to contracts involving exclusively sea transport. Thus, even the sea segment of a contract of carriage involving also transportation by other means would be excluded from the scope of the draft instrument. However, it was generally felt that such a limitation of the sphere of application of the draft instrument would be excessive. After discussion, it was decided that the words “wholly or partly” would be maintained in the draft provision. With a view to facilitating further discussion regarding the possible implications of the draft instrument in the context of door-to-door transport, it was also agreed that the words “wholly or partly” should be identified by adequate typographical means as one element of the draft instrument that might require particular consideration in line with the final decision to be made regarding the scope of the draft instrument.

[See also paragraphs 53-75, A/CN.9/544 (12th Session of WG III) under article 5 at p. 89]

[See also paragraphs 81-86, 90, and 105-109 of A/CN.9/572 (14th Session of WG III) under Chapter 2, General Discussion at pp. 76, 78 and 80]

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Issue 5: The definition of “contract of carriage”

29. The next issue with respect to scope of application and freedom of contract that was considered by the Working Group was the definition of “contract of carriage”, as set out in A/CN.9/WG.III/WP.44.

30. It was suggested that the words “[an undertaking for]” should be inserted between the words “against” and “the payment of freight” to avoid the risk that the phrase “against the payment of freight” could be narrowly construed to exclude cases of future payment. While some support was expressed for this addition, it was not thought by the Working Group to add to the clarity of the provision.

31. The Working Group further discussed whether the opening phrase of the second sentence of the definition should be “This undertaking” or “This contract”, or whether the word “The” should be used instead of “This”. The Working Group expressed a preference for the use of the phrase “The contract”.

32. The suggestion was also made that the word “[international]” should be inserted between the phrases “must provide for” and “carriage by sea”. The reason for this suggestion was said to be concern that draft article 2 as it appeared in A/CN.9/WG.III/WP.44 did not

adequately convey the requirement of internationality of the sea leg of the carriage. While doubts were expressed regarding the necessity for the inclusion of the word “international”, the Working Group agreed to keep it in the provision in square brackets pending its consideration of draft article 2.

33. Another issue raised for the consideration of the Working Group was whether to retain or to delete the following final phrase in that definition: “[A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]” A view was expressed in support of retaining this phrase and deleting the square brackets around it. It was suggested that the inclusion of such a phrase would promote certainty regarding the application of the draft instrument to situations where the contract of carriage did not specify how the carriage was to take place, but where the actual carriage was by sea. While some sympathy was expressed for this view, it was suggested that a flexible interpretation of the first sentence of the draft provision could achieve a similar result, and that the final phrase in square brackets could be deleted as unnecessary. Further, it was thought that a contract could implicitly provide for carriage by sea, and that, in any event, the key for determining the scope of application of the draft instrument was the contract of carriage, not the actual carriage of the goods. Another view was expressed that, in light of the adoption of a “maritime plus” approach in the draft instrument, the inclusion of such a phrase would be superfluous.

Conclusions reached by the Working Group regarding Issue 5

34. After discussion, the Working Group decided that:

- The phrase “This undertaking” at the start of the second sentence of the definition of the “contract of carriage” should be replaced by the phrase “The contract”;
- The word “[international]” should be inserted in square brackets between the phrases “must provide for” and “carriage by sea” pending consideration by the Working Group of draft article 2 of A/CN.9/WG.III/WP.44;
- The bracketed final phrase of the definition should be deleted.

[See also paragraphs 52, 53 and 54 of A/CN.9/576 (15th Session of WG III) under article 1(2) at p. 8]

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 5. General scope of application

18. The Working Group noted that draft article 5 corresponded to the text contained in draft article 8 of the text contained in A/CN.9/WG.III/WP.56. The Working Group approved the definition of the term “contract of carriage” as contained in draft article 1, paragraph (1). The Working Group also approved the text contained in draft article 5 as set out in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraphs 1, 5, 8 and 24 of draft article 1**

17. With regard to the terms “contract of carriage”, “carrier”, “shipper” and “goods” relevant to draft article 5, the Working Group approved the substance of the definitions respectively provided for in paragraphs 1, 5, 8 and 24 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

25. The Commission approved the substance of draft article 5 and the definitions contained in draft article 1, paragraphs 1, 5 and 8, and referred them to the drafting group.

[See also paragraphs 21-24 of A/63/17 (41st Session of UNCITRAL) under article 5 at p. 98]**Article 1(2). Volume contract**

“Volume contract” means a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time. The specification of the quantity may include a minimum, a maximum or a certain range.

[See also paragraph 78 of A/CN.9/544 (12th Session of WG III) under article 6 at p. 100]**[See also paragraphs 97-104 of A/CN.9/572 (14th Session of WG III) under article 80 at p. 719]****[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]****Proposed redraft of provisions regarding scope of application and freedom of contract (draft articles 1, 2, 3, 4, 88, 89 and new draft article 88a)**

52. Based upon the discussion in the Working Group (see above, paras. 10 to 51) regarding the provisions of the draft instrument relating to scope of application and freedom of contract as they appeared in A/CN.9/WG.III/WP.44 (draft articles 1, 2, 3, 4 and 5) and A/CN.9/WG.III/WP.32 (draft articles 88 and 89), an informal drafting group composed of a number of delegations prepared a revised version of those provisions that resulted in proposed redraft articles 1, 2, 3, 4, 88 and 89, and a proposed new draft article 88a intended to allow for derogation from the draft instrument in the case of volume contracts that would meet certain prescribed conditions. The proposed new text of those provisions was as follows:

“Article 1

“(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage.

“(x) “Volume contract” means a contract that provides for the carriage of [a specified minimum quantity of] cargo in a series of shipments during an agreed period of time.

“(xx) “Non-liner transportation” means any transportation that is not liner transportation. For the purpose of this paragraph, “liner transportation” means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by vessels operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

[* * *]

53. The Working Group heard a brief report from the informal drafting group outlining the changes that had been made from previous versions of these articles as they appeared in A/CN.9/WG.III/WP.44 and A/CN.9/WG.III/WP.32. In the definition of “contract of carriage”, the final bracketed sentence of the previous version of draft article 1(a) had been deleted as decided by the Working Group (see above, paras. 33 and 34). Further, a definition of “volume contract” was added as proposed paragraph (x), and the definition of “liner service” was deleted as unnecessary in light of later proposed provisions that referred only to “non-liner transportation”. [* * *]

Proposed redraft of article 1

54. The Working Group first considered the proposed text for draft article 1 (see paragraph 52 above).

Definition of volume contract (proposed redraft article 1, paragraph x)

55. It was suggested that the words “[a specified minimum quantity of]” in proposed draft article 1(x) should be deleted to reflect a commercial practice in volume contracts, which does not specify the minimum quantity of goods to be transported but only an estimated quantity. It was emphasized that a reference to the quantity of goods to be transported should be retained although without mentioning a minimum quantity.

56. It was suggested that the words “during an agreed period of time” in proposed draft article 1(x) should be deleted. However, it was indicated that a limited time period was essential to the definition of volume contracts. It was added that, in practice, it was not possible for carriers to reserve space for a shipper for an indeterminate period of time.

[* * *]

Conclusions reached by the Working Group on proposed draft article 1

58. After discussion, the Working Group decided that:

- The proposed draft text for article 1 should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

[See also paragraph 154 of A/CN.9/594 (17th Session of WG III) under article 80 at p. 729]

[See also paragraphs 154 and 161-172 of A/CN.9/621 (19th Session of WG III) under article 80 at p. 733]

[See also paragraphs 279-280 of A/CN.9/642 (20th Session of WG III) under article 80 at p. 737]

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Definition of “volume contract” – Paragraph 2 of draft article 1

250. While the proponents of the proposed refined text of draft article 83 insisted that one of the key components of that compromise was that the definition of “volume contract” in draft article 1(2) remained unamended, a significant minority of delegations were of the view that the definition should be revised. The rationale for that position was that the existing definition was too vague, and that it would be in the interests of the parties to know precisely what would trigger the application of the volume contract provision. Further it was thought that the threshold for the operation of volume contracts should be high enough so as to exclude small shippers, notwithstanding the additional protections built into the refined text of draft article 83.

251. In addition to the proposal for the amendment of the definition of “volume contract” noted in paragraph 246 above, other proposals for amendment were made as follows:

- instead of a “specified quantity of goods” the text should refer to a “significant quantity of goods”; and
- the specified quantity of goods referred to should be 600,000 tons and the minimum series of shipments required should be 5.

252. While there was a significant minority of delegations of the view that the definition of “volume contract” should be amended, possibly along the lines suggested in the paragraph above, there was insufficient consensus to amend the existing definition. The Working Group was urged to be realistic about what could be achieved on the matter. Proposals for amending the definition, in particular by introducing a minimum shipment volume below which no derogations to the convention could be made, it was said, had been considered and discarded at earlier occasions and there was no reason to expect that they could be accepted at the present stage.

253. The Working Group approved the substance of the definition of the term “volume contract” in paragraph 2 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraph 2 (“volume contract”)

32. As a possible solution to the concerns expressed with respect to the operation of the volume contract provision (see paras. 243 and 244 below), it was suggested that the definition of “volume contract” in draft article 1, paragraph 2, could be adjusted in order to narrow the potential breadth of the volume contract provision. In particular, the view was expressed that if a specific number of shipments or containers or a specific amount of tonnage of cargo were to be added to the definition, it could provide additional protection, so that parties actually entering into volume contracts would clearly be of equal bargaining power. Some support was expressed for that suggestion.

33. However, the Commission noted that previous attempts by the Working Group to find a workable solution that would provide greater specificity to the definition of “volume contract” had not met with success, and that the Working Group had thus turned its attention to inserting additional protection for parties perceived to be at a disadvantage in the text of draft article 82 itself (see para. 245 below). The Commission agreed that the definition of “volume contract” should be retained as drafted, and that the compromise reached by the Working Group (see A/CN.9/645, paras. 196-204) should therefore be maintained.

34. The Commission approved the substance of draft article 1, paragraph 2, on the definition of “volume contract” and referred it to the drafting group.

Article 1(3). Liner transportation

“Liner transportation” means a transportation service that is offered to the public through publication or similar means and includes transportation by ships operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.
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Article 1(4). Non-liner transportation

“Non-liner transportation” means any transportation that is not liner transportation.

[See also paragraphs 81-86, 90 and 105-109 of A/CN.9/572 (14th Session of WG III) under Chapter 2, General Discussion at pp. 76, 78 and 80]

[See also paragraphs 52-54 of A/CN.9/576 (15th Session of WG III) under article 1(2) at p.8]

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Definition of liner and non-liner transportation (proposed draft article 1, paragraph xx)**

57. It was suggested that the order of the sentences in the proposed text of draft article 1(xx) should be inverted. However, it was also observed that the order of the sentences in the proposed draft article 1(xx) better reflected the use of the notion of non-liner transportation in the draft instrument. Another drafting suggestion was to delete the definition of “non-liner transportation” completely. In addition, in response to a question, the use of the phrase “includes transportation” in subparagraph (ii) was explained as being necessary to describe only part of the transportation service being offered, which could include other services, such as warehousing.

Conclusions reached by the Working Group on proposed draft article 1

58. After discussion, the Working Group decided that:

- The proposed draft text for article 1 should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraphs 3 and 4 of draft article 1**

19. With regard to the terms “liner transportation” and “non-liner transportation” used in draft article 6, the Working Group approved the substance of the definitions respectively provided for in paragraphs 3 and 4 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 1, paragraph 3 (“liner transportation”)**

27. The Commission approved the substance of draft article 1, paragraph 3, on the definition of “liner transportation” and referred it to the drafting group.

Draft article 1, paragraph 4 (“non-liner transportation”)

28. The Commission approved the substance of draft article 1, paragraph 4, on the definition of “non-liner transportation” and referred it to the drafting group.

Article 1(5). Carrier

“Carrier” means a person that enters into a contract of carriage with a shipper.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(b) Definition of “carrier” (draft article 1.1)**

73. It was recalled that the definition of “carrier” in the draft instrument followed the same principle as laid down in the Hague-Visby Rules and the Hamburg Rules, under which the carrier was a contractual person. A carrier might have entered into the contract either on its own behalf and in its own name or through an employee or agent acting on its behalf and in its name. A carrier would typically perform all of its functions through such persons (A/CN.9/WG.III/WP.21, annex, para. 2). However, a concern was expressed that the definition of “carrier” did not make sufficient reference to the parties on whose behalf a contract of carriage was made. It was stated that the position of freight forwarders under the draft instrument was not entirely clear, as these parties were arguably covered by the definition of carrier (A/CN.9/WG.III/WP.21/Add.1, para. 11). Another concern was expressed that, as currently drafted, the definition of “carrier” might not make it sufficiently clear that it was intended to cover both natural and legal “persons”.

74. While it was generally agreed that the draft definition of “carrier” constituted an acceptable basis for continuation of the discussion, some felt that further explanations would need to be given in the course of the preparation of the draft instrument as to the reasons for which a simpler definition of “carrier” had been proposed, in contrast with the more complex but perhaps also more precise definitions contained in existing maritime transport conventions.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

17. The Working Group adopted the definitions contained in paragraphs (5), (9) and (25) of draft article 1 in substance. Although it was deemed unnecessary in some legal systems, the Working Group agreed to retain draft article 4 and to extend its coverage to apply also to shippers to the extent that shipper liability was covered by the draft convention. In respect of the phrase, “or otherwise” the Working Group agreed to retain this phrase and requested the Secretariat to review its utility. In respect of procedural issues, the Working Group agreed that a review be undertaken as to the scope of defences and limits of liability after these terms had been settled.

Draft article 11. Period of responsibility of the carrier

28. The Working Group was reminded that its most recent consideration of draft article 11 on the period of responsibility of the carrier was at its sixteenth session (see A/CN.9/591, paras. 190 to 208). The Working Group proceeded to consider draft article 11 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1

29. Clarification was requested regarding the different definitions of “carrier” (draft article 1(5)) and of “performing party” (draft article 1(6)) in the draft convention, such that the definition of “performing party” included employees, agents and subcontractors, while the definition of “carrier” did not. The question was raised whether this might cause ambiguity regarding when the period of responsibility commenced if the goods were received by the employee or agent of the carrier, and not by the carrier itself. It was explained that the draft convention had specifically attempted to avoid agency issues, but that at times, it was thought

to be important to stress that a particular provision was intended to include carriers acting through their agents, and thus the term “carrier or performing party” had been used, but that as a general matter, the employees of carriers would be included in the provision by virtue of their inclusion in the definition of performing parties.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Paragraphs 1, 5, 8 and 24 of draft article 1

17. With regard to the terms “contract of carriage”, “carrier”, “shipper” and “goods” relevant to draft article 5, the Working Group approved the substance of the definitions respectively provided for in paragraphs 1, 5, 8 and 24 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

25. The Commission approved the substance of draft article 5 and the definitions contained in draft article 1, paragraphs 1, 5 and 8, and referred them to the drafting group.

Article 1(6). Performing party

(a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, keeping,* care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

(b) “Performing party” does not include any person that is retained, directly or indirectly, by a shipper, by a documentary shipper, by the controlling party or by the consignee instead of by the carrier.

*The addition of “keeping” is a technical correction notified in Depositary Notification C.N.563.2012.TREATIES-XLD.8 and effected in

Depositary Notification C.N.105.2013.TREATIES-XLD.8.

Article 1(7). Maritime performing party

“Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(p) Definition of “performing party” (draft article 1.17)**

95. It was noted that in preparing the draft definition of “performing party” different views expressed during the consultation process were taken into account. Some favoured including any party that performs any of the carrier’s responsibilities under a contract of carriage if that party is working, directly or indirectly, for the carrier. Others advocated excluding the “performing party” definition entirely. The relatively restrictive definition in the current text was presented as a compromise (for further comments about the definition of the performing carrier (“performing party”), see paras. 14 to 21 of document .

96. It was suggested that the concept of the performing carrier (“performing party”) should be deleted and that the contractual carrier (who should be the only person to respond to the claimant) should have the right of recourse against performing parties. It was added that the channelling of liability to a party (in this case the contracting party) would be preferable and that such channelling of liability worked in practice, as demonstrated for example by the International Convention on Civil Liability for Oil Pollution Damage (CLC), 1969.

97. Another suggestion was to further restrict the notion of the performing party by excluding entities that handled and stored goods (such as operators of transport terminals) and include in the definition only true carriers.

98. It was also suggested that the restriction of the definition by using the concept of “physically performs” was arbitrary and would cause problems in practice (e.g. it would be difficult to establish with one limitation period who was the person to be sued, and might cause difficulties of interpretation in applying draft articles 4.2.1, 4.3 and 5.2.2). The definition of the “actual carrier” in article 1(2) of the Hamburg Rules was suggested to be preferable.

99. However, wide support was expressed for the presence of the notion in the draft instrument; its concept was also widely supported, including the use of the term “physically performs” as a way to limit the categories of persons to be included within the definition. It was considered that the notion of performing party was useful since it provided a meaningful protection to the claimant (it was in particular beneficial to the consignee to be able to hold the last performing carrier liable for the goods). It was indicated that the protection to the performing party as contained in draft article 6.10 as well as 6.3.1 (also known in some legal systems as “Himalaya clause”) was an essential part of the role of “performing party” in the draft instrument.

100. It was also suggested that all of the options for the definition of “performing party” contained in the draft text and commentary should be retained for the time being.

101. It was stated that, while the definition should not be broadened, it would be useful to have some clarification as to how the persons that fell outside the definition of performing party would be treated as regards matters such as any right of suit against them and any liability limits and defences applicable to them.

102. It was suggested to replace “under a contract of carriage” with an expression such as “in the context of transport operations” or “in performing the transport operations” to indicate more clearly the relation of the performing party to the “contract of carriage”. It was added in more general terms that the performing party was not a party to the contract of carriage between the

shipper and the contracting carrier and that the drafting of the definition should be reviewed to make that clear. In that connection, the question was raised whether it was necessary to address any obligations that the performing party was carrying out and which were not obligations assumed by the contracting carrier.

103. It was noted (without suggesting that the definition of “performing party” should necessarily be narrowed) that the Working Group would have to consider the possibility that a performing party (such as a warehouse operator) would be located in a State that was not a party to the convention being prepared. It was also observed that, to the extent operators of transport terminals would be performing parties, the Working Group would have to take into account a possible conflict between the draft instrument and the United Nations Convention on the Liability of Operators of Transport terminals in International Trade (Vienna, 1991).

104. Suggestions were made to simplify and shorten the drafting of the definition. It was suggested to delete the words “regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage” as unclear and as adding nothing substantial to the definition. The presence of the last sentence of the definition was supported because it clarified the defined concept. The Working Group considered that the words “[or fails to perform in whole or in part]” should be deleted.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]**(b) Definitions of “maritime performing party” and “non-maritime performing party”**

28. The Working Group proceeded with a consideration of the definition of maritime and non-maritime performing parties. The Working Group heard proposals for possible definitions of “maritime performing party” and “non-maritime performing party”, and for adjustments to the existing definition of “performing party” set out in article 1(e) of the draft instrument.

29. The definitions proposed were as follows:

“(e) ‘Performing party’ means a person other than the carrier that physically performs [or undertakes to perform] any of the carrier’s responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term ‘performing party’ includes maritime performing parties and non-maritime performing parties as defined in subparagraphs (f) and (g) of this paragraph but does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee.”

“(f) ‘Maritime performing party’ means a performing party who performs any of the carrier’s responsibilities during the period between the arrival of the goods at the port of loading [or, in case of trans-shipment, at the first port of loading] and their departure from the port of discharge [or final port of discharge as the case may be]. The performing parties that perform any of the carrier’s responsibilities inland during the period between the departure of the goods from a port and their arrival at another port of loading shall be deemed not to be maritime performing parties.”

“(g) ‘Non-maritime performing party’ means a performing party who performs any of the carrier’s responsibilities prior to the arrival of the goods at the port of loading or after the departure of the goods from the port of discharge.”

30. By way of presentation, the Working Group heard that two approaches had been envisaged in creating the definitions, namely, a functional approach and a geographical approach. The geographical approach had been chosen as the simpler of the two. It was proposed that the geographical area for the definition could be the “port”, although it was conceded that a definition of “port” could pose considerable difficulties, and would likely be defined with reference to national law. A further caveat added by the proponents of the definitions was that the final sentence of the proposed definition of “maritime performing party” was intended to deal with the situation where a maritime leg of the carriage was followed by a land leg, which was in turn followed by another maritime leg, but that this phrase would require refinement.

31. There was general agreement in the Working Group that these definitions were a good basis for continuing the discussion on how to define maritime and non-maritime performing parties. There was general agreement that a geographical approach to the definition was appropriate, and there was support for the suggestion that inland movements within a port should be included in the definition of a maritime performing party, as, for example, in the case of a movement by truck from one dock to the next. However, a widely shared view was that

movement between two physically distinct ports should be considered as part of a non-maritime performing party's functions. It was suggested that a rail carrier, even if it performed services within a port, should be deemed to be a non-maritime performing party. A caveat was raised that experience under national law in some States indicated that the application of the geographical approach (while generally appropriate), was likely to generate substantial litigation. It was suggested that the draft definition could clarify the situation where non-maritime performing parties carried out some of their activities in a port area, as, for example, in the loading of a truck for movement of the goods outside of the port. It was proposed that this clarification could be achieved by indicating that performing parties were those who carried out the carrier's obligations in connection with the sea carriage. In response, it was noted that "performing parties" under the definition contained in draft article 1(e) were already qualified as those parties who carried out core functions pertaining to the carrier. It was suggested that it was slightly unclear whether the definition of a maritime performing party also concentrated on these core functions.

32. A second area of discussion concerned whether the phrase "or undertakes to perform" should be included in the draft definition. Support was expressed for the inclusion of this phrase and the deletion of the square brackets around it, since it was suggested that inclusion of the phrase would appropriately take the interests of claimants into account by recognizing a direct cause of action against each party in what could be a very long chain of subcontracts. An opposing view suggested that the inclusion of the phrase "or undertakes to perform" could cause problems in practice, since the performing party who simply undertook to perform would be responsible to the carrier, but that it would be difficult for the shipper to ascertain the facts and determine against whom the action should be taken. The Working Group decided that the inclusion or exclusion of the phrase "or undertakes to perform" could be decided at a later stage, in conjunction with an analysis of the existing definition of "performing party" in article 1(e) of the draft instrument (see paras. 34 to 42 below) and in view of the overall balance for cargo liability in the draft instrument.

33. Another concern raised was whether the definition should deal with performing parties in non-contracting States. It was suggested that this matter, if appropriate in light of concerns with respect to forum-shopping and the issue of enforcement of foreign judgements, could be dealt with later in view of the convention as a whole. As a matter of drafting, it was suggested that the phrase "first port of loading" be changed to "next port of loading" in the proposed paragraph (f).

(c) Definition of "performing party" in article 1(e)

34. In addition to the definition proposed in paragraph 29 above, the Working Group considered the text of draft article 1(e), which read as follows: "(e) 'Performing party' means a person other than the carrier that physically performs [or undertakes to perform] any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage. The term 'performing party' does not include any person who is retained by a shipper or consignee, or is an employee, agent, contractor, or subcontractor of a person (other than the carrier) who is retained by a shipper or consignee."

35. By way of introduction, the Working Group heard that article 1(e) had not changed significantly in the redraft of the draft instrument, and that the historical aspect of the discussion could be found in the footnotes to article 1(e). It was also stated that the footnotes contained alternative language to that presented in the text of article 1(e) (see A/CN.9/WG.III/WP.32, footnotes 8-10).

36. With a view to broadening the definition of “performing party”, it was suggested that the square brackets around the phrase “undertakes to perform” should be removed. The Working Group was reminded that the relevance of the definition was to establish that the contracting carrier would be liable for the errors, faults, and omissions of performing parties in general. It was stated that the narrower definition resulting from deleting the phrase in square brackets would allow performing parties who undertake to perform and then who either do not perform or delegate that performance to another party to escape liability. Further, it was suggested that it would be inappropriate to subject those who undertake to perform and do not perform at all to a lower standard than those who undertake to perform and fail in their attempted performance. In response to concerns that so-called “paper carriers”, or those who do not actually perform the carriage, should not be held responsible based on their undertaking to carry, it was suggested that the language of the definition would simply allow a direct action against the performing party who was at fault, and that it would avoid a multiplicity of actions in working through the chain of contracts to get to the same party. It was also suggested that failure to include the phrase in the definition could allow for the linkages in the chain of contracts to be broken. For these reasons, strong support was expressed for the inclusion of the phrase “or undertakes to perform”. It was suggested that this proposal should be further clarified to exclude remote defendants by inserting into the phrase the word “physically”, so that the performing party would have to “undertake to perform physically”. While it was suggested that it was implicit that those who undertook to perform with respect to the contract of carriage undertook to do so physically, there was also strong support expressed for this refinement of the original proposal.

37. Concern was expressed by some delegations that the draft instrument should not cover performing parties at all. In addition, the concern was again raised that the phrase “or undertakes to perform” would make it difficult for the shipper to identify all of those parties whom the contracting carrier had engaged to perform some aspect of the carriage, and that the contract would be between the performing party and the contracting carrier. It was suggested that inclusion of the phrase might create a multiplicity of actions against performing parties that would not necessarily be the proper defendants, which would result in no improvement over the situation where the shipper would simply bring action against the performing carrier and the contracting carrier. In addition, it was felt that inclusion of the phrase in the definition would violate the concept of privity of contract between the shipper and the contracting carrier.

38. Concern was also expressed regarding the limitation of the definition to those persons other than the carrier that perform “any of the carrier’s responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods”, since it was felt that the definition should include all of the functions of the carrier rather than only those listed. It was also suggested that there was a potential anomaly in the definition, since in some cases the carrier could be performing the loading or discharging of the goods on behalf of the shipper, yet the definition referred to persons performing “at the carrier’s request or under the carrier’s supervision or control”.

39. Further concern was expressed that the inclusion of the phrase “undertakes to perform” made the definition too broad. In response to this and to a question whether the interaction of this definition and the period of responsibility in article 7 could mean that the performing party who failed to pick up the goods would be liable when the contracting carrier would not be liable, the Working Group heard that the period of responsibility of the performing party and of the carrier was intended to be the same, and that the liability of the performing party in his role as performing party would never be wider than the contracting carrier’s responsibility as contracting carrier. In addition, it was stated that the notion of undertaking physical performance would clarify the intended narrower scope of the definition. Another potential difficulty with the definition was raised in the situation where certain ports require that port operations are undertaken by administrative authorities.

40. The Working Group was urged to bear in mind the two separate aspects of the issue of performing parties: that of liability for the performing party, and that of liability of the performing party. It was suggested that these issues might be better dealt with in a substantive provision such as draft article 15 on the liability of performing parties, rather than in a definition. It was felt by some delegations that this definition of “performing party”, while adequate in general terms for the moment, might have to be revisited in the context of a discussion of draft article 15.

41. Two matters with respect to the definition were clarified. First, it was emphasized that the definition should not include an employee or agent as a performing party. In addition, it was observed that if the Working Group decided to exclude non-maritime performing parties from the application of the draft instrument, language along the lines of the proposed definition in paragraph 29 above including both maritime performing parties and non-maritime performing parties would have to be included in this general definition in article 1(e).

42. The Working Group made a provisional decision that the phrase “undertakes physically to perform” should be included in the definition without square brackets in order to both broaden the definition and clarify its limits in terms of physical performance pursuant to the contract of carriage. The Working Group asked the Secretariat to consider adding an inclusive phrase, such as “among others”, “inter alia” or a reference to “similar functions”, to the list of the carrier’s functions, and to consider shortening the definition, among other possibilities by deleting the phrase “regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage” as noted in footnote 8 of the revised draft instrument (A/CN.9/WG.III/WP.32).

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Paragraphs 6 and 7 – “performing party” and “maritime performing party”

128. The Working Group noted that the definition of “performing party” contained two sentences: the first described a performing party, and the second extended that initial definition to include employees, agents and subcontractors. It was noted that the purpose of the definition of “performing party” was to regulate three different issues, which should not be confused. First, the definition was intended to govern parties that performed the carrier’s activities under a contract of carriage, usually subcontractors, and their joint and several liability with the contracting carrier. Secondly, the definition was aimed at regulating the vicarious liability of

the performing party for its employees or others working in its service. Finally, the definition, in conjunction with draft articles 4 and 19, was aimed at extending the protection of the so-called “Himalaya clause” to such employees, agents or subcontractors.

129. It was noted that the definition of “maritime performing party” referred back to the definition of “performing party” and thus it also included employees, agents and subcontractors. It was suggested that, as formulated, the definition could have the unintended effect that any possible contractual liability of a maritime performing party under the contract of carriage could be imposed directly on an employee, agent or subcontractor, and there was support for the view that the definition of “performing party” should be reconsidered to avoid such an unintended consequence. In that respect, it was noted that, as drafted, the unintended consequence of rendering employees directly contractually liable would be inconsistent with many national laws which protected employees from such liability.

130. In response, it was explained that the reason that the definition had been framed so broadly was in order to avoid the privity of contract problem that had arisen in the jurisprudence with respect to Himalaya clauses that allowed for such protection under the clause only for subcontractors, but not for those further down the chain of contracts. In addition, it was said that it was difficult to envisage from both a practical and, in some countries, a legal perspective, a situation where an individual employee would be held responsible as a maritime performing party, including all of the liabilities that would follow therefrom. It was suggested that, in practice, it would be unlikely that a cargo owner would sue an employee directly on the basis that litigants tended to sue those with the greatest financial means to satisfy a judgement. It was cautioned that, if the definition were to be reformulated, care should be taken to avoid the accidental removal of the vicarious liability of employers, and, since reference was made throughout the draft convention to “performing parties” and “maritime performing parties”, caution was also advised against changes that could have unintended consequences elsewhere in the text.

131. It was suggested that the reformulation of the definition should be considered by the Working Group. It was agreed that any reformulation should consider the substantive articles throughout the text that referred to the definition and should be based on the following guiding principles:

- Carriers and subcontractors should have joint and several liability;
- Carriers and employers should be vicariously liable for their employees; and
- The protection of the so-called “Himalaya clause” should apply to employees in the same way that it applied to employers and not be limited in operation by the principle of privity of contract.

Proposal to exclude rail carriers

132. The Working Group was reminded of its policy decision to exclude inland carriers from the draft convention.

133. As set out in A/CN.9/WG.III/WP.84, a proposal was made that rail carriers, even if performing services within a port, should be excluded from the definition of “maritime performing party.” To that end, it was suggested that the following sentence be added at the end of draft article 1, paragraph 7(the definition of “maritime performing party”): “A rail carrier, even if it performs services that are the carrier’s responsibilities after arrival of the goods at the

port of loading or prior to the departure of the goods from the port of discharge, is a non-maritime performing party.”

134. In support of the proposal, it was suggested that such an exemption was warranted given the practical reality that although rail carriers might be somewhat similar to other inland carriers in that they collected cargo or delivered it for carriage within a port area, rail carriers differed dramatically from other inland carriers in that the ultimate purpose of their services was virtually exclusively to move goods great distances into or out of a port, and not simply to move goods from one place to another within a port.

135. It was questioned whether a specific exemption was necessary given that the existing text of the draft convention made it clear that such inland carriers were almost invariably classified as such and not covered by the definition of maritime performing party, thus falling outside of the scope of the draft convention. In response, it was said that without an express provision, courts would be required to undertake an analysis on a case-by-case basis to determine if a rail carrier was covered by the definition or not. It was said that an express exemption provided clarity and would reduce litigation on that question.

136. Concern was expressed that the consequences of a blanket exemption for rail carriers had not been fully considered. One issue raised was the problem that a catalogue of carriers of various types might seek to be similarly exempted from the scope of application of the draft convention. In addition, a view was expressed that a preferable approach to a blanket exemption might be to provide more clearly in the text that the draft convention did not apply if maritime transport was neither contemplated nor actually performed, since it was suggested that freight forwarders needed the flexibility to perform contracts of carriage in the manner they saw fit, including the right to use the optimal modes of transport.

137. Further, it was questioned why such an exemption should be limited to rail carriers. Some support was expressed for the view that the proposed exemption should also extend to road carriers (as suggested in A/CN.9/WG.III/WP.90) and possibly to inland barges. In that respect it was said that, unlike rail carriers, truckers might perform purely inland carriage as well as services that were exclusively within the port area, and that therefore any exemption for road carriage might need to be formulated in different terms than that which applied to rail carriage. It was suggested that an exemption for both road and rail carriers might be drafted too broadly and thus exempt truckers who exclusively provided services in the port area and should be treated as “maritime performing parties”. One suggestion to allow for a more nuanced approach to the problem was an exemption drafted along the following lines: “a rail carrier or road carrier is a maritime performing party only when it performs or undertakes to perform its services exclusively within the port area”. That proposal received some support.

Conclusions reached by the Working Group regarding draft paragraphs 6 and 7

138. After discussion, the Working Group decided to postpone its decision on the definitions of “performing party” and “maritime performing party” pending an examination of redrafted provisions, including a possible exemption for rail and possibly other inland carriers from the definition of maritime performing party, taking into account the proposals made in the Working Group.

[* * *]

Revised text of draft articles 1(6) and 1(7) (“performing party” and “maritime performing party”); and draft articles 4, 18 and 19

141. In accordance with its earlier decision to reconsider the reformulated definitions of “performing party” and “maritime performing party” as originally contained in paragraphs 6 and 7, respectively, of draft article 1 (see above, para. 138), the Working Group continued its deliberations on the following revised text of those provisions, as well as consequential changes to draft articles 4, 18 and 19:

“Article 1. Definitions

“6. (a) “Performing party” means a person other than the carrier that performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, discharge or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control. It includes agents or subcontractors of a performing party to the extent that they likewise perform or undertake to perform any of the carrier’s obligations under a contract of carriage.

“(b) Performing party does not include:

“(i) an employee of the carrier or a performing party; or

“(ii) any person that is retained, either directly or indirectly, by a shipper, by a documentary shipper, by the consignor, by the controlling party or by the consignee instead of by the carrier.

“7. “Maritime performing party” means a performing party to the extent that it performs or undertakes to perform any of the carrier’s obligations during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge of a ship, but, in the event of a trans-shipment, does not include a performing party that performs any of the carrier’s obligations inland during the period between the departure of the goods from a port and their arrival at another port of loading. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area.

“Article 4. Applicability of defences and limits of liability

“[renumber current article 4 as paragraph 1]

“2. If judicial or arbitral proceedings are instituted in respect of loss or damage [or delay] covered by this Convention against master, crew or any other person who performs services on board the ship or employees or agents of a carrier or a maritime performing party that person is entitled to defences and limits of liability as provided for in this Convention.

“3. Paragraph 2 applies whether judicial or arbitral proceedings are founded in contract, in tort or otherwise.

“Article 18. Liability of the carrier for other persons

“The carrier is liable for the breach of its obligations pursuant to this Convention caused by the acts or omissions of:

“(a) Any performing party;

“(b) Master or crew of the ship;

“(c) Employees or agents of the carrier or a performing party; or

“(d) Any other person that performs or undertakes to perform any of the carrier’s obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control.

“Article 19. Liability of maritime performing parties

“1. A maritime performing party that initially received the goods for carriage in a Contracting State, or finally delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State if the occurrence that caused the loss, damage or delay took place during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge from a ship, when it has custody of the goods or at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage:

“(a) Is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier’s defences and limits of liability as provided for in this Convention, and

“(b) Is liable for the breach of its obligations pursuant to this Convention caused by the acts and omissions of any person to which it has entrusted the performance of any of the carrier’s obligations under the contract of carriage. ...”

142. It was explained that the three guiding principles agreed upon by the Working Group with respect to the reformulation of the definitions of “performing party” and “maritime performing party” (see above, para. 131) had been followed in redrafting the text. In the revised text, “Performing party” was defined narrowly, such that subparagraph (a) detailed the inclusive list, and subparagraph (b) detailed the excluded persons, which was thought to solve the potential problem of the employee of the maritime performing party being held liable pursuant to the draft convention for the actions of its employer. In addition, it was indicated that the list of persons included in the vicarious liability provision of draft article 18 was expanded to specifically include the persons who, the Working Group had decided, should receive such protection. Further, automatic protection was specifically included for the broader category of persons, as agreed by the Working Group, and protection pursuant to draft article 4 was expanded, including small additional changes such as the inclusion of arbitral proceedings in the text of the provision. Certain technical adjustments were also made to draft article 19(1), such as moving a portion of subparagraph 1(a) into the chapeau. Finally, it was explained that the last sentence of the definition of “maritime performing party” was intended to exclude specifically from the definition those inland carriers who carried the goods only into or out of the port, as decided by the Working Group.

“by the carrier” in draft article 1(6)(b)(ii)

143. It was suggested that the closing phrase, “by the carrier” in draft article 1(6)(b)(ii) could be deleted as redundant. However, it was explained that that phrase was necessary because

subparagraph (b) set out the exclusions from the definition, and subparagraph (b)(ii) specifically referred to the situation in draft article 14(2), where a shipper or other person could agree to perform obligations normally undertaken by the carrier. In such a case, it was clarified, the draft convention should exclude from the definition those retained either directly or indirectly by cargo interests, but that since the carrier itself was also retained by the shipper, the phrase had to be included to ensure that the carrier was not excluded as a “performing party”.

“Inland carrier” in draft article 1(7)

144. In response to concerns raised that the phrase “inland carrier” did not include carriage by inland waterway, partially due to uncertainties of translation in various language versions of the text, the Working Group affirmed that it intended to include road, rail and inland waterway transport within the term. There was support for a request that that intention be clarified in the text, and for the suggestion that the position of ferries operated by inland carriers also be clarified, perhaps more in terms of the definition of the contract of carriage of goods by sea than as part of the definition of “maritime performing parties.”

145. In addition, it was noted that the term “inland carrier” might not be ideal, since the word “carrier” was a defined term, and it was suggested that “inland performing party” might be preferable. That suggestion was not favoured, however, as it was thought that it could inadvertently exclude from the definition of “maritime performing party” some inland performing parties who clearly should be included, such as stowage planners, who might do their work exclusively from an office located outside of a port, but who were clearly maritime performing parties.

“trans-shipment” and “port” in draft article 1(7)

146. A question was raised regarding the exclusion of performing parties in the case of trans-shipment from the definition of “maritime performing party.” While it was acknowledged that the Working Group had agreed to such treatment, concern was raised regarding the apparent gap that such treatment created in the coverage of the draft convention. Nonetheless, the text in this regard was accepted as drafted.

147. An additional drafting point was raised with respect to the second sentence of the definition of “maritime performing party” referring to trans-shipment. It was thought that that sentence could be deleted as being covered by the closing sentence of the definition that only included in its scope inland carriers that performed services exclusively within a port area, thus excluding from the definition those involved in trans-shipment that did not perform services exclusively in a port area, but rather travelled between ports. Some support was expressed for that view, and it was suggested that such an approach could be considered in further drafting adjustments.

148. Concerns were raised, however, that in the case of very large or geographically proximate ports, or different ports that were administered under a single authority, it would be very difficult to determine whether a performing party were performing its services “exclusively within a port area”, and thus very difficult to determine who qualified as “maritime performing parties.” Support was expressed for those concerns, including some support for the suggestion that the Working Group might wish to consider excluding altogether inland carriers from operation of the draft convention. In response, it was noted that the Working Group had previously agreed to leave the determination of what constituted a “port”

to local authorities and the judiciary, since views on that topic differed widely according to geographic conditions. It was also indicated that it was difficult to determine whether this would be a serious problem, and that, in any event, the draft convention had left undefined a number of terms given the inability of the instrument to answer every question. In addition, it was noted that the Hamburg Rules referred to the “port” without defining the term. Despite concerns that such an approach to determining the ambit of a particular port could result in unnecessary and expensive litigation to determine the local meaning of “port”, it was agreed that a solution such as the suggested exclusion of all inland carriers would be a policy decision that would have serious consequences throughout the draft convention. As such, the current approach taken in draft article 1(7) was broadly supported.

Draft article 4

149. It was observed that paragraph 1 of draft article 4 should be amended through the inclusion of “arbitral proceedings” in order to render it consistent with the additional paragraphs proposed in the revised text. In response to a question regarding the use of the phrase “that person is entitled to defences and limits of liability as provided for in this Convention” in the revised text, it was explained that a different phrase was used from that of the original text in order to clarify that where, for example, a carrier contractually agreed to increase its limitation on liability, a person referred to in draft article 4 would not be bound by that contractual agreement, but would rather be governed by the terms of the draft convention. Support was expressed for that approach, and clarification of the text in that regard was encouraged.

Various drafting issues

150. It was indicated that the definition of “performing party” included agents but excluded employees, and that in some jurisdictions, agents and employees would be treated similarly. In response to a question, it was noted that there was a duplication in draft article 18 that should be corrected, in that subparagraph (a) referred to “any performing party” and subparagraph (c) included “agents”, but that “agents” were already included in the definition of “performing party”. However, it was thought that that issue should be examined more closely, since it might still be necessary to refer to “agents of the carrier” in draft article 18. A further suggestion was made that “agents of the carrier” should be expressly included in the definition of the “performing party.”

151. In response to a question regarding the treatment of employees and agents under draft article 19(1)(b), it was noted that the phrase “any person to which it has entrusted the performance” was intended to include such persons. However, it was agreed that should any doubt persist in that regard, the master and crew of the ship, employee and agent should be included in the text of draft article 19(1)(b). A preference was expressed for such a clarification in the text, but a further observation was made that that inclusion should be very specific so as to ensure that it referred to the master and crew of the ship that performed the ocean transport leg for which the maritime performing party was responsible.

152. A question was also raised regarding the inclusion of independent contractors in the Himalaya protection. It was indicated that “subcontractors” were included in the definition of the “performing party” and thus were included under Himalaya protection by virtue of the inclusion of the “performing party”, but it was suggested that if that reference were unclear, consideration could be given to the addition of “independent contractors”.

Conclusions reached by the Working Group regarding the revised text

153. After discussion, the Working Group decided that:

- It was satisfied that the revised text corresponded to its earlier decisions;
- Some drafting suggestions as set out in the paragraphs above should be considered by the Secretariat, including examination of the list of persons excluded from “performing party”; the treatment of “agents” in draft article 1(6), 4(2) and 18; and appropriate wording to include inland waterways in the closing sentence of draft article 1(7);
- The revised text was otherwise generally acceptable to the Working Group.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraphs 6, 7 and 25 of draft article 1**

61. With regard to the terms “performing party” and “maritime performing party” used in draft article 20, the Working Group approved the substance of the definitions respectively provided for in paragraphs 6 and 7 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 20. Liability of maritime performing parties; and draft article 1, paragraphs 6 (“performing party”) and 7 (“maritime performing party”)**

79. It was noted that draft article 20 made the maritime performing party subject to the same liabilities imposed on the carrier. According to the definition in draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. The combined effect of those provisions was said to be inappropriate, as seaworthy packing could also be performed inland. Furthermore, cargo companies located in seaports were more and more frequently performing services that did not fall under the obligations of the carrier. Furthermore, there might be doubts as to whether a road or rail carrier that brought goods into the port area would qualify as a maritime performing party for its entire journey or whether it would be a mere performing party until it reached the port area and would become a maritime performing party upon entering the port area. As it was in practice difficult to establish the boundaries of port areas, the practical application of those provisions would be problematic. In view of those problems, it was suggested that the draft Convention should allow for declarations whereby Contracting States could limit the scope of the Convention to carriage by sea only.

80. In response, it was noted that in accordance with draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. That qualification was consistent with a policy decision taken by the Working Group that road carriers should generally not be equated with maritime performing parties. Therefore, a road carrier that brought goods from outside the port area into the port area would not be regarded as a maritime performing party, as the road

carrier had not performed its obligations exclusively in the port area. Furthermore, it was noted that it had become common for local authorities to define the extent of their port areas, which would in most cases provide a clear basis for the application of the draft article. The Working Group, it was further noted, did not consider that there was any practical need for providing a uniform definition of “port area”.

81. The Commission approved the substance of draft article 20 and of the definitions contained in draft article 1, paragraphs 6 and 7, and referred them to the drafting group.

Article 1(8). Shipper

<p>“Shipper” means a person that enters into a contract of carriage with a carrier.</p>

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(r) Definition of “shipper” (draft article 1.19)

106. The Working Group noted that the definition mirrored the definition of “carrier” in draft article 1.1. The shipper was a contractual party who might have entered into the contract either on its own behalf and in its own name or through an employee or agent acting on its behalf and in its name. A shipper would typically perform all of its functions through such persons. The shipper might be the same person as the consignee, as was the case in many FOB (“free on board”) sales (A/CN.9/WG.III/WP.21, annex, para. 22).

107. Bearing in mind the concerns expressed in the context of the discussion of draft article 1.1, it was generally agreed that the draft definition of “shipper” constituted an acceptable basis for continuation of the discussion at a future session.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

17. The Working Group adopted the definitions contained in paragraphs (5), (9) and (25) of draft article 1 in substance. Although it was deemed unnecessary in some legal systems, the Working Group agreed to retain draft article 4 and to extend its coverage to apply also to shippers to the extent that shipper liability was covered by the draft convention. In respect of the phrase, “or otherwise” the Working Group agreed to retain this phrase and requested the Secretariat to review its utility. In respect of procedural issues, the Working Group agreed that a review be undertaken as to the scope of defences and limits of liability after these terms had been settled.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraphs 1, 5, 8 and 24 of draft article 1**

17. With regard to the terms “contract of carriage”, “carrier”, “shipper” and “goods” relevant to draft article 5, the Working Group approved the substance of the definitions respectively provided for in paragraphs 1, 5, 8 and 24 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

25. The Commission approved the substance of draft article 5 and the definitions contained in draft article 1, paragraphs 1, 5 and 8, and referred them to the drafting group.

Article 1(9). Documentary shipper

“Documentary shipper” means a person, other than the shipper, that accepts to be named as “shipper” in the transport document or electronic transport record.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 33. Assumption of the shipper’s rights and obligations by the documentary shipper**

254. The Working Group was reminded that its most recent consideration of the content of draft article 33 on the assumption of the shipper’s rights and obligations by the documentary shipper was at its sixteenth session (see A/CN.9/591, paras. 171 to 175). The Working Group proceeded to consider draft article 33 as contained in A/CN.9/WG.III/WP.81.

255. It was observed that the definition of “documentary shipper” as set out in paragraph 10 of draft article 1 had been created from the first sentence of the previous version of the draft provision as found in A/CN.9/WG.III/WP.56.

256. The Working Group agreed that draft articles 1(10) and 33 should be approved as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraph 9 of draft article 1**

103. With regard to the term “documentary shipper” used in draft article 34, the Working Group approved the substance of the definition of that term provided in paragraph 9 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 34. Assumption of shipper's rights and obligations by the documentary shipper; and draft article 1, paragraph 9 ("documentary shipper")**

106. A concern was expressed that draft article 34 was too broad in subjecting the documentary shipper to all of the obligations of the shipper. That view was not taken up by the Commission. In response to a question whether the documentary shipper and the shipper could be found to be jointly and severally liable, the view was expressed that there was not intended to be joint and several liability as between the two.

107. The Commission approved the substance of draft article 34 and of the definition contained in draft article 1, paragraph 9, and referred them to the drafting group.

[* * *]

Draft article 1, paragraph 9 ("documentary shipper")

174. The Commission approved the substance of draft article 1, paragraph 9, containing the definition of "documentary shipper" and referred it to the drafting group.

Article 1(10). Holder

"Holder" means:

(a) A person that is in possession of a negotiable transport document; and (i) if the document is an order document, is identified in it as the shipper or the consignee, or is the person to which the document is duly endorsed; or (ii) if the document is a blank endorsed order document or bearer document, is the bearer thereof; or

(b) The person to which a negotiable electronic transport record has been issued or transferred in accordance with the procedures referred to in article 9, paragraph 1.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(l) Definition of "holder" (draft article 1.12)**

91. The suggestion was made that the term "for the time being" was unnecessary. Support was expressed for maintaining a requirement that the holder should be in "lawful" possession of a negotiable transport document. It was suggested that the definition should reflect the simple and widely understood distinction between negotiable documents "to order", bearer documents and non-negotiable documents naming the consignee.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Definitions (draft article 1)****Draft article 1(f) “Holder”**

181. Concerns were expressed with respect to the identity of the “holder” in draft article 1(f), and that the definition seemed to include parties who were not always holders. The view was expressed that any drafting difficulties could be resolved, but that the intention of the definition was that subparagraph (i) dealt with paper documents and covered all parties, while subparagraph (ii) concerned electronic transport records, where the issue was not physical possession, but control, and which could include the shipper and the consignee. It was observed that general drafting improvements could be made to subparagraph (ii), such as the inclusion of certain holders such as the documentary shipper in draft article 31. It was also suggested that draft article 1(f)(ii) should specifically indicate to whom the electronic transport record would be transferable.

[* * *]

185. After discussion, the Working Group decided that:

- There was general support for the definitions in draft articles 1(f), (o), (p), (q) and (r), subject to the drafting suggestions set out above in paragraphs 181 to 184.

[See also paragraphs 207-210, A/CN.9/576 (15th Session of WG III) under article 1(21) and (22) at p. 48]**[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]****Paragraphs 10, 11 and 12 of draft article 1**

25. With regard to the terms “holder” and “consignee” used in draft article 7, the Working Group approved the substance of the definitions respectively provided for in paragraphs 11 and 12 of draft article 1, and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 1, paragraph 10 (“holder”)**

30. The Commission approved the substance of draft article 1, paragraph 10, on the definition of “holder” and referred it to the drafting group.

Article 1(11). Consignee

“Consignee” means a person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(c) Definition of “consignee” (draft article 1.2)**

75. It was recalled that the definition of “consignee” was based on the definition contained in article 1(4) of the Hamburg Rules, with added reference to the contract of carriage or the transport document on the basis of which the consignee became entitled to take delivery of the goods. It was explained that the additional reference was intended to exclude a person who was entitled to take delivery of the goods on some other basis than the contract of carriage, e.g. the true owner of stolen goods (A/CN.9/WG.III/WP.21, annex, para. 3). A question was raised as to whether the draft definition was to be interpreted as making it impossible for the consignee as defined to delegate the exercise of its right to take delivery of the goods to another person. Another question was raised as to the reasons for which specific mention was made of the contract of transport, the transport document and the electronic record. It was questioned whether it was appropriate to place the contract of carriage (which was presumably the only source of the consignee’s entitlement) on A/CN.9/510 the same level as the transport document or its electronic equivalent. Support was expressed for deleting the reference to “a transport document or electronic record”. It was stated in response that the need to identify various possible sources of the consignee’s entitlement to take delivery of the goods came from the fact that, in certain circumstances or in certain legal systems, the right evidenced by the transport document might be different from the right evidenced by the original contract of carriage, although the transport document would always be issued for the execution of the contract of carriage. In the context of that discussion, a concern was expressed that the reference to the transport document might be misunderstood as covering also documents such as warehouse receipts. With a view to avoiding misunderstanding as to the origin of the consignee’s entitlement to take delivery, it was suggested that the definition might be redrafted along the following lines: “‘Consignee’ means a person entitled to take delivery of the goods under a contract of carriage, which may be expressed by way of a transport document or electronic record”. Another suggestion was that a reference to the controlling party might need to be introduced in the definition of “consignee”.

76. The Working Group took note of those questions, concerns and suggestions for continuation of the discussion at a later stage.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraphs 10, 11 and 12 of draft article 1**

25. With regard to the terms “holder” and “consignee” used in draft article 7, the Working Group approved the substance of the definitions respectively provided for in paragraphs 11 and 12 of draft article 1, and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraph 11 (“consignee”)

31. The Commission approved the substance of draft article 1, paragraph 11, on the definition of “consignee” and referred it to the drafting group.

Article 1(12). Right of control

“Right of control” of the goods means the right under the contract of carriage to give the carrier instructions in respect of the goods in accordance with chapter 10.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(q) Definition of “right of control” (draft article 1.18)

105. It was noted that this was more a cross-reference than a definition. It was proposed that article 1.18 could therefore be deleted. However it was agreed to retain the definition for further consideration at a later stage.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Paragraph 13 of draft article 1

169. With regard to the term “right of control”, the Working Group approved the substance of the definition, subject to correcting the reference to “chapter 11” to “chapter 10” provided for in paragraph 13 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraphs 12 (“right of control”) and 13 (“controlling party”)

184. The Commission approved the substance of draft article 1, paragraph 12, containing the definition of “right of control” and paragraph 13, containing the definition of “controlling party” and referred them to the drafting group.

Article 1(13). Controlling party

“Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(h) Definition of “controlling party” (draft article 1.7)**

87. The Working Group took note that the definition of “controlling party” was listed merely as an index reference rather than as a comprehensive definition. It took note that the term was referred to in draft articles 11.2 and the term “right to control” was referred to in draft article 1.18. It was suggested that definitions that were used in the draft instrument should be self-contained definitions and not merely index references. However, it was observed that the index referencing was a useful drafting method to shorten the substantive provisions. Noting the concerns that were expressed, the Working Group agreed that the definition should be retained for further discussions.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraph 14 of draft article 1**

170. With regard to the term “controlling party”, the Working Group approved the substance of the definition provided for in paragraph 14 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 1, paragraphs 12 (“right of control”) and 13 (“controlling party”)**

184. The Commission approved the substance of draft article 1, paragraph 12, containing the definition of “right of control” and paragraph 13, containing the definition of “controlling party” and referred them to the drafting group.

Article 1(14). Transport document

“Transport document” means a document issued under a contract of carriage by the carrier that:

- (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and
- (b) Evidences or contains a contract of carriage.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(s) Definition of “transport document” (draft article 1.20)**

108. It was recalled that the definition of “transport document” should be read as preliminary to those of “negotiable transport document” and “non-negotiable transport document” in draft articles 1.14 and 1.16. Paragraph (a) would include a bill of lading issued to, and still in the possession of, a charterer, which does not evidence or contain a contract of carriage but functions only as a receipt, and some types of receipt issued before carriage or during transshipment. Paragraph (b) would include a negotiable bill of lading when operating as such, and a non-negotiable waybill (see A/CN.9/WG.III/WP.21, annex, para. 23).

109. The definition of “transport document” was generally supported by the Working Group on the basis that the two central functions of a transport document, namely, that of evidencing receipt of the goods and that of evidencing the contract of carriage, were appropriately encompassed by the definition. It was observed that the third traditional function of a bill of lading, namely, that of representing the goods, was not touched upon by the definition. A question was raised regarding the omission of any reference in that definition to negotiability particularly in light of draft articles 1.14 and 1.16, which respectively defined “negotiable transport document” and “non-negotiable transport document”. In response, it was suggested that the definition of “transport document” was intended to be generic and to encompass both negotiable and non-negotiable transport documents so a reference to negotiability or to the function of the bill of lading as representing the goods was not required in that present definition.

110. In response to a question that was raised regarding the possibility that a transport document might “contain” a contract of carriage, it was pointed out that the words “evidences or contains a contract of carriage” in paragraph (b) were designed to accommodate different approaches in national laws to the question whether a transport document might evidence or contain a contract of carriage. In response to a question on whether paragraphs (a) and (b) represented alternative or cumulative functions, it was noted that the definition applied where the requirements in either (a) or (b) was satisfied or where the requirements in both paragraphs were met. Notwithstanding the above comments, that were thought to require further consideration in the preparation of a revised version of the definition of “transport document”, the Working Group agreed to the retention of the text of draft article 1.20 as a sound basis for discussion of the remainder of the provisions contained in the draft instrument.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 1 definitions relevant to chapter 3**

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on “transport document”; paragraph 17 on “negotiable transport document”; paragraph 18 on “non-negotiable transport document”; paragraph 20 on “electronic transport record”; paragraph 21 on “negotiable electronic transport record”; paragraph 22 on “non-negotiable electronic transport record”; and paragraph 23 on the “issuance” and “transfer” of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations

with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of “non-negotiable transport document” as found in draft article 1(18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Definition of “transport document”(draft article 1, paragraph 15)

113. It was pointed out that, in light of the deletion of paragraph (a) of draft article 37 (see above, paras. 109 to 110) and of the decision of the Working Group to delete all references to the consignor (see above, paras. 21 to 24), certain adjustments would also have to be made to the definition of “transport document” in paragraph 15 of draft article 1.

114. It was suggested that the “or” between paragraphs (a) and (b) of draft article 1(15) should be replaced with an “and” in order to reflect the Working Group’s agreement that a mere receipt would not constitute a transport document for the purposes of the draft convention. Therefore, the Working Group agreed that the two conditions set forth in paragraph 15 of draft article 1 should be made conjunctive rather than disjunctive. The Working Group was satisfied that such adjustments to the definition of “transport document” would not have adverse implications for other provisions in the draft convention, except for a minor redrafting of paragraph (a) of draft article 43.

115. Subject to those amendments, the Working Group approved the substance of paragraph 15 of draft article 1 and referred it to the drafting group.

Consequential amendments to draft article 6(2)(b)

116. An additional consequential change proposed in light of the deletion of the concept of the “consignor” and of the amendments to the definition of “transport document” was to delete the text of paragraph 2(b) of draft article 6 and replace it with the phrase “a transport document or an electronic transport record is issued”.

117. The Working Group agreed to amend paragraph 2(b) of draft article 6 accordingly and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraph 14 “transport document”

133. It was observed that the Working Group had agreed at its final session to delete reference to the “consignor” in the draft Convention and that, as a consequence, the definition of “transport document” had been adjusted to make subparagraphs (a) and (b) conjunctive rather than disjunctive. As mere receipts were thus excluded from the definition of a “transport document”, it was proposed that the phrase “or a performing party” could be deleted from the chapeau of the definition. The Commission approved that correction.

134. An additional proposal was made that the phrase “or a person acting on its behalf” should be inserted where the previous phrase had been deleted, in order to bring the definition in line with the phrase in draft article 40, paragraph 1, on signature. However, it was noted that in the preparation of the draft Convention, care had been taken to avoid reference to matters of agency, which, while common relationships in commercial transport, were thought to be too complex to be brought within the scope of the Convention. Further, it was observed that while there was perceived to be a need to reference acting on behalf of the carrier with respect to signature, it was thought that inserting the phrase in the definition of “transport document” would raise questions regarding its absence elsewhere in the draft Convention. The Commission supported that view, and decided against including the additional phrase.

135. It was also suggested that the following text should be inserted as a paragraph into the definition: “Evidences when goods are acquired by/delivered to the consignee”. However, it was observed that draft article 11 set out the obligation of the carrier to carry the goods to the place of destination and deliver them to the consignee, and the proposal was not taken up by the Commission.

Article 1(15). Negotiable transport document

“Negotiable transport document” means a transport document that indicates, by wording such as “to order” or “negotiable” or other appropriate wording recognized as having the same effect by the law applicable to the document, that the goods have been consigned to the order of the shipper, to the order of the consignee, or to bearer, and is not explicitly stated as being “non-negotiable” or “not negotiable”.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(n) Definition of “negotiable transport document” (draft article 1.14)

93. It was suggested that there be a clearer explanation of the differences between negotiability and non-negotiability. It was noted that the question as to what constituted a document of title differed between jurisdictions. It was suggested that there was a need for more precision in understanding core terms such as “negotiable” in order to provide for appropriate rules on negotiable electronic records. In response it was noted that whilst it was important to be more precise in this area, particularly because it was a new area and was affected by national law, the Working Group should keep in mind that it could not regulate all consequences.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 1 definitions relevant to chapter 3**

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on “transport document”; paragraph 17 on “negotiable transport document”; paragraph 18 on “non-negotiable transport document”; paragraph 20 on “electronic transport record”; paragraph 21 on “negotiable electronic transport record”; paragraph 22 on “non-negotiable electronic transport record”; and paragraph 23 on the “issuance” and “transfer” of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of “non-negotiable transport document” as found in draft article 1(18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Definition of “negotiable transport document” (draft article 1, paragraph 16)**

118. With regard to the term “negotiable transport document” used in draft article 37, a suggestion was made to replace “to the order of the consignee” with “to the order of the specified/named person”, as the consignee would be the endorsee of an order bill of lading and it would be important to indicate who the endorser would be, in particular, if the bank was the consignee. Further, it was stated that such a change would not be a change in substance and would solve the perceived inconsistency that lay between paragraphs 12 and 16 of draft article 1.

119. In response, it was pointed out that that would introduce a new term, “specified/named person”, which would in turn need to be defined and could be inconsistent with the definition of “holder” in paragraph 11 of draft article 1. The term, it was also said, would introduce greater uncertainty and would be less advantageous for banks financing foreign trade contracts. Under current practice, transport documents usually contained space for inserting the name of the “consignee”, so that banks already had the opportunity to protect their rights by convention not only accommodated that practice, but also offered additional protection for banks that might be reluctant to accept being named as consignees out of concerns over possible liability or burden in respect of the goods by providing, in draft article 45, that the consignee was only obliged to take delivery of the goods if it had exercised its rights under the contract of carriage.

120. In response to a question as to what law was meant by the expression “the law applicable to the document” in paragraph 16 of draft article 1, it was observed that the draft

convention refrained from determining which law should govern the instrument, a question to which domestic systems of private international law offered conflicting answers. In any event, it was also pointed out that the scope of the reference to applicable law was limited to the question of which expressions might legally be equivalents of words such as “to order” or “negotiable”.

121. The Working Group agreed to retain the definition provided for in paragraph 16 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraphs 15 (“negotiable transport document”), 16 (“non negotiable transport document”), 18 (“electronic transport record”), 19 (“negotiable electronic transport record”), 20 (“non-negotiable electronic transport record”), 21 (“issuance” of a negotiable electronic transport record), 22 (“transfer” of a negotiable electronic transport record) and 27 (“freight”)

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase “or a performing party” where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

Article 1(16). Non-negotiable transport document

<p>“Non-negotiable transport document” means a transport document that is not a negotiable transport document.</p>
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[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(o) Definition of “non-negotiable transport document” (draft article 1.16)

94. Although a suggestion was made that this definition was not necessary and should be deleted, the Working Group agreed to retain the definition for further consideration.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 1 definitions relevant to chapter 3

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on “transport document”; paragraph 17 on “negotiable transport document”; paragraph 18 on “non-negotiable transport document”; paragraph 20 on “electronic transport record”; paragraph 21 on “negotiable

electronic transport record”; paragraph 22 on “non-negotiable electronic transport record”; and paragraph 23 on the “issuance” and “transfer” of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of “non-negotiable transport document” as found in draft article 1(18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Definition of “non-negotiable transport document” (draft article 1, paragraph 17)

122. The Working Group approved the substance of the definition provided for in paragraph 17 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraphs 15 (“negotiable transport document”), 16 (“non negotiable transport document”), 18 (“electronic transport record”), 19 (“negotiable electronic transport record”), 20 (“non-negotiable electronic transport record”), 21 (“issuance” of a negotiable electronic transport record), 22 (“transfer” of a negotiable electronic transport record) and 27 (“freight”)

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase “or a performing party” where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

Article 1(17). Electronic communication

“Electronic communication” means information generated, sent, received or stored by electronic, optical, digital or similar means with the result that the information communicated is accessible so as to be usable for subsequent reference.
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[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(i) Definitions of “electronic communication” (draft article 1.8) and “electronic record” (draft article 1.9)**

88. The Working Group heard that these provisions had been drafted taking account of the work of the UNCITRAL Working Group on Electronic Commerce. It was noted that the draft definitions differed from the terms used in the UNCITRAL Model Law on Electronic Commerce by referring to “electronic communications” rather than “data message” and by including a reference to “digital images”. The Working Group agreed that whilst it was not mandatory to preserve at any cost a term used in existing UNCITRAL texts, it was important to consider the reasons for making such changes and examine the implications of these changes vis a vis the UNCITRAL Model Law on Electronic Commerce. The Working Group also heard that the draft instrument had been drafted in recognition of the language used in the UNCITRAL Model Law on Electronic Commerce and the Model Law on Electronic Signatures but it might be necessary to adjust the language of these texts to suit the specific structure of the draft instrument. While it was observed that the use of digital imaging was increasingly relied upon in marine transport (a reason for which the draft expressly referred to that term), it was widely felt that further consideration would need to be given to the reasons for which the central notion of “data message” might not be used in the draft instrument. In particular, it was questioned whether the need to introduce a reference to digital imaging (which was already implicitly covered by the broad definition of “data message” in the UNCITRAL Model Law on Electronic Commerce) would justify doing away with such an essential notion. A concern was expressed that the reference in draft article 1.9 to information that was attached “or otherwise linked” could be too broad and undermine the contractual relationship between the carrier and consignee because it could allow the carrier to include additional contractual terms after the electronic record had been issued. Another concern was expressed that the reference in the definition of “electronic record” to “one or more messages” implied that there could be several messages constituting an electronic record and that it could be problematic to identify these. It was suggested that a small expert group be convened to examine provisions relating to electronic commerce in more detail.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Definition of “electronic communication” (draft article 1, paragraph 18)**

123. In response to a question concerning the rationale for the differences between the definition of “electronic communication” in paragraph 18 of draft article 1 and the definition provided in the United Nations Convention on the Use of Electronic Communication in International Contracts (ECC), it was pointed out that the definition used in the draft conventions combined elements of the definitions of “electronic communication” and “data messages” as contained in the ECC with the criteria for functional equivalence of electronic communications set forth in the ECC.

124. The Working Group approved the substance of the definition provided for in paragraph 18 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 3. Form requirements; and draft article 1, paragraph 17 (“electronic communication”)**

18. The question was asked whether the definition of electronic communication contained in draft article 1, paragraph 17, should include as well the requirement that the communication should also identify its originator. In response to that question, it was observed that the definition of electronic communication used in the draft Convention followed the definition of the same term in the United Nations Convention on the Use of Electronic Communications in International Contracts. The capability of identifying the originator, it was said, was a function of electronic signature methods, which was dealt with in draft article 40, and not a necessary element of the electronic communication itself. The Commission agreed that the draft definition adequately reflected that understanding.

19. Subject to the agreed amendments, the Commission approved the substance of draft article 3 and the definition in draft article 1, paragraph 17, and referred them to the drafting group.

Article 1(18). Electronic transport record

“Electronic transport record” means information in one or more messages issued by electronic communication under a contract of carriage by a carrier, including information logically associated with the electronic transport record by attachments or otherwise linked to the electronic transport record contemporaneously with or subsequent to its issue by the carrier, so as to become part of the electronic transport record, that:

- (a) Evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage; and
- (b) Evidences or contains a contract of carriage.

[See also paragraph 88, A/CN.9/510 (9th Session of WG III) under article 1(17) at p. 41]

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Draft article 1(o) “Electronic transport record”**

182. Support was expressed in the Working Group for the definition of “electronic transport record”. A suggestion was made that the last paragraph could be simplified.

[* * *]

185. After discussion, the Working Group decided that:

- There was general support for the definitions in draft articles 1(f), (o), (p), (q) and (r), subject to the drafting suggestions set out above in paragraphs 181 to 184.

[See also paragraph 207, A/CN.9/576 (15th Session of WG III) under articles 1(21) and (22) at p. 48]

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 1 definitions relevant to chapter 3

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on “transport document”; paragraph 17 on “negotiable transport document”; paragraph 18 on “non-negotiable transport document”; paragraph 20 on “electronic transport record”; paragraph 21 on “negotiable electronic transport record”; paragraph 22 on “non-negotiable electronic transport record”; and paragraph 23 on the “issuance” and “transfer” of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of “non-negotiable transport document” as found in draft article 1(18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Definition of “electronic transport record” (draft article 1, paragraph 19)

125. The Working Group approved the substance of the definition of “electronic transport record”, subject to the necessary amendments to align it with the revised version of the definition of “transport document” (see above, paras. 113 to 114), and referred it to the drafting group. Definition of “negotiable electronic transport record” (draft article 1, paragraph 20)

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraphs 15 (“negotiable transport document”), 16 (“non negotiable transport document”), 18 (“electronic transport record”), 19 (“negotiable electronic transport record”), 20 (“non-negotiable electronic transport record”), 21 (“issuance” of a negotiable electronic transport record), 22 (“transfer” of a negotiable electronic transport record) and 27 (“freight”)

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase “or a performing party” where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

Article 1(19). Negotiable electronic transport record

“Negotiable electronic transport record” means an electronic transport record:

- (a) That indicates, by wording such as “to order”, or “negotiable”, or other appropriate wording recognized as having the same effect by the law applicable to the record, that the goods have been consigned to the order of the shipper or to the order of the consignee, and is not explicitly stated as being “non-negotiable” or “not negotiable”; and
- (b) The use of which meets the requirements of article 9, paragraph 1.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(m) Definitions of “negotiable electronic record” (draft article 1.13) and “non-negotiable electronic record” (draft article 1.15)

92. The Working Group accepted these definitions as a sound basis for further discussions.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Draft article 1(p) “Negotiable electronic transport record”

183. In response to a question, it was clarified that the phrase “consigned to the order of the shipper or to the order of the consignee” in subparagraph (i) was intended to include the situation where goods were consigned to a named party. A drafting suggestion was made to substitute the phrase “including, but not limited to” for the phrase “that indicates” in subparagraph (i).

[* * *]

185. After discussion, the Working Group decided that:

- There was general support for the definitions in draft articles 1(f), (o), (p), (q) and (r), subject to the drafting suggestions set out above in paragraphs 181 to 184.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 1 definitions relevant to chapter 3

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on “transport document”; paragraph 17 on “negotiable transport document”; paragraph 18 on “non-negotiable transport document”; paragraph 20 on “electronic transport record”; paragraph 21 on “negotiable electronic transport record”; paragraph 22 on “non-negotiable electronic transport record”; and paragraph 23 on the “issuance” and “transfer” of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of “non-negotiable transport document” as found in draft article 1(18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Definition of “electronic transport record” (draft article 1, paragraph 19)

126. With regard to the term “negotiable electronic transport record” used in draft article 37, the Working Group took note of the concern that had been expressed with regard to paragraph 16 of draft article 1 (see above, paras. 118 to 120). Nevertheless, the Working Group approved the substance of the definition provided for in paragraph 20 of draft article 1 and referred it to the drafting group. Definition of “non-negotiable electronic transport record” (draft article 1, paragraph 21)

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraphs 15 (“negotiable transport document”), 16 (“non negotiable transport document”), 18 (“electronic transport record”), 19 (“negotiable electronic transport record”), 20 (“non-negotiable electronic transport record”), 21 (“issuance” of a negotiable electronic transport record), 22 (“transfer” of a negotiable electronic transport record) and 27 (“freight”)

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase “or a performing party” where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

Article 1(20). Non-negotiable electronic transport record

“Non-negotiable electronic transport record” means an electronic transport record that is not a negotiable electronic transport record.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Draft article 1(q) “Non-negotiable electronic transport record” and draft article 1(r) “Contract particulars”

184. The Working Group had no comment on draft articles 1(q) or (r).

Conclusions reached by the Working Group on the definitions in draft articles 1(f), (o), (p), (q) and (r)

185. After discussion, the Working Group decided that:

- There was general support for the definitions in draft articles 1(f), (o), (p), (q) and (r), subject to the drafting suggestions set out above in paragraphs 181 to 184.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 1 definitions relevant to chapter 3

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on “transport document”; paragraph 17 on “negotiable transport document”; paragraph 18 on “non-negotiable transport document”; paragraph 20 on “electronic transport record”; paragraph 21 on “negotiable

electronic transport record”; paragraph 22 on “non-negotiable electronic transport record”; and paragraph 23 on the “issuance” and “transfer” of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of “non-negotiable transport document” as found in draft article 1(18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

127. With regard to the term “non-negotiable electronic transport record” used in draft article 37, the Working Group approved the substance of the definition provided for in paragraph 18 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraphs 15 (“negotiable transport document”), 16 (“non negotiable transport document”), 18 (“electronic transport record”), 19 (“negotiable electronic transport record”), 20 (“non-negotiable electronic transport record”), 21 (“issuance” of a negotiable electronic transport record), 22 (“transfer” of a negotiable electronic transport record) and 27 (“freight”)

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase “or a performing party” where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

Article 1(21). Issuance

<p>The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.</p>
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Article 1(22). Transfer

The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

[See also paragraphs 192-195, A/CN.9/576 (15th Session of WG III) under article 9 at p. 121]

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Draft articles containing electronic commerce aspects**Right of Control—Draft article 54, Transfer of rights—Draft article 59, Transfer of rights—Draft article 61 bis**

206. The Working Group next considered only the electronic commerce aspects of draft article 54 with respect to the right of control, and draft articles 59 and proposed article 61 bis regarding the transfer of rights. The Working Group did not have any specific comment relating to the electronic commerce aspects of these draft articles as they appeared in A/CN.9/WG.III/WP.47.

Proposed redraft of certain provisions pertaining to electronic commerce

207. Based upon the discussion in the Working Group (see above, paras. 180 to 205), an informal drafting group composed of a number of delegations prepared a revised version of certain of the provisions relating to electronic commerce as they appeared in A/CN.9/WG.III/WP.47. Draft article 1(f) was revised to delete the enumeration of persons in subparagraph (ii) in favour of the phrase “the person”, and the phrase “issued or” was added prior to the word “transferred”. Further, it was thought that the closing sentence of draft article 1(o) could not be shortened without losing its necessary content. Draft article 6(1)(a) was deleted in favour of the following phrase, “(a) the method to effect the issuance and the transfer of that record to an intended holder”, and the word “consignee” in draft article 6(1)(d) was deleted in favour of “holder”. In addition, the second sentence of draft article 35 was deleted in favour of the sentence, “Such signature must identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.” Further, the word “other” was deleted from draft article 61 bis (2). Finally, in addition to the consequential changes to draft article 6(1)(a) noted above, in order to address the issue raised with respect to ensuring technological neutrality (see above, paras. 192 to 195), the following new definition was proposed for inclusion in draft article 1:

“Article 1(xx)

“The issuance and the transfer of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record. [A person has exclusive

control of an electronic transport record if the procedure employed under article 6 reliably establishes that person as the person who has the rights in the negotiable electronic transport record.]”

208. It was further explained that the informal drafting group inserted square brackets around the closing sentence in proposed article 1(xx) to indicate only that further thought must be given to the wording of the text, but not to indicate any uncertainty regarding the necessity of its inclusion.

209. The Working Group made general comments with respect to the redrafted provisions. The view was expressed that further thought should be given to the question of whether the second part of draft article 1(f)(ii) with respect to “exclusive control” was necessary. It was also thought that the intention behind proposed draft article 1(xx) should be explained in an explanatory note to the draft instrument. Support was expressed for the approach taken in the redraft of article 35 as being flexible and accommodating many different legal systems.

Conclusions reached by the Working Group on proposed redraft of electronic commerce provisions

210. The Working Group approved the approach taken in the proposed revisions to the electronic commerce provisions for inclusion in the draft instrument.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 1 definitions relevant to chapter 3

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on “transport document”; paragraph 17 on “negotiable transport document”; paragraph 18 on “non-negotiable transport document”; paragraph 20 on “electronic transport record”; paragraph 21 on “negotiable electronic transport record”; paragraph 22 on “non-negotiable electronic transport record”; and paragraph 23 on the “issuance” and “transfer” of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of “non negotiable transport document” as found in draft article 1 (18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Definition of “issuance” and “transfer” of negotiable electronic transport records (draft article 1, paragraph 22)**

128. With regard to draft article 1, paragraph 22, a question was raised whether this paragraph did in fact provide definitions of “issuance” and “transfer” and whether it dealt with a matter of substance. It was further noted that the provision was not clear, because whereas it was possible to transfer exclusive control, it was impossible to

“issue” exclusive control.

129. Suggestions made in the contexts of the definition were: (i) to delete “issuance” entirely from the definition; and (ii) to refer to the “creation” of exclusive control. Other suggestions were made that paragraph 22 of draft article 1 should be moved to the other chapters of the draft convention, as it was a substantive issue. Proposals were made to move paragraph 22 to draft articles 8 or 9 or as a separate article in chapter 3.

130. The Working Group agreed to the suggestion that the concepts mentioned in paragraph 22 of draft article 1 would be more clearly understood if “issuance” and “transfer” of a negotiable electronic transport record were to be defined separately and if the definition of “issuance” of a negotiable electronic transport record would refer to the requirement that such a record must be created in accordance with procedures that ensured that the electronic record was subject to exclusive control throughout its life cycle. The Working Group referred paragraph 22 of draft article 1 to the drafting group with the request to formulate appropriate wording to that effect.

[* * *]

Paragraph 11 of draft article 1

160. In light of the Working Group’s decision to amend the definitions of “issuance” and “transfer” in draft article 1(22) (see above, paras. 128 to 130), it was suggested that the phrase “and that has exclusive control of that negotiable electronic transport record” in paragraph 11(b) of the definition of the “holder” was no longer necessary, as the new definitions of “issuance” and “transfer” prepared by the drafting group both included the concept of exclusive control. The Working Group approved that suggestion.

161. With regard to the term “holder” used in draft article 50, the Working Group approved the substance of the definition of that term provided in paragraph 11 of draft article 1, subject to the above amendment, and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraphs 15 (“negotiable transport document”), 16 (“non negotiable transport document”), 18 (“electronic transport record”), 19 (“negotiable electronic transport record”), 20 (“non-negotiable electronic transport record”), 21 (“issuance” of a

negotiable electronic transport record), 22 (“transfer” of a negotiable electronic transport record) and 27 (“freight”)

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase “or a performing party” where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

Article 1(23). Contract particulars

“Contract particulars” means any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(g) Definition of “contract particulars” (draft article 1.6)

86. It was questioned whether the definition of “contract particulars” was necessary given that draft article 8.2 broadly included the features of contract particulars. It was suggested that article 1.6 operated merely as the element of an index rather than as a formal definition. The Working Group acknowledged that draft article 1.6 introduced a new term which had a close and direct relevance to draft article 8.2 and a suggestion was made to postpone consideration of this definition until draft article 8.2 had been considered. This postponement was agreed to but it was noted that the definition might contain contradictions when read together with draft article 1.20, which required that a transport document should evidence or contain a contract of carriage. By contrast the definition of contract particulars referred to any information “relating to the contract of carriage”. It was suggested that the text should indicate more clearly what that phrase referred to. In this respect it was suggested that when the Working Group considered draft articles 1.9 and 1.20 it consider whether the requirement that an electronic communication or a transport document evidences a contract of carriage was really necessary. It was suggested that it would be more relevant for the transport document or electronic record to evidence receipt of the goods. It was also noted that draft article 1.7 when read with draft article 8.2 failed to include a reference to the shipper notwithstanding draft article 7.7, which referred to a shipper as identified in the contract particulars. The Working Group agreed that these concerns should be considered in redrafting the definition.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Draft article 1(q) “Non-negotiable electronic transport record” and draft article 1(r) “Contract particulars”

184. The Working Group had no comment on draft articles 1(q) or (r).

Conclusions reached by the Working Group on the definitions in draft articles 1(f), (o), (p), (q) and (r)

185. After discussion, the Working Group decided that:

- There was general support for the definitions in draft articles 1(f), (o), (p), (q) and (r), subject to the drafting suggestions set out above in paragraphs 181 to 184.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Paragraph 23 of draft article 1

99. With regard to the term “contract particulars” used in draft article 32, the Working Group approved the substance of the definition of that term provided in paragraph 23 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 32. Information for compilation of contract particulars; and draft article 1, paragraph 23 (“contract particulars”)

103. It was observed in the Commission that draft articles 32 and 33 provided for potentially unlimited liability on the part of the shipper for not fulfilling its obligations in respect of the provision of information for the contract particulars or in respect of shipping dangerous goods. Concern was expressed that the potentially unlimited liability of the shipper was in contrast with the position of the carrier, which faced only limited liability as a result of the operation of draft article 61. Given other contractual freedoms permitted pursuant to the draft Convention, it was suggested that some relief in this regard could be granted to the shipper by deleting the reference to “limits” in draft article 81, paragraph 2, thereby allowing the parties to the contract of carriage to agree to limit the shipper’s liability. (See the discussion of the proposed deletion of “limits” in respect of draft art. 81, para. 2, in paras. 236-241 below.) The Commission agreed that it would consider that proposal in conjunction with its review of draft article 81 of the text.

104. The Commission approved the substance of draft article 32 and of the definition contained in draft article 1, paragraph 23, and referred them to the drafting group.

Article 1(24). Goods

<p>“Goods” means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.</p>
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[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(k) Definition of “goods” (draft article 1.11)**

90. A concern was expressed that the reference in the definition of “goods” that a carrier or a performing party “received for carriage” rather than “undertakes to carry” may mean that the definition failed to cover cases where there was a failure by the carrier to receive the goods or load cargo on board a vessel. It was said that the current reference only to receipt of goods was too narrow. Alternatively it was suggested that the definition be simplified by removing any reference to receipt of the goods. It was decided that the Secretariat should prepare two alternative texts taking account of each of these approaches.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

17. The Working Group adopted the definitions contained in paragraphs (5), (9) and (25) of draft article 1 in substance. Although it was deemed unnecessary in some legal systems, the Working Group agreed to retain draft article 4 and to extend its coverage to apply also to shippers to the extent that shipper liability was covered by the draft convention. In respect of the phrase, “or otherwise” the Working Group agreed to retain this phrase and requested the Secretariat to review its utility. In respect of procedural issues, the Working Group agreed that a review be undertaken as to the scope of defences and limits of liability after these terms had been settled.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraphs 1, 5, 8 and 24 of draft article 1**

17. With regard to the terms “contract of carriage”, “carrier”, “shipper” and “goods” relevant to draft article 5, the Working Group approved the substance of the definitions respectively provided for in paragraphs 1, 5, 8 and 24 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 26. Deck cargo on ships; and draft article 1, paragraphs 24 (“goods”), 25 (“ship”) and 26 (“container”)**

90. There was not sufficient support for a proposal to supplement the definition of the word “goods” with a reference to road and railroad cargo vehicles, as it was considered that the proposed addition would require amendments in other provisions of the draft Convention, such as draft article 61, paragraph 2, that mentioned goods, containers or road and railroad cargo vehicles.

91. The Commission approved the substance of draft article 26 and of the definitions contained in draft article 1, paragraphs 24, 25 and 26, and referred them to the drafting group. The Commission requested the drafting group to ensure consistency throughout the draft Convention in references to “customs, usages and practices of the trade”.

Article 1(25). Ship

“Ship” means any vessel used to carry goods by sea.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Paragraphs 6, 7 and 25 of draft article 1

62. With regard to the term “ship” used in draft article 20, it was suggested that the term should be changed to “seagoing vessel”[“any vessel designed to be used to carry goods by sea”], in order to differentiate it from inland navigation vessels and that “vessel” in paragraph 2 of draft article 5 should be changed to “ship”. In response, it was pointed out that this could lead to confusion, as vessels designed for inland navigation could also be used for sea. After discussion, the Working Group approved the substance of the definition provided for in paragraph 25 of article 1 and agreed that the drafting group should look at the aforementioned issues to make sure that vessel and ship were used consistently and that the appropriate terms were used in the various language versions.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 26. Deck cargo on ships; and draft article 1, paragraphs 24 (“goods”), 25 (“ship”) and 26 (“container”)

90. There was not sufficient support for a proposal to supplement the definition of the word “goods” with a reference to road and railroad cargo vehicles, as it was considered that the proposed addition would require amendments in other provisions of the draft Convention, such as draft article 61, paragraph 2, that mentioned goods, containers or road and railroad cargo vehicles.

91. The Commission approved the substance of draft article 26 and of the definitions contained in draft article 1, paragraphs 24, 25 and 26, and referred them to the drafting group. The Commission requested the drafting group to ensure consistency throughout the draft Convention in references to “customs, usages and practices of the trade”.

Article 1(26). Container

“Container” means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.

Article 1(27). Vehicle

“Vehicle” means a road or railroad cargo vehicle.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(e) Definition of “container” (draft article 1.4)**

81. Various views were expressed regarding the draft definition. One view was that the text was too broadly worded to constitute a workable definition. In particular, the use of the word “includes” made it an open-ended definition that might encompass packaging techniques that would not meet the criteria generally expected to be met by sea-going containers, particularly if transportation as deck cargo was involved. It was suggested that the definition should be limited to “containers designed for transport at sea”. As a matter of drafting, the view was expressed that the opening words “‘Container’ includes any type of container” introduced an element of circularity that was unacceptable in a formal definition. Yet another view was that a specific definition of “container” was useless since containers as any other type of packaging should be covered by the definition of “goods” under draft article 1.11.

82. With a view to alleviating some of the concerns that had been expressed with respect to a broad definition of “container”, it was pointed out that the draft provision had been introduced not as a general and theoretical definition but exclusively for the purposes of the provisions where the notion of “container” was used in the draft instrument, namely the provisions on deck cargo (draft article 6.6), the provisions regarding liability, which also referred to such notions as “package” and “shipping unit” (draft article 6.7), and the provisions on evidence, which dealt with the special case where goods were delivered to the carrier in a closed container (draft article 8.3). While support was expressed for the view that it might be necessary to consider exclusively containers designed for sea transport in the context of the provision on deck cargo, it was felt by a number of delegations that a broader definition might be acceptable in the context of draft articles 6.7 and 8.3. The Secretariat was requested to prepare a revised definition, with possible variants reflecting the above-mentioned views and concerns, for consideration at a future session.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Proposal for expanding the definition of “containers”**

73. The Working Group was reminded that a proposal had been made regarding a suggested improvement to be made to the definition of “container” currently in draft article 1(26) (see A/CN.9/WG.III/WP.102), and that it would seem logical to discuss that proposal in connection

with draft article 26. It was explained that the proposal was to adjust the definition of “container” in the draft convention by adding to it the term “road cargo vehicle”, and that that change would primarily have an effect on draft articles 26(1) and (2) and 62(3). It was noted that road cargo vehicles were often carried overseas in large numbers, usually on specialized trailer carrying vessels that were designed to carry both such vehicles and containers either on or below deck. It was explained that the current text of the draft convention treated road cargo vehicles pursuant to draft article 26(1)(c), rather than grouping them with containers pursuant to draft article 26(1)(b), such that the carrier might not be liable for damage to the goods in road cargo vehicles due to the special risk of carrying them on deck as part of the category in paragraph (c). It was suggested that road cargo vehicles should instead be treated in the same fashion as containers, such that the normal liability rules would apply to them regardless of whether they were carried on or below deck.

74. By way of further explanation, it was noted that adjusting the definition of “container” so as to include road cargo vehicles would ensure that it would not be possible to consider a road cargo vehicle as one unit pursuant to draft article 62(3), but that, as in the case of containers, each package in the road cargo vehicle could be enumerated for the purposes of the per package limitation on liability. It was noted that that particular problem had been raised by the International Road Transport Union (IRU) (see A/CN.9/WG.III/WP.90) as being of particular concern. Further, it was suggested that adjusting the definition of “container” as proposed could have the additional benefit of treating containers and road cargo vehicles in an equitable fashion.

75. An additional proposal was made to extend the definition of “container” to include not only “road cargo vehicles”, but to include “railroad cars” as well. While it was noted that railroad cars were seldom carried on deck, it was suggested that the inclusion of that term in the definition of “container” could have certain advantages, for example, in respect of the shipper’s obligation to properly and carefully stow, lash and secure the contents of containers pursuant to draft article 28.

76. Broad support was expressed for both proposals, as they entailed practical benefits, reflected the current practice and were especially reasonable from the viewpoint of the industry. It was observed that the proposal did not cause any change in the conflict of conventions provision of the draft convention and that there would be in particular no conflict with the CMR. It was further noted that if the proposals were to be approved, the drafting group should review the entire draft convention on the use of the terms “container” and “trailer”.

77. However, some concerns were raised with regard to extending the definition of “containers”. From the viewpoint of carriers, it was said, the expanded definition might result in an increase of the carrier’s level of liability, thus upsetting the balance currently reflected in the draft convention.

78. From the viewpoint of shippers, the concern was expressed that an expanded definition of “containers” might have undesirable implications on draft article 62 on limitation of liability especially with regard to sea transport of a road cargo vehicle. For example, if the bill of lading did not include the enumeration of the goods on the vehicle, the vehicle and its contents would be regarded as a single package and thus all the owners of the goods on the truck would lose the per package limitation. This danger would also be a matter of concern for road haulers. It was pointed out that the CMR provided for a higher weight limitation of liability than currently

contemplated in the draft convention. Thus, in case of cargo loss or damage during a sea journey while the goods were loaded on a truck, the road carrier might be liable to compensate cargo owners at an amount higher than it could recover from the sea carrier. Another concern was the possible implication that the inclusion of road vehicles in the definition of containers might have for loss or damage to a road cargo vehicle which was transported by sea without any goods loaded on it. For those reasons, rather than amending the definition of “containers” it was suggested that it would be preferable to take an article-by-article approach and add the words “road cargo vehicles” and “railroad cars” whenever the context so required.

79. In response to those concerns, it was stated that goods in “road cargo vehicles” would need to be enumerated to benefit from the per package limitation and that that was already the practice, especially under the CMR. As regards damage to the vehicle itself, it was pointed out that the definition of “goods” as provided in paragraph 24 of draft article 1 addressed that issue as it included containers not supplied with cargo. Furthermore, from a practical point of view, it was noted that an amendment in the definition of containers had the advantage of avoiding the need for adding the expressions “road cargo vehicles” and “railroad cars” every time the term “container” was used (draft articles 1(25), 1(26), 15(c), 18(5)(a), 26(1)(b), 28(3), 42(3), 42(4), 42(4)(a)(i), 42(4)(b)(i), 42(4)(b)(ii), 43(c)(ii), 51(2)(b), 62(3)).

80. In view of the concerns that had been raised, and noting the relationship between some of the arguments and the notion of “package” in draft article 62, paragraph 3, the Working Group agreed that it should postpone its deliberations on the matter until it had examined that other provision.

[* * *]

92. Further, the Working Group was reminded that paragraph 3 of draft article 28, contained the phrase “container or trailer”, which would require amendment depending on the Working Group’s decision whether to include “road and rail cargo vehicles” in the definition of “container” in draft article 1(26), or whether to make the necessary adjustments to the substantive provisions in the draft convention (see above, paras. 73 to 80).

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 26. Deck cargo on ships; and draft article 1, paragraphs 24 (“goods”), 25 (“ship”) and 26 (“container”)

90. There was not sufficient support for a proposal to supplement the definition of the word “goods” with a reference to road and railroad cargo vehicles, as it was considered that the proposed addition would require amendments in other provisions of the draft Convention, such as draft article 61, paragraph 2, that mentioned goods, containers or road and railroad cargo vehicles.

91. The Commission approved the substance of draft article 26 and of the definitions contained in draft article 1, paragraphs 24, 25 and 26, and referred them to the drafting group. The Commission requested the drafting group to ensure consistency throughout the draft Convention in references to “customs, usages and practices of the trade”.

Article 1(28). Freight

“Freight” means the remuneration payable to the carrier for the carriage of goods under a contract of carriage.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(j) Definition of “freight” (draft article 1.10)

89. A concern was expressed that the definition of freight was incomplete in that it failed to state the person who was liable to pay the freight. However, it was agreed that the role of the definition was simply to describe what freight was and that issues relating to the freight namely to whom it should be paid and by whom could be dealt with elsewhere.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 1, paragraphs 15 (“negotiable transport document”), 16 (“non negotiable transport document”), 18 (“electronic transport record”), 19 (“negotiable electronic transport record”), 20 (“non-negotiable electronic transport record”), 21 (“issuance” of a negotiable electronic transport record), 22 (“transfer” of a negotiable electronic transport record) and 27 (“freight”)

136. After making the same correction to draft article 1, paragraph 18, as had been made to draft article 1, paragraph 14, by twice deleting the phrase “or a performing party” where it appeared in the chapeau of draft article 1, paragraph 18, the Commission approved the substance of the definitions contained in draft article 1, paragraphs 15, 16, 18, 19, 20, 21, 22 and 27, and referred them to the drafting group.

Article 1(29). Domicile

“Domicile” means (a) a place where a company or other legal person or association of natural or legal persons has its (i) statutory seat or place of incorporation or central registered office, whichever is applicable, (ii) central administration or (iii) principal place of business, and (b) the habitual residence of a natural person.

[See also paragraphs 115-116, A/CN.9/576 (15th Session of WG III) under article 66 at p. 619]

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraphs 28 and 29 of draft article 1**

215. With regard to the terms “domicile” and “competent court” used in draft article 69, the Working Group approved the substance of the definitions respectively provided for in paragraphs 28 and 29 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 68. Actions against the carrier; and draft article 1, paragraphs 28 (“domicile”) and 29 (“competent court”)**

213. The Commission approved the substance of draft article 68 and the definitions in draft article 1, paragraphs 28 and 29, and referred them to the drafting group.

Article 1(30). Competent court

“Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over the dispute.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Proposed revised text for chapter on jurisdiction****General discussion**

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

“Article 1(xx) “Competent court”

““Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over a matter.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Paragraphs 28 and 29 of draft article 1**

215. With regard to the terms “domicile” and “competent court” used in draft article 69, the Working Group approved the substance of the definitions respectively provided for in paragraphs 28 and 29 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 68. Actions against the carrier; and draft article 1, paragraphs 28 (“domicile”) and 29 (“competent court”)**

213. The Commission approved the substance of draft article 68 and the definitions in draft article 1, paragraphs 28 and 29, and referred them to the drafting group.

Non-maritime Performing Party [Deleted]

I(8). “Non-maritime performing party” means a performing party to the extent that it is not a maritime performing party.

[Last version before deletion: A/CN.9/WG.III/WP.81]

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Paragraph 8 – “non-maritime performing party”**

139. The Working Group noted that the term “non-maritime performing party” was only used in draft article 20, paragraph 3. In light of its earlier decision to delete that paragraph (see para. 105 above), the Working Group agreed that that definition be deleted.

Conclusions reached by the Working Group regarding draft paragraph 8

140. The Working Group agreed that the definition of “non-maritime performing party” contained in draft paragraph 8 be deleted.

Time of receipt and Place of the receipt [Deleted]

[(bb) [Unless otherwise provided in this Convention] “the time of receipt” and “the place of the receipt” means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.]

[Last version before deletion: A/CN.9/WG.III/WP.56]

Time of delivery and Place of delivery [Deleted]

[(cc) [Unless otherwise provided in this Convention,] “the time of delivery” and “the place of delivery” means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final means of transport in which they are carried under the contract of carriage.]

[Last version before deletion: A/CN.9/WG.III/WP.56]

[See paragraphs 117-120, A/CN.9/576 (15th Session of WG III) under article 66 at p. 619, and footnote 20 in A/CN.9/WG.III/WP.81]

Consignor [Deleted]

I(10). “Consignor” means a person that delivers the goods to the carrier or to a performing party for carriage.

[Last version before deletion: A/CN.9/WG.III/WP.101]

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(d) Definition of “consignor” (draft article 1.3)

77. It was recalled that the definition of “consignor” might include the shipper, the person referred to in article 7.7 or somebody else who on their behalf or on their request actually delivered the goods to the carrier or to the performing party (A/CN.9/WG.III/WP.21, annex, para. 4). The definition of “consignor” was also intended to include the person who actually delivered the goods to the carrier in cases where such person was a person other than the “free

on board” (FOB) seller or the agent, not being the shipper, who nevertheless was mentioned as the shipper in the transport document. That person who actually delivered the goods had no liabilities under draft article 7.7 or under draft article 11.5. Its only right was to obtain a receipt pursuant to draft article 8.1 from the carrier or performing party to whom it actually delivered the goods (*ibid.*, paras. 118-119).

78. Wide support was expressed in favour of introducing in the draft instrument a definition of “consignor” based on the draft provision. A suggestion that mention should be made that the consignor was acting as an agent of the shipper was objected to on the grounds that the consignor, although presumably acting on behalf of the shipper would not necessarily act as an agent. The consignor might be acting on the basis of its own obligations, for example pursuant to the contract of sale. Support was expressed for the introduction of a mention that the consignor delivered the goods “on behalf” of the shipper.

79. As to the delivery of the goods “to a carrier for carriage”, a suggestion was made that additional language should be introduced to clarify that the consignor should deliver the goods to the “actual” or “performing” carrier. That suggestion was supported, although the view was expressed that the words “a carrier” sufficiently addressed the possibility that a performing party might intervene in addition to the original carrier.

80. A view was expressed that, in possibly revising the current definition of “consignor” the Working Group might consider the text of paragraph 5 of article 1 of the United Nations Convention on Multimodal Transport of Goods (1980). The Working Group took note of that view.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Paragraphs 10, 11 and 12 of draft article 1

21. With regard to the term “consignor” used in draft article 7, it was proposed that the concept of “consignor” as defined in paragraph 10 of draft article 1 should be deleted so as to make the draft convention less complicated (see A/CN.9/WG.III/WP.103). It was further suggested that any reference to “consignor” in the draft convention should be deleted accordingly. The rationale for the proposal was the following: (i) the consignor did not have any obligations and had only one right under the draft convention, which was the right to obtain a receipt upon its delivery of the goods to the carrier pursuant to subparagraph (a) of draft article 37; (ii) there were no practical difficulties reported regarding the issuance of a receipt for the consignor that might require it to be dealt with on a uniform basis in the draft convention; (iii) confusion with other transport conventions and some national laws could be avoided; and (iv) the term “transport document” could also be simplified and be aligned with actual maritime practice. Broad support was expressed for this proposal.

22. A contrary suggestion was made that the definition of “consignor” should be retained and that additional provisions on the rights and obligations of the consignor should be added to the draft convention. It was explained that the rights and obligations of the contractual shipper and the consignor (the actual shipper) should be dealt differently, as the rights and obligations of the latter only arose upon the delivery of the goods to the carrier. It was further explained that the relationship between the contractual shipper and the consignor had raised substantial

legal issues in certain national legal systems. More specifically, under FOB trade, it would not always be the case that there would be a documentary shipper and, thus it would be impossible for the consignor to be deemed a documentary shipper. However, the prevailing view was that the aforementioned concern should be dealt with most appropriately by domestic law, especially sales law, and the sales contract itself, which would determine to what extent the consignor would be entitled to receive documents.

23. Although broad support was expressed for the deletion of the reference to “consignor” in the draft convention, it was suggested that subparagraph (a) of draft article 37 should be retained in some form so as to protect the right of the FOB seller to obtain non-negotiable transport documents.

24. With regard to the term “consignor” used in draft article 7, the Working Group agreed that the definition provided for in paragraph 10 of draft article 1 should be deleted, as well as any other reference to “consignor” in the draft convention. However, the Working Group further agreed to discuss the suggestion made with regard to subparagraph (a) of draft article 37 at a later stage in its deliberations.

Article 2. Interpretation of this Convention

In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 2. Interpretation of this Convention

10. The Working Group recalled that the text contained in draft article 2 corresponded to that contained in A/CN.9/WG.III/WP.56. Noting that the text represented standard text in many international conventions, the Working Group approved the substance of the text contained in draft article 2.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 2. Interpretation of this Convention

13. The Working Group approved the substance of draft article 2 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 2. Interpretation of this Convention**

16. The Commission approved the substance of draft article 2 and referred it to the drafting group.

Article 3. Form requirements

The notices, confirmation, consent, agreement, declaration and other communications referred to in articles 19, paragraph 2; 23, paragraphs 1 to 4; 36, subparagraphs 1 (b), (c) and (d); 40, subparagraph 4 (b); 44; 48, paragraph 3; 51, subparagraph 1 (b); 59, paragraph 1; 63; 66; 67, paragraph 2; 75, paragraph 4; and 80, paragraphs 2 and 5, shall be in writing. Electronic communications may be used for these purposes, provided that the use of such means is with the consent of the person by which it is communicated and of the person to which it is communicated.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Draft article 5**

190. The Working Group next considered draft article 5. There was support for the view that the list of articles which contained references to notices and consents should not be considered closed, since other provisions might have to be included, such as draft articles 88a and 61 bis.

Conclusions reached by the Working Group on proposed draft article 5

191. The Working Group approved of the text for further discussion and for inclusion in the draft instrument, subject to the insertion of additional articles referring to notices and consents.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 3. Form requirements**

11. The Working Group considered the text in draft article 3 to be acceptable pending further examination as to the cross-references contained therein. The Working Group also agreed that it might be desirable to include within the final text an explanatory note to the effect that any notices contemplated in the draft convention that were not expressly mentioned in draft article 3 might be made by any means including orally or by exchange of data messages that did not meet the definition of “electronic communication”.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

14. It was noted that the reference to paragraph 3 of draft article 20 as contained in draft article 3 was incorrect and should be to paragraph 2 of draft article 20. The Working Group approved the substance of draft article 3, with the above-mentioned correction, and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 3. Form requirements; and draft article 1, paragraph 17 (“electronic communication”)**

17. The Commission agreed that the cross references contained in draft article 3 were incomplete and that reference should also be made to draft articles 24, paragraph 4; 69, paragraph 2; and 77, paragraph 4, as those provisions also contemplated communications that needed to be made in writing.

18. The question was asked whether the definition of electronic communication contained in draft article 1, paragraph 17, should include as well the requirement that the communication should also identify its originator. In response to that question, it was observed that the definition of electronic communication used in the draft Convention followed the definition of the same term in the United Nations Convention on the Use of Electronic Communications in International Contracts. The capability of identifying the originator, it was said, was a function of electronic signature methods, which was dealt with in draft article 40, and not a necessary element of the electronic communication itself. The Commission agreed that the draft definition adequately reflected that understanding.

19. Subject to the agreed amendments, the Commission approved the substance of draft article 3 and the definition in draft article 1, paragraph 17, and referred them to the drafting group.

Article 4. Applicability of defences and limits of liability

1. Any provision of this Convention that may provide a defence for, or limit the liability of, the carrier applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted in respect of loss of, damage to, or delay in delivery of goods covered by a contract of carriage or for the breach of any other obligation under this Convention against:
 - (a) The carrier or a maritime performing party;
 - (b) The master, crew or any other person that performs services on board the ship; or
 - (c) Employees of the carrier or a maritime performing party.
2. Any provision of this Convention that may provide a defence for the shipper or the documentary shipper applies in any judicial or arbitral proceeding, whether founded in contract, in tort, or otherwise, that is instituted against the shipper, the documentary shipper, or their subcontractors, agents or employees.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]**(m) Paragraph 6.10**

101. The Working Group heard that paragraph 6.10 addressed a well-recognised principle that needed to be considered in the context of the draft instrument as a whole. It was recognized that the provision was very important to avoid the possibility that merely taking a non-contractual claim could circumvent the entire draft instrument. It was further agreed that the implications of the provision would depend on the ultimate scope of the draft instrument and thus no definitive decision should be taken on the provision at this stage.

102. A suggestion to include a reference to delay in delivery in the provision was widely supported.

103. A concern was raised that paragraph 6.10 did not appear to cover noncontractual claims brought against persons other than the carrier, such as handlers or stevedores. This question was felt to require further clarification. A question was raised as to whether other persons mentioned in subparagraph 6.3.3 were also intended to be covered by paragraph 6.10 and thus enjoy the same benefits, defences and limits. In response, it was noted that the purpose of paragraph 6.10 was to channel all claims that could be brought under the draft instrument into the current provision and that, as these other parties were not subject to suit under the draft instrument, there would be no point to include such parties within the scope of the provision. These other persons were protected by draft article 6.3.3. It was further pointed out that “any person other than the carrier” were those parties that did not fall within the definition of the performing party under draft article 1.17, and therefore had no responsibility under the draft instrument, but according to draft article 6.3.3, such parties could benefit from the defences and limitations in liability available to the carrier.

104. As a matter of drafting, it was pointed out that the title of the provision needed to be standardised in all language versions.

105. A question was also raised as to whether paragraph 6.10 would be better placed in draft article 13 on rights of suit. In response it was noted that whilst draft article 13 defined the individual persons who were able to bring a suit, by way of an allocation of the right to sue, draft article 6 on liability of the carrier provided the substantive basis of that suit. For that reason it was suggested that while the structure of these provisions might change in the future, the current placement of paragraph 6.10 within draft article 6 was appropriate.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 21. Non-contractual claims

88. The Working Group considered the text of draft article 21 as contained in document A/CN.9/WG.III/WP.32.

Drafting matters

89. It was agreed that reference in this draft article to “performing party” should be revised to “maritime performing party”. Further, it was noted that the phrase “in connection with” (as discussed in paras. 42 and 58 above) also appeared in draft article 21.

Interaction with paragraph 15(4)

90. It was suggested that this paragraph was a duplication of paragraph 15(4) in A/CN.9/WG.III/WP.36, and that article 21 should be deleted as being repetitious. In response, it was noted that paragraph 15(4) was intended to provide so-called Himalaya protection for servants and agents of the carrier, while draft article 21 extended the defences and limits of liability in the draft instrument to noncontractual claims.

Conclusions reached by the Working Group on paragraph 4

91. After discussion, the Working Group decided that:

- The word “maritime” should be added to the phrase “performing parties”;
- The Secretariat should consider whether paragraph 15(4) and draft article 21 were repetitious and, if not, whether they should be consolidated, given their close relationship;
- The Secretariat should include this draft article in its consideration of the phrase “in connection with” throughout the draft instrument.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 4. Applicability of defences and limits of liability

12. Noting that draft article 4 referred to “maritime performing party”, it was agreed that discussion of the term be deferred until draft articles 18 and 19, which dealt generally with performing parties, were considered.

13. It was questioned whether there was a need to include draft article 4 given that draft article 5 already set out the scope of application of the draft convention. It was suggested that in

many jurisdictions, courts might extend the defences and limits of liability provided by the draft convention to other parties acting on behalf of the carrier even without a provision such as draft article 4. In response, it was noted that the provision was useful in certain jurisdictions. It was further pointed out that the draft article corresponded to similar provisions contained in the Hague-Visby and Hamburg Rules. It was said that its deletion might be interpreted as a reversal of the rule contained in those earlier conventions.

14. Support was expressed for the structure and underlying policy of draft article 4 but it was noted that, as currently drafted, the draft article appeared to apply only in respect of actions against the carrier. It was suggested that draft article 4 be extended to apply to shippers insofar as shipper liability was covered by the draft convention. That proposal received support.

15. Secondly, a concern was expressed that, as drafted, draft article 4 referred only to “defences and limits of liability” which might be too narrow and fail to protect the right of the carrier to a proper forum under the draft convention. It was suggested that draft article 4 be reviewed to ensure that it had the same intended effect in all jurisdictions.

16. A question was raised as to the meaning of the term “or otherwise”. It was suggested that those words were helpful to encompass claims other than contractual or tort claims such as claims in restitution or arising out of quasi-contract. It was agreed that the term should be retained to ensure that the draft article was broad enough to cover situations that might arise in different legal systems.

17. The Working Group adopted the definitions contained in paragraphs (5), (9) and (25) of draft article 1 in substance. Although it was deemed unnecessary in some legal systems, the Working Group agreed to retain draft article 4 and to extend its coverage to apply also to shippers to the extent that shipper liability was covered by the draft convention. In respect of the phrase, “or otherwise” the Working Group agreed to retain this phrase and requested the Secretariat to review its utility. In respect of procedural issues, the Working Group agreed that a review be undertaken as to the scope of defences and limits of liability after these terms had been settled.

[* * *]

Revised text of draft articles 1(6) and 1(7) (“performing party” and “maritime performing party”); and draft articles 4, 18 and 19

141. In accordance with its earlier decision to reconsider the reformulated definitions of “performing party” and “maritime performing party” as originally contained in paragraphs 6 and 7, respectively, of draft article 1 (see above, para. 138), the Working Group continued its deliberations on the following revised text of those provisions, as well as consequential changes to draft articles 4, 18 and 19:

[* * *]

“Article 4. Applicability of defences and limits of liability

“[renumber current article 4 as paragraph 1]

“2. If judicial or arbitral proceedings are instituted in respect of loss or damage [or delay] covered by this Convention against master, crew or any other person who performs services on board the ship or employees or agents of a carrier or a

maritime performing party that person is entitled to defences and limits of liability as provided for in this Convention.

“3. Paragraph 2 applies whether judicial or arbitral proceedings are founded in contract, in tort or otherwise.

[* * *]

142. It was explained that the three guiding principles agreed upon by the Working Group with respect to the reformulation of the definitions of “performing party” and “maritime performing party” (see above, para. 131) had been followed in redrafting the text. In the revised text, “Performing party” was defined narrowly, such that subparagraph (a) detailed the inclusive list, and subparagraph (b) detailed the excluded persons, which was thought to solve the potential problem of the employee of the maritime performing party being held liable pursuant to the draft convention for the actions of its employer. In addition, it was indicated that the list of persons included in the vicarious liability provision of draft article 18 was expanded to specifically include the persons who, the Working Group had decided, should receive such protection. Further, automatic protection was specifically included for the broader category of persons, as agreed by the Working Group, and protection pursuant to draft article 4 was expanded, including small additional changes such as the inclusion of arbitral proceedings in the text of the provision. Certain technical adjustments were also made to draft article 19(1), such as moving a portion of subparagraph 1(a) into the chapeau. Finally, it was explained that the last sentence of the definition of “maritime performing party” was intended to exclude specifically from the definition those inland carriers who carried the goods only into or out of the port, as decided by the Working Group.

[* * *]

Draft article 4

149. It was observed that paragraph 1 of draft article 4 should be amended through the inclusion of “arbitral proceedings” in order to render it consistent with the additional paragraphs proposed in the revised text. In response to a question regarding the use of the phrase “that person is entitled to defences and limits of liability as provided for in this Convention” in the revised text, it was explained that a different phrase was used from that of the original text in order to clarify that where, for example, a carrier contractually agreed to increase its limitation on liability, a person referred to in draft article 4 would not be bound by that contractual agreement, but would rather be governed by the terms of the draft convention. Support was expressed for that approach, and clarification of the text in that regard was encouraged.

[* * *]

Conclusions reached by the Working Group regarding the revised text

153. After discussion, the Working Group decided that:

- It was satisfied that the revised text corresponded to its earlier decisions;
- Some drafting suggestions as set out in the paragraphs above should be considered by the Secretariat, including examination of the list of persons excluded from “performing

party”; the treatment of “agents” in draft article 1(6), 4(2) and 18; and appropriate wording to include inland waterways in the closing sentence of draft article 1(7);

- The revised text was otherwise generally acceptable to the Working Group.

[See also paragraphs 89-97, A/CN.9/621 (19th Session of WG III) under article 19 at p. 227, and paragraphs 141-148 under articles 1(6) and (7) at p. 23]

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

15. Noting that draft article 4 had received ample discussion in previous meetings, the Working Group approved the substance of draft article 4 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 4. Applicability of defences and limits of liability

20. The Commission approved the substance of draft article 4 and referred it to the drafting group.

CHAPTER 2. SCOPE OF APPLICATION

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

B. General discussion

1. Sphere of application

(a) Possible application of the draft instrument to door-to-door transport

26. The Working Group devoted considerable attention to the issue whether the period of responsibility of the carrier as dealt with in the draft instrument was to be restricted to port-to-port transport operations or whether, should the contract of carriage include also land carriage before or after (or before and after) the sea carriage, the draft instrument should also cover the entirety of the contract (door-to-door concept). The discussion was initiated by suggestions that—since a great and increasing number of contracts of carriage by sea in particular in the liner trade of containerized cargo included land carriage before and after the sea leg—it was desirable to make provision in the draft instrument for the relationship between the draft instrument and conventions governing inland transport, which were applicable in some countries. Draft article 4.2.1 (Carriage preceding or subsequent to sea carriage) in document A/CN.9/WG.III/WP.21, which was placed between square brackets, indicated the approach that was suggested to be followed. The draft article provided for a network system, but one as minimal as possible. The draft instrument was only displaced where a convention that constituted mandatory law for inland carriage was applicable to the inland leg of a door-to-door carriage, and it was clear that the loss or damage in question occurred solely in the course of the inland carriage. This meant that, where the damage occurred during more than one leg of the door-to-door carriage or where it could not be ascertained where the loss or damage occurred, the draft instrument would apply to the whole door-to-door transit period.

27. Suggestions were made that the draft instrument should be restricted to port-to-port transport operations. One reason given was that the extension of the proposed maritime regime to door-to-door operations required consultations with representatives of other modes of transport, which had not occurred during the preparatory work that had led to the production of document A/CN.9/WG.III/WP.21. However, in response it was pointed out that, while such consultations would take place and while the working methods of the Commission and the Working Group gave ample opportunity for such consultations, the proposed door-to-door approach took account of the legitimate interests of land carriers in that the mandatory liability regimes of the treaties were preserved by the draft instrument.

28. A further argument against the extension to door-to-door operations was that the earlier attempt at preparing a multimodal legislative convention, namely the United Nations Convention on International Multimodal Transport of Goods (Geneva 1980), was not successful and that including multimodal transport in the draft instrument might compromise the acceptability of the new instrument. It was also stated the UNCTAD/ICC Rules for Multimodal Transport Documents provided a contractual solution that worked in practice, which reduced the need for a legislative regime. Furthermore, UNCTAD was preparing a study on the feasibility of an

international multimodal regime and it would be advisable to await the results of that study before taking a decision in the context of the draft instrument. However, it was stated in response that the door-to-door approach put forward for consideration was not aimed at constituting a fully-fledged multimodal regime but rather a maritime regime that took into account the reality that the maritime carriage of goods was frequently preceded or followed by land carriage. The draft instrument reflected that reality and was limited to resolving conflicts with mandatory treaties on land carriage. It was also suggested that limiting the draft instrument only to the sea leg might be regarded as not sufficiently useful a contribution to the harmonization of transport law, and that the proposed door-to-door concept increased the attractiveness of the project.

29. It was also stated that extending the maritime regime to land carriage segments preceding or following the sea carriage might give rise to legal complexities in a situation where the regime of the carriage of goods by sea would govern one set of issues and the regime of the carriage of goods by land (to the extent it was mandatory) would govern other issues and that difficulties would arise in reconciling and interpreting such legal regimes. Moreover, the carriage of goods by land would be governed by different rules depending on whether or not the land carriage was part of the door-to-door transport operation involving a sea leg. In response it was argued that the minimal system along the lines of draft article 4.2.1 was workable, responded to the expectations of the parties and the draft article established a good starting point for the discussion during which the solutions could be further refined to avoid difficulties of interpretation. Moreover, in other modes of carriage, notably under the Warsaw Convention, the parties were free to deal contractually with the land carriage preceding or following the air carriage as permitted by the mandatory regime governing land carriage and that situation worked satisfactorily in practice.

30. Considerable support was expressed for the view that the legislative regime applicable to maritime export-import operations should not treat the maritime leg in isolation disregarding the broader door-to-door transport operation. The draft instrument should respond to the reality that, in particular, containerized traffic in the liner trade was usually structured as door-to-door operations and that, in the light of technological developments, including electronic commerce, and the improvement of logistical facilities, the frequency of such operations would certainly increase in the future. Non-vessel-operating carriers (NVOs) were increasingly offering such door-to-door services and transport documents were issued covering the door-to-door operations; it would thus be artificial to restrict the legislative treatment of the transport of containers to the port-to-port segment of carriage, because the containers were not checked at the beginning and the end of the sea leg but rather at the agreed point in the interior at the facilities of the customer. That reality was reflected in the definition of the “contract of carriage” in draft article 1, pursuant to which such a contract meant a contract under which the goods were carried “wholly or partly” by sea. The way in which the coverage of door-to-door operations was suggested to be approached was based on resolving conflicts between treaties and preventing the draft instrument from displacing mandatory provisions of conventions such as the CMR and the COTIF. While the concept as currently reflected in draft article 4.2.1 was in need of detailed consideration and refinement, the approach was widely supported because it responded to the expectations of the trading community. It was added that through the concept of “performing party” (draft art. 1.17), which was yet to be considered by the Working Group, for example a road carrier that physically transported the goods would become responsible to the cargo owner as a performing party and the draft instrument would have to resolve a conflict between the regime of the draft instrument and the mandatory regime governing the road carriage.

31. It was noted that land carriage could be subject not to a mandatory regime of an international treaty but to a non-unified national regime (either because the State in question was not party to a treaty or because the land carriage was not international and did not meet the conditions for the applicability of the treaty). While the current version of draft article 4.2.1 subparagraph (b) envisaged that the draft instrument would yield only to mandatory provisions of an international convention, it was said that it might be useful to consider the relationship between the draft instrument and provisions of a non-unified national law relating to inland carriage (alluded to in the last sentence of paragraph 50 of A/CN.9/WG.III/WP.21).

32. In discussing the issue the Working Group was conscious of the mandate given to it by the Commission (A/56/17, para. 345), in particular of the fact that the Commission had decided that the considerations in the Working Group should initially cover port-to-port transport operations, but that the Working Group would be free to consider the desirability and feasibility of dealing also with door-to-door transport operations, or certain aspects of those operations, and depending on the results of those considerations recommend to the Commission an appropriate extension of the Working Group's mandate. Bearing that in mind, the Working Group adopted the view that it would be desirable to include within the scope of the Working Group's discussions also door-to-door operations and to deal with these operations by developing a regime that resolved any conflict between the draft instrument and provisions governing land carriage in cases where sea carriage was complemented by one or more land carriage segments. Consequently, the Working Group requested the Commission to approve the approach suggested by the Working Group. The Working Group considered that it would be useful for it to continue its discussions of the draft instrument under the provisional working assumption that it would cover door-to-door transport operations.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

A. General discussion

25. In preparation for the current session of the Working Group, a proposal was submitted by the Government of Canada (A/CN.9/WG.III.WP.23) concerning the scope and structure of the draft instrument. In light of the discussion held at the ninth session of the Working Group regarding the scope of application of the draft instrument on a door-to-door or on a port-to-port basis, the following three options were presented: (1) to continue working on the existing draft instrument, but to add a reservation that would enable contracting States to decide whether or not to implement article 4.2.1 and the relevant rules governing the carriage of goods preceding or subsequent to the carriage by sea; (2) to continue working on the existing draft instrument, including article 4.2.1, but to insert "national law" after "international convention" in article 4.2.1(b); or (3) to revise the existing draft instrument to include a separate chapter each on common provisions, on carriage of goods by sea (port-to-port), on carriage of goods by sea and by other modes before or after carriage by sea (door-to-door), and on final clauses and reservations, including a provision on express reservations for the port-to-port chapter and the door-to-door chapter.

26. The Working Group welcomed this contribution to the discussion on the scope of application of the draft instrument. It was, however, questioned if this was the appropriate time to discuss the options proposed for the structure of the draft instrument. Support was expressed

for the view that an in-depth discussion on the scope of application would be premature, particularly since the Secretariat had been requested to prepare a background paper on this topic for discussion at a future session of the Working Group. It was suggested that while an in-depth discussion of the issue or the choosing of option might be premature, the options presented in the Canadian proposal, in addition to possible other options, should form part of the background paper on scope of application to be presented at a future session of the Working Group.

27. The Working Group decided to proceed with a discussion of the liability issue in Chapter 6 of the draft instrument, to be followed by consideration of the period of responsibility issues in Chapter 4. The Working Group agreed to discuss in general terms the scope of application issues during its examination of the related issue of the period of responsibility covered in Chapter 4 (see below, para. 123).

28. In a preliminary exchange of views with representatives of international organizations involved in land transportation, the Working Group heard comments from the representative of the Intergovernmental Organisation for International Carriage by Rail (OTIF) and the Comité international des transports ferroviaires (CIT), who expressed support for the establishment of a global rules to govern multimodal transport, provided that unimodal transport situations, such as those involving transport by road, rail and inland waterways, were duly taken into account. In that context, interest was expressed for option (3) in the Canadian proposal (for continuation of that exchange of views, see below, para. 124 and annexes I and II).

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

2. Consideration of specific issues related to the scope of the draft instrument

240. Having provisionally agreed that the scope of the draft instrument should cover door-to-door transport, the Working Group proceeded with a more specific discussion of the following five issues: (a) the type of carriage covered by the draft instrument; (b) the relationship of the draft instrument with other conventions and with domestic legislation; (c) the manner in which performing parties should be dealt with under the draft instrument; (d) the limits of liability under the draft instrument; and (e) the treatment of non-localized damages under the draft instrument.

(a) Type of carriage covered by the draft instrument

241. It was generally felt that more clarity was needed with respect to the type of carriage covered by the draft instrument. The frequent reference to the notion of “maritime plus” carriage, its implications regarding the use of non-maritime modes of transport, and the reliance on a network system to govern the relationships between the draft instrument and other transport conventions, created a need to review precisely the respective limits of “maritime plus” carriage as covered by the draft instrument and multimodal carriage of goods as understood, for example, in the 1980 Convention. One obvious distinction between the type of carriage covered by the draft instrument and unqualified multimodal carriage resulted from the definition of “contract of carriage” given by paragraph 1.5, under which the draft instrument applied to a carriage of goods “wholly or partly by sea”. The discussion then focused on whether it would be desirable and feasible to establish any further distinction between multimodal carriage and the type of carriage covered by the draft instrument, or whether

carriage of goods under the draft instrument should be understood as covering any multimodal carriage involving a sea leg.

242. Several possible criteria were suggested for establishing such a distinction. One suggestion was that the draft instrument should cover “intercontinental” carriage of goods wholly or partly by sea. That suggestion was generally objected to on the grounds that it would be highly impractical, politically unacceptable and legally unfounded to attempt establishing a distinction between “intercontinental” carriage and “international” carriage. Another suggestion was that, in view of the strong influence of maritime law reflected in the draft instrument, the draft instrument should only apply to a multimodal carriage where the importance of the maritime leg was predominant. Some support was expressed for the view that the respective importance of sea carriage and land carriage in the overall multimodal carriage should be taken into account. In that respect, it was stated that, in practice, the draft instrument was expected to apply mostly to the transport of containers that would be carried for the most part by sea, with inland carriage taking place on relatively short distances before or after the sea carriage. That view was objected to on the grounds that the respective importance of the sea carriage and carriage by other modes should not be assessed by reference to the itinerary actually followed by the goods but more subjectively by reference to the intent of the parties as expressed in the contract of carriage. From a statistical perspective, the example was given of a region where containers carried by rail before or after a sea leg would, on average, travel inland over 1,700 miles. The prevailing view was that no attempt should be made to establish in the draft instrument the ancillary character of the land carriage. It was generally felt that the only practical way of addressing that aspect of the scope of the draft instrument was to decide that multimodal carriages involving a sea leg should be covered by the draft instrument, irrespective of the relative duration or distance involved in that sea leg.

243. A question was raised as to how the internationality of the carriage covered by the draft instrument should be reflected in the individual unimodal legs of the carriage. The suggestion was made that the draft instrument should only apply to those carriages where the maritime leg involved cross-border transport. Under that suggestion, it was said to be irrelevant whether the land legs involved in the overall carriage did or did not involve cross-border transport. It was pointed out that such an approach would be in line with other conventions such as the COTIF, under which the internationality of the carriage should be determined in respect of the carriage by rail only. The Working Group took note of that suggestion and requested the Secretariat to reflect it, as a possible variant, in the revised draft to be prepared for continuation of the discussion at a future session. The prevailing view, however, was that, pursuant to draft article 3, the internationality of the carriage should not be assessed in respect of any of the individual unimodal legs but in respect of the overall carriage, with the place of receipt and the place of delivery being in different States. For example, in the case of carriage of goods from Vancouver to Honolulu, the applicability of the draft instrument should not depend on whether the goods were shipped directly to Honolulu or first carried by road to Seattle and subsequently shipped to Honolulu.

244. After discussion, the Working Group agreed on a provisional basis that the draft instrument should cover any type of multimodal carriage involving a sea leg. No further distinction would be needed, based on the relative importance of the various modes of transport used for the purposes of the carriage. It was also agreed that draft article 3 might need to be redrafted to better reflect that the internationality of the carriage should be assessed on the basis

of the contract of carriage. The Secretariat was requested to prepare revised provisions, with possible variants, for continuation of the discussion at a future session. In view of the decision made by the Working Group regarding the type of carriage to be covered by the draft instrument, the attention of States members of the United Nations Economic Commission for Europe (UN/ECE) was drawn to the need to ensure coordination of their delegations in the Working Group and in the UN/ECE to avoid duplication of efforts.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Freedom of contract (draft articles 1, 2, 88 and 89)

81. The Working Group was reminded that it had most recently considered draft articles 1 and 2 at its twelfth session (see A/CN.9/544, paras. 51-84), and draft articles 88 and 89 at its eleventh session (see A/CN.9/526, paras. 203-218).

82. The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paragraph 11 above). The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to draft articles 1, 2, 88 and 89 in an effort to achieve consensus with respect to the best approach to be taken regarding freedom of contract issues. The Working Group agreed to divide matters relating to freedom of contract into three main issues for the purposes of analysis, i.e. scope of application, protection of third parties and Ocean Liner Service Agreements (OLSAs), and to proceed with the discussion accordingly.

Scope of application

83. It was noted that the scope of application issue would require a decision regarding the types of situations and contracts which would be subject to the mandatory rules of the draft instrument and which would not, or which provisions of the draft instrument would apply on a non-mandatory basis in which situations. The Working Group considered the text of draft article 2 as contained in document A/CN.9/WGIII/WP.36, particularly paragraph 3 thereof. It was suggested that there were three possible theoretical approaches to defining the scope of application of the draft instrument, each of them with advantages and disadvantages.

Documentary approach

84. The first approach, used in the Hague-Visby rules, was document-oriented and would require the issuance of a bill of lading or similar document to trigger the application of the draft instrument. One advantage of adopting this approach was that once the document was issued, it would automatically fall within the mandatory liability regime. Another advantage was said to be that this approach was well known given its long history. However, a disadvantage of the documentary approach was thought to be that modern trade did not necessarily use bills of lading or similar documents, and, further, that new documents could be used in the future which might not fall within any definition devised for this approach. However, it was suggested that the inclusion of a non-exhaustive list of documents intended to be included within the mandatory coverage of the draft instrument, followed by a generic final category, could overcome concerns relating to definition. In response, it was observed that the addition of a generic closing category would not necessarily solve the problem, since it could itself create

uncertainty. The view was also expressed that the documentary approach was obsolete, and that it did not fit easily within the scheme devised by the draft instrument.

Contractual approach

85. The second approach, used in the Hamburg Rules and found in draft paragraph 2(3) of A/CN.9/WGIII/WP.36, was contract-oriented and would require the issuance of a contract of carriage of goods for the application of the draft instrument. It was stated that certain types of contracts of carriage would need to fall outside the scope of application of the draft convention despite being contracts of carriage, for example voyage charter parties, or specialized contracts of carriage, such as volume contracts, slot or space charter parties, heavy lift contracts and towage contracts, again creating possible definitional problems. However, it was also suggested that many of the contracts to be excluded under the contractual approach fell under the rubric of “non-liner trade” and therefore would also be excluded under the trade approach.

Trade approach

86. The third approach was trade-oriented and would apply the draft instrument on a mandatory basis to all contracts in the “liner trade”, but would not apply it to the “non-liner” or “tramp” trade. The advantages of this approach were that it reflected well-established trade practice, and obviated the need to exhaustively define all possible types of contracts for the application of the draft instrument. However, this approach could also pose problems in the legal definition of the relevant categories, as well as with respect to the protection of third parties.

Contracts freely negotiated

87. It was also noted that another aspect relevant to the scope issue was whether a given contract of carriage had been freely negotiated between the parties or not. It was said that the draft instrument should apply to contracts freely negotiated on a non-mandatory basis, except for certain obligations that should not be capable of modification by mutual agreement, such as seaworthiness, while contracts that were not freely negotiated should be mandatorily subject to the draft instrument. Further, some concern was expressed in this regard for the plight of small shippers with unequal bargaining power who, it was said, could be disadvantaged when negotiating contracts which could fall outside of the mandatory application of the instrument.

Mandatory nature of specific provisions in the draft instrument

88. Another factor to be considered by the Working Group in this discussion was said to be which, if any, of the particular provisions of the draft instrument should be of a mandatory nature.

Conclusions reached by the Working Group on scope of application

89. After discussion, a broad consensus emerged within the Working Group that the draft instrument should be mandatorily applicable to traditional shipments with traditional bills of lading and sea waybills and to shipments under their electronic equivalents. There was also broad agreement that traditional charter parties, volume contracts in the non-liner trade, slot charters in the liner trade, and towage and heavy lift contracts should be excluded from the application of the draft instrument. A majority of the delegations favoured the contractual approach. However, it was believed that a compromise could be achieved by using a combination of the trade approach, the contractual approach and the documentary approach.

Other aspects could be factored into this effort to define the mandatory application of the draft instrument, such as the issue of whether or not a contract had been freely negotiated, and whether some provisions of the draft instrument should always be mandatory.

90. The Working Group decided that:

- An informal drafting group should be requested to prepare a provision on scope based on the views outlined in the paragraph above, and, in any event, taking into consideration the text as set out in draft paragraph 2(3) of A/CN.9/WGIII/WP.36 (see paras. 105 to 109 below).

Third parties

91. It was recalled that the Working Group had agreed that the second issue in its analysis of freedom of contract would concern the mandatory nature of the draft instrument regarding the protection of third parties, where such third parties held rights under the draft instrument (A/CN.9/544, para. 81). Whilst the Working Group had before it a draft text relating to third parties contained in draft paragraph 2(4) of A/CN.9/WG.III/WP.36 requiring the issuance of a negotiable transport document or electronic record, two alternative texts were proposed as follows:

“Alternative 1: Notwithstanding paragraph 1, if a transport document or an electronic record is issued pursuant to a charter party, contract of affreightment, volume contract or similar agreement, then the provisions of this instrument apply to such a transport document or an electronic document or an electronic record to the extent that the transport document or the electronic record governs the relation between the carrier and any person named as consignor or consignee or any person being the holder, provided that the person is not the charterer or any other party to the contract mentioned in paragraph 1.

“Alternative 2: Notwithstanding paragraph 1, the provisions of this instrument apply between the carrier and a third party who according to the provisions of this instrument has rights or duties in relation to the carrier, provided that this person is not the charterer or any other party to the contract mentioned in paragraph 1.”

92. The Working Group heard that these alternative texts had been prepared to reflect the principle that third parties should have mandatory protection under the draft instrument, but that such protection should not be related to any negotiable transport document such as a bill of lading. Alternative 1 continued to require that the third party be connected to a document or to an electronic record but removed the requirement that the document or record be negotiable, whereas alternative 2 omitted any reference to a transport document or an electronic record of any type.

Defining the category of “third party”

93. A view was expressed that alternative 2 provided greater protection for third parties, however, some caution was raised that alternative 2 could be too broad, and could extend third party protection to unintended parties, such as an insurer or a creditor. Another issue raised with respect to alternative 2 was that the phrase “rights or duties in relation to the carrier” raised the possibility that obligations could be imposed on third parties. Support was expressed for alternative 1 on the basis that it required that there be some connection between the third party and a document or electronic record, and that it made clearer who could take advantage of

that provision. There was some support for another proposal to limit the definition of third parties to consignors, consignees, controlling parties, holders, persons referred to in draft article 31, and the “notify party”. It was further suggested that the categories of consignor, consignee and document holders could encompass controlling parties and the notify party, thus making specific inclusion of them unnecessary.

Documentary basis, no documentary basis or negotiable documentary basis

94. There was support for the suggestion that failure to tie the identity of the third party to a document would make it difficult to establish the limits of the category, and could impose a heavy burden on the carrier to identify third parties. In addition, the suggestion was made that mandatory rules should govern the relationship between the carrier and third parties in order to standardize the contents of the document and to reduce transaction costs, especially in documentary credits. It was suggested that mandatory protection for such a purpose would not extend to third parties without a document or an electronic record. Further, it was thought that third parties should have some reliance on the documents in order to qualify for protection. It was suggested, however, that only documents or electronic records that transferred rights should require third party protection, since otherwise parties could negotiate for their own protection in the sales contract and other trade arrangements. The possibility was raised that this reasoning should also be extended to transferees of the right of control where no document was issued, but that, in any event, this issue should be kept in mind in future discussion on the right of control.

Additional considerations

95. The Working Group was reminded that the issue of third parties should be borne in mind when determining which provisions of the draft instrument would be mandatory, in order to ensure that third party protection was not rendered illusory. In addition, it was suggested that there could be some other categories of third parties deserving of protection under the draft instrument, and that the category of third parties should not yet be considered closed. It was also suggested that care should be taken in granting third party rights based on documents other than documents of title. Further, it was suggested that the meaning of “third parties” should be consistent with the meaning attributed to the use of that term in provisions relating to ocean liner service agreements (OLSAs) and in charter parties.

Conclusions reached by the Working Group with respect to third parties

96. The Working Group agreed that:

- Third parties should be protected in the draft instrument;
- The identification of such third parties should be made on the basis of the documentary approach in alternative 1;
- The third parties deserving of protection should be established clearly, but the categories should not yet be considered closed;
- The protection of third parties should be taken into account when determining which provisions of the draft instrument were to be mandatory;
- The meaning of the term “third party” should be consistent with its use elsewhere in the draft instrument, notably when used in provisions relating to OLSAs and charter parties.

[* * *]

Redraft of provisions relating to scope of application

105. As requested by the Working Group (see paras. 83 to 96 above), an informal drafting group composed of a number of delegations prepared a redraft of the provisions regarding scope of application. In presenting the redraft, the Working Group heard that that text used a “hybrid” approach, incorporating elements from all three of the possible approaches. The redrafted text was based on the broad consensus expressed by the Working Group and outlined in paragraphs 83 to 96 above and taking into consideration draft paragraph 1(a) and draft article 2 as set out in A/CN.9/WG.III/WP.36. The text that was proposed to the Working Group for its consideration was as follows:

“Article 1

“(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. This undertaking must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage. [A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage provided that the goods are actually carried by sea.]

“[(--)] “Liner service” means a maritime transportation service that (i) is available to the general public through publication or otherwise; and (ii) is performed on a regular basis between specified ports in accordance with announced timetables or sailing dates.]

“[(--)] “Non-liner service” means any maritime transportation service that is not a liner service.]

“Article 2

“1. Subject to articles 3 to 5, this Instrument applies to contracts of carriage in which the [contractual] place of receipt and the [contractual] place of delivery are in different States, and the [contractual] port of loading and the [contractual] port of discharge are in different States, if

“(a) the [contractual] place of receipt [or [contractual] port of loading] is located in a Contracting State, or

“(b) the [contractual] place of delivery [or [contractual] port of discharge] is located in a Contracting State, or

“(c) [the actual place of delivery is one of the optional places of delivery [under the contract] and is located in a Contracting State, or]

“(d) the contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract.

“[References to [contractual] places and ports mean the places and ports provided under the contract of carriage or in the contract particulars.]

“[2. This instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.]

“Article 3

“1. This Instrument does not apply to

“(a) subject to article 5, charter parties, whether used in connection with liner services or not; and

“(b) subject to article 4, volume contracts, contracts of affreightment, and similar contracts providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not; and

“(c) subject to paragraph 2, other contracts in non-liner services.

“2. This Instrument applies to contracts of carriage in non-liner services under which the carrier issues a transport document or an electronic record that

“(a) evidences the carrier’s or a performing party’s receipt of the goods; and

“(b) evidences or contains the contract of carriage, except in the relationship between the parties to a charter party or similar agreement.

“Article 4

“If a contract provides for the future carriage of goods in a series of shipments, this Instrument applies to each shipment in accordance with the rules provided in articles 2, 3(1)(a), 3(1)(c), and 3(2).

“Article 5

“If a transport document or an electronic record is issued pursuant to a charter party or a contract under article 3(1)(c), then such transport document or electronic record shall comply with the terms of this Instrument and the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record from the moment at which it regulates the relationship between the carrier and the person entitled to rights under the contract of carriage, provided that such person is not a charterer or a party to the contract under article 3(1)(c).”

106. The Working Group heard that the informal drafting group had not had sufficient time to consider OLSAs, nor draft articles 88 and 89. Further, the redrafted article 1 definition of “contract of carriage” had not changed in substance from the original text in A/CN.9/WG.III/WP.36, but for moving the requirement of the international sea leg to article 2 of the redraft. Definitions of “liner” and “nonliner service” were proposed for inclusion in the draft article 1 definition section. The Working Group heard that article 2 of the redraft contained mainly the original text of draft article 2, but for the addition of a “double” international requirement (of both the overall contract of carriage and the sea voyage itself), the use of the word “contractual” in square brackets to further define the terms, and the placing of paragraph 2 in square brackets. Further, paragraph 3(1) of the redraft was intended to parallel the exclusion clause in the original paragraph 2(3), by treating first charter parties, then volume contracts, contracts of affreightment and similar contracts, with subparagraph (c) of the redraft representing an attempt to assist in the identification of “similar contracts”. Paragraph 3(2) of the redraft then used the combined elements of the draft instrument’s definition of “transport document” in the original draft article 1(k) to place certain contracts in non-liner services that should not be excluded within the scope of the draft instrument. The Working Group heard that

the effect of article 3 of the redraft, while complicated, was to ensure that those transactions covered by the Hague and Hague-Visby Rules would continue to be covered by the draft instrument. Article 4 of the redraft was said to be substantially similar to the original draft article 2(5). Finally, it was said that article 5 of the redraft was intended to provide third party protection along the lines of the original draft paragraph 2(4), but that the “non-negotiable document” approach outlined above in paragraph 94 had been used in the redraft.

107. While the Working Group agreed that the redrafted text would require further examination and discussion before any specific positions could be taken on it, a number of general comments were made. Doubts were expressed regarding whether the redraft adequately provided for the internationality of the sea leg of the carriage. The view was expressed that the redraft in fact required “double” internationality, in that the redrafted paragraph 2(1) required that both the place of receipt and the place of delivery be in different States, and that the port of loading and the port of discharge be in different States.

108. Concern was also expressed as to whether the redraft should clarify what was meant in subparagraph 2(b) by the terms “volume contracts” and “contracts of affreightment”. A suggestion was made that such terms should be defined to ensure consistency of judicial interpretation. In that respect, it was noted that the redrafted subparagraph 2(b) was intended to give some assistance in standardizing the interpretation of those terms by describing “similar contracts” as “providing for the future carriage of goods in a series of shipments, whether used in connection with liner services or not”. Some hesitation was expressed against the inclusion of any further definition of these terms, particularly given their varied usage in different jurisdictions.

109. The Working Group agreed that the redraft represented a sound text upon which to base future discussions on scope of application, once further reflection and consultations had taken place.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Scope of application and Freedom of contract (draft articles 1, 2, 88 and 89)

10. The Working Group was reminded that it had most recently considered the topics of scope of application and freedom of contract at its fourteenth session (see A/CN.9/572, paras. 81-104), and that it had previously considered draft articles 1 and 2 at its twelfth session (see A/CN.9/544, paras. 51-84), and draft articles 88 and 89 at its eleventh session (see A/CN.9/526, paras. 203-218).

11. The Working Group heard a short report from the informal consultation group (see A/CN.9/572, para. 166) which took the initiative of continuing the discussion between sessions of the Working Group, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in the preparation of the draft instrument. The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to the topics of scope of application and freedom of contract, taking into account the draft text prepared by the informal drafting group as instructed by the Working Group during its fourteenth session (see A/CN.9/572, para. 90) as published in

A/CN.9/WG.III/WP.44, and the text of draft articles 88 and 89 as they appeared in A/CN.9/WG.III/WP.32.

General discussion and methodology for continuation of work

12. The Working Group heard that in the course of the intersessional work undertaken by the informal consultation group, a number of drafting suggestions had been made and views regarding some more substantive policy issues had been expressed with respect to the scope of application provisions set out in A/CN.9/WG.III/WP.44, and regarding draft articles 88 and 89 of the draft instrument. Further to the conclusions reached by the Working Group with respect to the issue of Ocean Liner Service Agreements (OLSAs) (see A/CN.9/572, para. 104, and, more generally, A/CN.9/WG.III/WP.42 and A/CN.9/WG.III/WP.34, paras. 18-29 and 34-35), it was suggested that the inclusion of OLSAs within the draft instrument needed not necessarily to be accomplished by way of separate provisions, which could be difficult to draft. Instead, it was suggested that since OLSAs were a type of volume contract, adjustments could be made to the provisions in A/CN.9/WG.III/WP.44 and to draft articles 88 and 89 in order to subsume OLSAs into the existing approach to volume contracts in the scope of application of the draft instrument. Such a drafting approach was also said to be favourable in that it obviated the need for a definition of OLSAs, which had been an issue of some concern in the Working Group.

13. General support was expressed for this suggested technique for the inclusion of OLSAs into the scope of application scheme for the draft instrument under consideration by the Working Group. The Working Group agreed that an informal drafting group should prepare the necessary adjustments to the existing scope of application provisions in order to improve the drafting and to accommodate the inclusion of OLSAs therein. However, it was noted that certain substantive policy issues raised by the scope of application provisions should be decided by the Working Group prior to the commencement of the drafting exercise. It was agreed by the Working Group that consideration of these matters should take place on the basis of a list of key issues as set out in the following headings and paragraphs.

[* * *]

Proposed redraft of provisions regarding scope of application and freedom of contract (draft articles 1, 2, 3, 4, 88, 89 and new draft article 88a)

52. Based upon the discussion in the Working Group (see above, paras. 10 to 51) regarding the provisions of the draft instrument relating to scope of application and freedom of contract as they appeared in A/CN.9/WG.III/WP.44 (draft articles 1, 2, 3, 4 and 5) and A/CN.9/WG.III/WP.32 (draft articles 88 and 89), an informal drafting group composed of a number of delegations prepared a revised version of those provisions that resulted in proposed redraft articles 1, 2, 3, 4, 88 and 89, and a proposed new draft article 88a intended to allow for derogation from the draft instrument in the case of volume contracts that would meet certain prescribed conditions. The proposed new text of those provisions was as follows:

“Article 1

“(a) “Contract of carriage” means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract must provide for carriage by sea and may provide for carriage by other modes of transport prior to or after the sea carriage.

“(x) “Volume contract” means a contract that provides for the carriage of [a specified minimum quantity of] cargo in a series of shipments during an agreed period of time.

“(xx) “Non-liner transportation” means any transportation that is not liner transportation. For the purpose of this paragraph, “liner transportation” means a transportation service that (i) is offered to the public through publication or similar means and (ii) includes transportation by vessels operating on a regular schedule between specified ports in accordance with publicly available timetables of sailing dates.

“Article 2

“1. Subject to Articles 3(1), this Instrument applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading [of a sea carriage] and the port of discharge [of the same sea carriage] are in different States, if:

(a) The place of receipt [or port of loading] is located in a State Party; or

(b) The place of delivery [or port of discharge] is located in a State Party; or

[(c) The contract of carriage provides that this Instrument, or the law of any State giving effect to it, is to govern the contract.]

References to [places and]2 ports mean the [places and] ports agreed in the contract of carriage.

“2. This Instrument applies without regard to the nationality of the ship, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

“Article 3

“1. This Instrument does not apply to:

(a) Charter parties;

(b) Contracts for the use of a ship or of any space thereon;

(c) Except as provided in paragraph 2, other contracts in non-liner transportation; and

(d) Except as provided in paragraph 3, volume contracts.

“2. Without prejudice to subparagraphs 1(a) and (b), this Instrument applies to contracts of carriage in non-liner transportation when evidenced by or contained in a transport document or an electronic transport record that also evidences the carrier’s or a performing party’s receipt of the goods, except as between the parties to a charter party or to a contract for the use of a ship or of any space thereon.

“3. (a) This Instrument applies to the terms that regulate each shipment under a volume contract to the extent that the provisions of this chapter3 so specify

(b) This Instrument applies to the terms of a volume contract to the extent that they regulate a shipment under that volume contract that is governed by this Instrument under subparagraph (a).

“Article 4

“Notwithstanding Article 3, if a transport document or an electronic transport record is issued pursuant to a charter party or a contract under Article 3(1)(b) or (c), the provisions of this Instrument apply to the contract evidenced by or contained in the transport document or electronic transport record as between the carrier and the consignor, consignee, controlling party, holder, or person referred to in article 31 that is not the charterer or the party to the contract under Article 3(1)(b) or (c).

“Article 88

“1. Unless otherwise specified in this Instrument, any provision is null and void if:

- (a) It directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Instrument;
- (b) It directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Instrument; or
- (c) It assigns a benefit of insurance of the goods in favour of the carrier or a person mentioned in Article 14bis.

“[2. Unless otherwise specified in this Instrument, any provision is null and void if:

- (a) It directly or indirectly excludes, limits, [or increases] the obligations under Chapter 7 of the shipper, consignor, consignee, controlling party, holder, or person referred to in Article 31; or
- (b) It directly or indirectly excludes, limits, [or increases] the liability of the shipper, consignor, consignee, controlling party, holder, or person referred to in Article 31 for breach of any of their obligations under Chapter 7.]

“Article 88a

“1. Notwithstanding article 88, if terms of a volume contract are subject to this Instrument under Article 3(3)(b), the volume contract may provide for greater or lesser duties, rights, obligations, and liabilities than those set forth in the Instrument provided that the volume contract [is agreed to in writing or electronically],⁵ contains a prominent statement that it derogates from provisions of the Instrument, and:

- (a) Is individually negotiated; or
- (b) Prominently specifies the sections of the volume contract containing the derogations.

“2. A derogation under paragraph 1 shall be set forth in the contract and may not be incorporated by reference from another document.

“3. A [carrier’s public schedule of prices and services,] transport document, electronic transport record, or similar document is not a volume contract under paragraph 1, but a volume contract may incorporate such documents by reference as terms of the contract.

“4. The right of derogation under this article applies to the terms that regulate shipments under the volume contract to the extent these terms are subject to this Instrument under Article 3(3)(a).

“5. Paragraph 1 is not applicable to:

(a) Obligations stipulated in Article 13(1)(a) and (b) [and liability arising from the breach thereof or limitation of that liability];

[(b) Rights and obligations stipulated in Articles [19], [25], [26], [27] and [XX] Figure 16 [and the liability arising from the breach thereof]].

“6. Paragraph 1 applies:

(a) Between the carrier and the shipper;

(b) Between the carrier and any other party that has expressly consented [in writing or electronically]⁷ to be bound by the terms of the volume contract that derogate from the provisions of this Instrument. [The express consent must demonstrate that the consenting party received a notice that prominently states that the volume contract derogates from provisions of the Instrument and the consent shall not be set forth in a [carrier’s public schedule of prices and services,] transport document, or electronic transport record. The burden is on the carrier to prove that the conditions for derogation have been fulfilled.]

“Article 89

“Notwithstanding chapters 4 and 5 of this Instrument, the terms of the contract of carriage may exclude or limit the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals except where it is proved that the loss ,damage, or delay resulted from an action or omission of the carrier [or of a person mentioned in Article 14bis] done recklessly and with knowledge that such loss, damage, or delay would probably occur; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that ordinary commercial shipments made in the ordinary course of trade are not concerned and no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.”

53. The Working Group heard a brief report from the informal drafting group outlining the changes that had been made from previous versions of these articles as they appeared in A/CN.9/WG.III/WP.44 and A/CN.9/WG.III/WP.32. In the definition of “contract of carriage”, the final bracketed sentence of the previous version of draft article 1(a) had been deleted as decided by the Working Group (see above, paras. 33 and 34). Further, a definition of “volume contract” was added as proposed paragraph (x), and the definition of “liner service” was deleted as unnecessary in light of later proposed provisions that referred only to “non-liner transportation”. In proposed redraft article 2(1), the specific references to “[contractual]” were deleted in favour of the final sentence. The previous version of draft article 2(1)(c) was deleted as having insufficient support. The language in square brackets in proposed redraft article 2(1)(a) and 2(1)(b) was intended to emphasize the sea carriage aspect and was included for further discussion by the Working Group. In an effort to improve clarity, the previous version of draft articles 3 and 4 were combined to create proposed redraft article 3. It was noted that the main rule in proposed redraft article 3(1) enumerated the contracts that were not included

within the scope of application of the draft instrument, and that, while subparagraph (b) clearly included charter parties, they were nonetheless named in subparagraph (a) for historical purposes. Proposed redraft article 3(2) set out a slightly rephrased version of the previous version of draft article 3(2) with respect to the inclusion of certain contracts in non-liner transportation. Proposed redraft article 3(3) was intended to bring volume contracts within the scope of application of the draft instrument on the basis of individual shipments performed under such contracts. Proposed redraft article 4 restated the elements of previous draft article 5 using the documentary approach, and specifically enumerated the persons to whom it applied. Like its predecessor in A/CN.9/WG.III/WP.32, proposed redraft article 88 dealt with the mandatory provisions of the draft instrument, dividing the issue into paragraph 1, concerning the carrier and maritime performing party, and paragraph 2, regarding cargo interests. Proposed paragraph 1 reflected the one-way mandatory approach agreed upon with respect to the carrier, and paragraph 2 reflected a more nuanced approach to the obligations of cargo interests for further discussion by the Working Group. Proposed new article 88a was drafted to reflect the discussion in the Working Group regarding the possibility to derogate from the provisions of the draft instrument in certain cases regarding volume contracts, including the necessary conditions for such derogation, as well as some additional requirements. Further, it was noted that pursuant to proposed new article 88a(4), if the volume contract in question met the listed requirements, the valid stipulations derogating from the draft instrument would cover both the volume contract and each individual shipment as specified in proposed new article 88a. Proposed new article 88a(5) set out the mandatory provisions from which there could never be derogation, and proposed new article 88a(6) established to whom the derogation would apply, and the necessary components for “express consent” to the derogation, as well as the added safeguard of placing on the carrier the burden of proving that the conditions for derogation had been met.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Scope of application, freedom of contract and related provisions

121. The Working Group was reminded that it had most recently considered the topics of scope of application and freedom of contract at its fourteenth and fifteenth sessions (see A/CN.9/572, paras. 81 to 104, and A/CN.9/576, paras. 10 to 109). It was also recalled that proposals concerning the scope of application, freedom of contract and related provisions had been presented for the consideration of the Working Group at its current session. (A/CN.9/WG.III/WP.61, A/CN.9/WG.III/WP.65, and A/CN.9/WG.III/WP.70).

122. The Working Group agreed with the suggestion that it should consider scope of application, freedom of contract and related provisions on the basis of the proposed revised text contained in the documents presented (in particular, A/CN.9/WG.III/WP.61) following what were thought to be the key outstanding issues:

- (a) Proposed deletion of draft paragraph 8(1)(c) of the draft convention;
- (b) New text proposed to clarify draft article 9 which articulated the scope of application of the draft convention;

(c) New proposed text for draft article 10, on the protection of third parties to contracts of carriage outside of the scope of application of the draft convention, and in particular, whether it was acceptable to define them without reference to transport documents or electronic transport records;

(d) New proposed draft paragraph 20(5), to further clarify scope of application with respect to maritime performing parties;

(e) Further consideration of draft paragraph 94(2) on the mandatory application of certain provisions of the draft convention with respect to shippers and other parties;

(f) Modified text of draft paragraph 95(1), on the conditions for the exercise of freedom of contract in the case of volume contracts;

(g) Further consideration of draft paragraph 95(4) mandatory provisions of the draft convention from which there could be no derogation;

(h) Modified text of draft paragraph 95(5)(b), on the conditions under which third parties could consent to be bound by the terms of a volume contract;

(i) The appropriateness of the text of draft paragraph 95(5)(c) which placed the burden of proof on the party claiming the benefit of the volume contract; and

(j) Any additional issues regarding the scope of application and freedom of contract that were of concern to the Working Group

Article 5. General scope of application

1. Subject to article 6, this Convention applies to contracts of carriage in which the place of receipt and the place of delivery are in different States, and the port of loading of a sea carriage and the port of discharge of the same sea carriage are in different States, if, according to the contract of carriage, any one of the following places is located in a Contracting State:

- (a) The place of receipt;
- (b) The port of loading;
- (c) The place of delivery; or
- (d) The port of discharge.

2. This Convention applies without regard to the nationality of the vessel, the carrier, the performing parties, the shipper, the consignee, or any other interested parties.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(b) Internationality of the carriage

33. The Working Group discussed the implications of the approach to internationality taken in draft article 3. In particular, a question was raised as to whether the provisions establishing the sphere of application of the draft instrument should result in different solutions regarding

the applicability of the draft instrument according to whether or not the transport segments preceding and following the maritime segment involved an element of internationality. It was generally considered that the draft instrument should apply as soon as an element of internationality characterized the overall contract of carriage, irrespective of whether or not certain segments of the carriage were purely domestic. To illustrate that point, it was stated that the draft instrument should apply to a transport initiating in Madrid and ending in Philadelphia, where the goods were carried by road from Madrid to Cádiz, by sea from Cádiz to New York, and by road from New York to Philadelphia. The draft instrument should apply equally to a transport between Berlin and Buffalo, where the goods were carried from Berlin to Rotterdam by train, then from Rotterdam to Montreal by sea, then from Montreal to Buffalo by road. In the context of that discussion, it was pointed out that, in preparing the draft instrument, particular attention would need to be given to the need for a clear solution regarding possible conflicts between the different legal regimes (whether of international or domestic origin) that might govern the different segments of the transport depending on the mode of transport being used. For example, to deal with the above-mentioned transport between Berlin and Buffalo, preference was generally expressed for the simpler, more broadly encompassing solution under which the draft instrument would govern the entire transport, irrespective of the fact that domestic segments were included. It was observed, however, that such a simple solution would differ from the more complex and more restrictive solution adopted in a recent revision of the COTIF, under which transport segments ancillary to the rail segment would be covered by the COTIF only where they were purely domestic.

34. With respect to the various factors listed in subparagraphs (a) to (e) of draft article 3.1 for determining the internationality of the carriage, support was generally expressed to adopting the broadest possible sphere of application for the draft instrument. As a matter of drafting, it was pointed out that, consistent with the door-to-door approach favoured as a working assumption by the Working Group, the notions of “place of receipt” and “place of delivery” should be preferred to the notions of “port of loading” and “port of discharge”. In that connection, it was observed that the port of loading and the port of discharge as well as any intermediary port would not necessarily be known to the shipper. With respect to the substance of the provision, doubts were expressed as to whether the place of conclusion of the contract mentioned in subparagraph (d) should be regarded as relevant for determining the application of the draft instrument. It was widely held that, in modern transport practice, the place of conclusion of the contract was mostly irrelevant to the performance of the contract of carriage and, if electronic commerce was involved, that place might even be difficult or impossible to determine.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

(a) General discussion regarding the three variants of draft article 2(1)

53. It was recalled that Variant A was based on the original text of the draft instrument, which did not distinguish between the various modes of transport that might be used for carrying the goods to determine the sphere of application of the draft instrument. Variant B was meant to emphasize that the scope of the draft instrument should be defined by reference to maritime transport, with possible extensions inland, provided that the goods, during the sea

voyage, were unloaded from the means of transport with which the land segment of the carriage was performed. The effect of Variant B was to exclude the application of the draft instrument, for example where goods were carried by road and the trailer in which they were contained had been loaded onto a ship during a maritime segment of the overall carriage. Variant C was intended to emphasize the maritime nature of the draft instrument by establishing that it should only apply to those carriages where the maritime leg involved cross-border transport (see A/CN.9/WG.III/WP.32, footnotes 27, 31 and 35).

54. Limited support was expressed for Variant B. It was stated that a distinction based on whether or not the goods had been unloaded from their original means of transport appeared somewhat outdated. For example, in the context of containerized transport, goods would often be downloaded or uploaded without such operations requiring or justifying a change in the legal regime applicable to the cargo. It was observed that the purpose of Variant B was mainly to raise the issue of possible conflicts between international conventions covering different modes of transport. The Working Group decided that such possible conflicts should be dealt with not in the context of the provision establishing the sphere of application of the draft instrument but in the provisions of chapter 18, in particular draft articles 83 and 84, which were directly intended to deal with the relationship between the draft instrument and other conventions. In the context of that discussion, doubts were expressed as to whether draft articles 83 and 84 adequately covered the issue of potential conflicts of conventions. It was also pointed out that the relationship between the draft instrument and other transport conventions would largely depend on the liability limits that would be established in draft article 18. The continuation of that discussion was postponed until the Working Group had reached a common understanding regarding the scope of the draft instrument.

55. Considerable support was expressed in favour of Variant A. Among the reasons given for avoiding to focus on any specific mode of transport in the definition of the sphere of application of the draft instrument, it was stated that the scope of the draft instrument should be as broad as possible and avoid relying on technical notions such as “port”, the definition of which might be difficult to agree upon. In that context, it was generally agreed that the draft instrument should cover carriage of goods not only from “ports” traditionally located on the coast of a State but also from offshore terminals in the high sea and even from oil rigs located in the exclusive economic zone of a State, outside its territorial waters.

56. The prevailing view, however, was that the focus of the draft instrument on maritime transport should be reflected in the provision establishing its sphere of application. It was pointed out that the acceptability of the draft instrument might be greater if its scope made it clearly distinguishable from a purely multimodal transport convention. The initial draft of the instrument had attempted to establish such a distinction simply by stating that the draft instrument was intended to cover door-to-door transport involving a sea leg. However, it was agreed by most delegations that a further restriction to the scope should be introduced by establishing that the draft instrument would apply to door-to-door carriage of goods, whether unimodal or multimodal, provided that such carriage involved a sea leg and that such sea leg involved cross-border transport.

(b) Draft articles 1(a) and 2(1)

57. Having decided on the general policy that the draft instrument should cover door-to-door carriage of goods, whether unimodal or multimodal, provided that such carriage involved

a sea leg and that such sea leg involved cross-border transport, the Working Group proceeded with the implementation of that policy, which could be envisaged either in the “Scope” provision or in the definition of “contract of carriage” (or possibly in both provisions).

58. With respect to subparagraphs (a) to (e) of paragraph 1 of draft article 2, general support was expressed for the deletion of subparagraph (d). As noted during the ninth session of the Working Group, it was widely held that, in modern transport practice, the place of conclusion of the contract was mostly irrelevant to the performance of the contract of carriage and, if electronic commerce was involved, that place might even be difficult or impossible to determine (see A/CN.9/510, para. 34).

59. No final decision was made on the text of subparagraph (c), currently between square brackets. It was decided that the text should be maintained between square brackets for continuation of the discussion at a future session.

60. A suggestion was made to improve on the text of subparagraph (e) to extend the benefit of the “paramount clause” by replacing at the beginning of the draft provision the words “the contract of carriage” by the words “the contract of carriage or any related contract” or the words “the contract of carriage or any contract related to the execution of the contract of carriage”. The Working Group took note of that suggestion.

61. The Working Group requested a small drafting group composed of several delegations to prepare wording based on a combination of Variants A and C, and designed to implement the policy regarding the sphere of application of the draft instrument. A first proposal made by the small drafting group was as follows:

“Article 1(a)

“Contract of carriage means a contract under which a carrier against payment of freight undertakes to carry goods by sea from a place in one State to a place in another State and may include carriage by other [mode] [means] of carriage preceding or subsequent to the carriage by sea.

“Article 2

“Subject to paragraph 3, this instrument applies to all contracts of carriage if

(a) the place of receipt [or port of loading] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the place of delivery [or port of discharge] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(c) [the actual place of delivery is one of the optional places of delivery specified either in the contract of carriage or in the contract particulars and is located in a Contracting State, or]

(d) the contract of carriage provides that this instrument, or the law of any State giving effect to it, is to govern the contract.”

62. While the proposal by the small drafting group was generally regarded as an improvement and a step towards achieving consensus over the sphere of application of the draft instrument, several concerns were expressed. One concern was that the proposed text might inappropriately exclude from the scope of the draft instrument those contracts that did not

specify or imply that the carriage would be undertaken by sea but left it open whether part of the carriage would be undertaken by sea, or which part of the carriage would be carried out by sea. For example, carriage from Vancouver to Portland would be outside the scope of the draft instrument unless it had been specified in the contract that the goods would initially travel from Vancouver to Seattle by sea. In addition, under the proposed wording, carriage from Vancouver to Hawaii through Seattle would also be outside the scope of the draft instrument unless it had been specified in the contract that the goods would initially travel from Vancouver to Seattle by sea. The sea leg from Seattle to Hawaii alone would not meet the requirement that the sea leg should involve cross-border transport. A more general concern was raised that, since the draft instrument was intended not only to cover certain aspects of multimodal carriage but also to replace the existing unimodal regime governing the international carriage of goods by sea, there should be no ambiguity regarding the applicability of the draft instrument to maritime transport.

63. Various drafting suggestions were made to alleviate the above concerns. One suggestion was to add the words “expressly or impliedly” after the word “undertakes” in the proposed definition of “contract of carriage”. That suggestion was intended to achieve a purely legal definition of the contract of carriage that would require no investigation regarding the actual routing of the goods to determine the applicability of the draft instrument. However, it was generally found that such drafting would be insufficient to address the concerns expressed regarding the scope of the draft instrument. It was also found that such wording might increase the risk for conflicts between unimodal transport conventions.

64. Another suggestion was that wording should be added to the proposed definition of the contract of carriage to the effect that, where the contract did not expressly or impliedly refer to a mode of transport and the voyage for which a given mode would be used, a contract of carriage would be covered by the draft instrument where it could be shown that the goods had actually been carried by sea.

65. Yet another suggestion was that the placement of the words “by sea” in the definition of “contract of carriage” might need to be reconsidered.

66. A further concern was expressed that the proposed definition of “contract of carriage” might be too broad in that it might include certain types of contracts (such as contracts for “slots” on-board vessels under charter parties) that should not be covered by the draft instrument. Based on that concern, a suggestion was made that, in order to be regarded as a “contract of carriage” under the draft instrument, a contract should be evidenced “by a transport document or an electronic record”. That suggestion was not adopted by the Working Group. It was generally felt that certain contracts of carriage not evidenced by a transport document (for example, in the context of short sea traffic) might need to be covered by the draft instrument and that the issue of the exclusion of charter parties from the scope of the draft instrument should be dealt with separately.

67. After discussion, the Working Group decided to continue its deliberations based on the proposal by the small drafting group. Although some support was expressed for maintaining Variant A as a possible alternative, the prevailing view was that all three variants should be deleted from the future revised version of the draft instrument. The small drafting group was requested to prepare a revised proposal, reflecting the views and concerns expressed in respect of its first proposal.

68. The second proposal prepared by the small drafting group was as follows:

“Article 1. Definitions

“For the purpose of this instrument:

(a)[(i)] Contract of carriage means a contract under which a carrier against payment of freight undertakes to carry goods by sea from a place [port] in one state to a place [port] in another state; such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after the carriage by sea.

[(ii) A contract that contains an option to carry the goods by sea shall be deemed to be a contract of carriage under paragraph (i), provided that the goods are actually carried by sea.]”

“Article 2. Scope of application

Subject to paragraph 3, this instrument applies to all contracts of carriage if

(a) the place of receipt [or port of loading] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(b) the place of delivery [or port of discharge] specified either in the contract of carriage or in the contract particulars is located in a Contracting State, or

(c) [the actual place of delivery is one of the optional places of delivery specified either in the contract of carriage or in the contract particulars and is located in a Contracting State, or]

(d) the contract of carriage provides that this instrument, or the law of any State giving effect to it, is to govern the contract.”

69. The discussion focused on the definition of “contract of carriage”. Regarding the use of the word “place” or “port” in subparagraph (i), preference was expressed for the word “port” in view of its maritime connotation. However, in view of the difficulties anticipated in the definition of “port”, the prevailing view was that the more neutral word “place” could be used, in view of the focus on the sea carriage being expressed throughout the draft provision. As a matter of drafting, it was suggested that the second phrase in subparagraph (i) might read as follows: “In addition, such contract may also include an undertaking by such carrier to carry the goods by other modes prior to or after such international carriage by sea.”

70. A more fundamental concern was raised with respect to the drafting of both the definition of “contract of carriage” and the provision establishing the sphere of application of the draft instrument. It was stated that the definition of the contract of carriage should be limited to describing the substantive obligations under a contract of carriage (a contract under which a carrier against payment of freight undertakes to carry goods from a place in one State to a place in another State) and providing an indication that such carriage should comprise a maritime leg. It was also stated that the test of internationality established to trigger the application of the draft instrument should be dealt with not in the definition of “contract of carriage” but exclusively in the provision dealing with the scope of the draft instrument. Therefore, it was suggested that the notion that the sea leg should take place between two different States should be expressed in draft article 2, together with the remainder of the test of internationality set forth by the draft instrument. The Working Group took note of that concern.

71. With respect to subparagraph (ii), divergent views were expressed. One view was that the draft provision was necessary and should be further improved, possibly through the addition of an indication that the option to carry the goods by sea could be either expressly stated or implied in the contract. It was also suggested that the words “shall be deemed” should be replaced by “may be deemed”.

72. Another view was that subparagraph (ii) should be deleted, as a possible cause for conflict with other conventions. For example, if the contract stipulated that the carriage should be “by air” and the goods were actually shipped by sea, both the draft instrument and the Warsaw Convention could apply. It was pointed out that the draft instrument should not be open to misuse by a carrier who might have shipped goods by sea in breach of its contractual obligations. As to the situation where the mode of transport was not specified in the contract, it was stated that it could be addressed by courts and that commercial parties should be encouraged to avoid such uncertainty in the contracts they entered into. As another objection to the text of subparagraph (ii), it was stated that the text was likely to introduce a confusion between contracts of carriage and freight forwarding contracts.

73. Yet another view was that the substance of subparagraph (ii) could be further discussed in the context of the provisions dealing with liability under the draft instrument. While it was generally felt that the text of subparagraph (ii) might need considerable redrafting, it was also felt that the draft instrument should provide for the situation where no specific mode of transport had been stipulated in the contract. Among various possibilities for redrafting subparagraph (ii), it was suggested that article 18(4) of the Montreal Convention might provide a useful model.

74. After discussion, the Working Group decided that the second proposal by the small drafting group should be kept for continuation of the discussion at a future session, subject to the relocation of subparagraph (ii) in square brackets outside of the definition of “contract of carriage” in article 1(a). The Secretariat was requested to prepare a revised draft, with possible variants, to reflect the various views and concerns expressed.

75. After the closure of discussion, another proposal for alternative wording for article 1(a) was made.

[Footnote: “Article 1(a)

“Contract of carriage means a contract under which a carrier against the payment of freight undertakes to carry goods from a place in one state to a place in another state if:

(i) the contract includes an undertaking to carry the goods by sea from a place in one state to a place in another state; or

(ii) the carrier may perform the contract at least in part by carrying the goods by sea from a place in one state to a place in another state, and the goods are in fact so carried.

In addition, a contract of carriage may also include an undertaking to carry goods by other modes prior to or after the international carriage by sea”.]

[See also paragraphs 81-90 and 105-109, A/CN.9/572 (14th Session of WG III) under General Discussion on Chapter 2 at p;. 76 and 80]

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Proposed redraft of article 2

59. The Working Group next considered the proposed redraft of article 2 (see paragraph 52 above).

Definition of geographical scope of application

60. Concerns were expressed that the proposed text for draft article 2(1) of the draft instrument would not sufficiently clarify the requirement of the internationality of the sea leg of the carriage to trigger the application of the draft instrument. Various views were expressed as to whether both references to sea carriage contained in square brackets in the chapeau of redraft article 2(1) should be retained, or whether only one or the other of the references should be retained, but no decision was made on this point.

Proposed draft article 2(1)(c). Contractual choice of application of the draft instrument

61. It was suggested that the proposed bracketed text for the redraft of article 2(1)(c) should be deleted, since, in the absence of a reference to internationality in the definition of the contract of carriage, the text might enable parties to a contract of domestic carriage to opt for the application of the draft instrument. However, it was also suggested that the proposed bracketed text should be retained as it corresponded to article X (c) of the Hague-Visby Rules, which had wide application in practice, especially for cross-traders carrying goods through States not party to the instrument. In turn, it was observed that article X (c) of the Hague-Visby Rules had created in certain countries difficulties at the constitutional level, which might be prevented by the deletion of the proposed bracketed text for draft article 2(1)(c). It was further indicated that article X (c) of the Hague-Visby Rules had been introduced in that instrument by the Visby Protocol, 1968, for reasons which were immaterial to the draft instrument, and that the provision gave rise to different interpretations in various jurisdictions. It was also suggested that retention of the proposed bracketed text for draft article 2(1)(c) would be incompatible with draft chapters 15 and 16 of the draft instrument since the joint effect of these rules would be to allow parties a choice of procedural rules and this choice would conflict with mandatory provisions of private international law. In this line, it was suggested that further consideration should be given to the possibility of redrafting the proposed bracketed text for draft article 2(1)(c), so as to limit its effect to contractual matters, such as, for instance, the contractual election of applicable law.

Conclusions reached by the Working Group on proposed draft article 2

62. After discussion, the Working Group decided that:

- The proposed redraft of article 2, including all text within square brackets, would be used as a basis for continuation of the discussion at a future session.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

123. The Working Group considered the text of draft article 8 as found in the annexes to A/CN.9/WG.III/WP.56, and in light of the adjustments to that text as proposed in paragraphs 19 to 22 of A/CN.9/WG.III/WP.61. There was support in the Working Group for the proposal that the brackets around the phrases “port of loading” and “port of discharge” in draft paragraphs 8(1)(a) and (b) should be removed and the text retained in order to be consistent with the adoption of those connecting factors as a basis for jurisdiction in claims against a carrier (see A/CN.9/WG.III/WP.61, para. 21). Concern was expressed regarding the proposed deletion of the phrases with respect to the internationality of the sea leg currently found in square brackets in the chapeau of draft paragraph 8(1), and their suggested replacement with an appropriate explanatory note to the draft convention.

Draft paragraph 8(1)(c). Contractual incorporation of the draft convention or the governing law

124. The Working Group was reminded that it had last considered draft paragraph 8(1)(c) at its fifteenth session (A/CN.9/576, para. 61), at which time the Working Group had not reached a decision concerning whether to delete or to retain draft paragraph 8(1)(c). The Working Group heard that those issues were further explored in document A/CN.9/WG.III/WP.65, which was intended to be of assistance to the Working Group in making a decision in this regard. It was recalled that the text of draft paragraph 8(1)(c) had been taken from article 10(c) of the Hague-Visby Rules, which had been inserted therein by the Visby Amendment in order to expand the rather limited geographical scope of application of the Hague Rules.

125. The view was expressed that the current broad scope of application of the draft convention did not require a provision such as draft paragraph 8(1)(c) to further broaden it, particularly when the problems that such an inclusion could create might outweigh the benefits of the slightly expanded scope of application. Such problems were thought to include:

(a) Perpetuating the differences in the interpretation of the text that have arisen with respect to the Hague-Visby Rules, particularly regarding whether the provision was intended as a choice of law rule, or whether it simply referred to the substantive incorporation of the provisions of the draft convention by the parties to the contract of carriage;

(b) Creating a possible conflict in regard to the many procedural rules in the draft convention’s chapters on jurisdiction and arbitration, which would normally be governed by the *lex fori* rather than by the law of the State chosen in the contract of carriage;

(c) The maritime performing party could be in the questionable position of being subject to the draft convention even though it may have performed its duties during carriage between non-contracting States;

(d) Certain countries had experienced difficulties at the constitutional level as a result of the rule in issue, since parties could use it as an opportunity to avoid having a contract of carriage be governed by the mandatory law or public order rules of the contracting State; and

(e) The law giving effect to the draft convention under draft paragraph 8(1)(c) could differ from the provisions of the draft convention, thus creating further potential conflicts.

126. In addition to the potential creation of the problems cited above through the insertion of draft paragraph 8(1)(c), it was suggested that its deletion would not prevent parties from

incorporating the draft convention into the terms of their contract of carriage, subject to the limits of applicable law. In view of these factors, there was support in the Working Group for the deletion of draft paragraph 8(1)(c).

127. On the other hand, some support was also expressed for the retention of draft paragraph 8(1)(c). In addition to allowing for a slightly broader scope of application of the draft convention, it was suggested that failure to include the provision could result in the somewhat complicated situation for the carrier where single voyage with ports of call in different contracting and non-contracting States could result in subjecting only some of the cargo on board to coverage by the draft convention. Further advantages of retaining draft paragraph 8(1)(c) were said to be greater clarity that the parties could apply the draft convention by virtue of a choice of law, and further, that in those jurisdictions that had a court of cassation, the application of the draft convention by virtue of choice of law would enable it to review the case under the draft convention as a matter of law.

Conclusions reached by the Working Group regarding draft article 8:

128. After discussion, the Working Group decided that:

- The brackets around the words “port of loading” and “port of discharge” in draft paragraphs 8(1)(a) and (b) should be removed and the text retained; and
- Draft paragraph 8(1)(c) should be deleted from the text of the draft convention.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 5. General scope of application

18. The Working Group noted that draft article 5 corresponded to the text contained in draft article 8 of the text contained in A/CN.9/WG.III/WP.56. The Working Group approved the definition of the term “contract of carriage” as contained in draft article 1, paragraph (1). The Working Group also approved the text contained in draft article 5 as set out in A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 5. General scope of application

16. The Working Group approved the substance of draft article 5 and referred it to the drafting group.

17. With regard to the terms “contract of carriage”, “carrier”, “shipper” and “goods” relevant to draft article 5, the Working Group approved the substance of the definitions respectively provided for in paragraphs 1, 5, 8 and 24 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 5. General scope of application; and draft article 1, paragraphs 1 (“contract of carriage”), 5 (“carrier”) and 8 (“shipper”)

21. The view was expressed that the notion of “contract of carriage” in the draft convention was wider than under previous conventions, such as the Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading, 25 August 1924, as amended by the Protocol of 23 February 1968 (the “Hague-Visby Rules”) and the United Nations Convention on the Carriage of Goods by Sea (the “Hamburg Rules”), because the Convention would also apply to carriage of goods done only partly by sea. However, it was pointed out that there was no requirement in the draft Convention for the goods actually to be carried by sea, which meant that, in theory, as long as the contract of carriage provided that the goods would be carried by sea, the Convention would apply even if the goods were not actually so carried. As the contract could identify a port of loading and a port of discharge in different States, the Convention would apply, even if the goods had not actually been loaded or discharged at those named ports. Alternatively, if the contract of carriage failed to mention any of the places or ports listed in draft article 5, subparagraphs 1 (a)-(d), it would be possible to infer that the Convention would not apply, even though the goods might, in fact, have been carried by sea in a manner that would have complied with the Convention requirements. The draft Convention, it was proposed, should be amended so as to place the emphasis on the actual carriage rather than on the contractual provisions. One delegation proposed new text for subparagraphs 1 (d) and (e) and a new paragraph 3 to attempt to achieve that. There was some support for that proposal.

22. It was pointed out that from time to time many contracts, for good commercial reasons, left the means of transport open, either entirely or as between a number of possibilities. In that regard, if the contract was not “mode-specific”, it might be assumed that the Convention would not apply, except if a requirement for carriage by sea could be implied. Moreover, the requirement that the contract “provide for carriage by sea” might technically exclude contracts that did not specify the mode of transport to be used. It was proposed that additional language should be added to indicate that a contract which permitted carriage by sea should be deemed a “contract of carriage” in cases where the goods were in fact carried by sea.

23. Another proposal was to open the possibility for limiting the scope of the draft Convention only to contracts for carriage by sea so as not to cover contracts for carriage by sea and other modes of transport. The concern was expressed that the draft Convention established special rules applying to one particular type of multimodal transport contract, namely multimodal transport contracts that provided for carriage by sea. That, it was said, would lead to a fragmentation of the laws on multimodal transport contracts. Moreover, the draft convention was said to be generally unsuitable for application to contracts for multimodal transport. It was also said that a comparison between the provisions of the draft and the provisions of other conventions dealing with the carriage of goods, such as the Convention on the Contract for the International Carriage of Goods by Road (1956), as amended by the 1978 Protocol (the “CMR”), the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (Appendix B to the Convention concerning International Carriage by Rail, as amended by the

Protocol of Modification of 1999 (the “CIM-COTIF”)) and the Convention for the Unification of Certain Rules for International Carriage by Air (the “Montreal Convention”), revealed not only that the draft Convention was designed almost exclusively with a view to sea carriage but also that it considerably diminished the liability of the carrier, as compared with those other conventions.

24. The Commission took note of those concerns, but was not in favour of amending the provisions that dealt with the scope of application of the Convention. It was observed that the basic assumption of the Working Group had been that the key for determining the scope of application of the draft instrument was the contract of carriage, not the actual carriage of the goods. It was also observed that the Working Group had spent a significant amount of time in considering the scope of the draft Convention and its suitability for contracts of carriage that included other modes of transportation in addition to carriage by sea.

25. The Commission approved the substance of draft article 5 and the definitions contained in draft article 1, paragraphs 1, 5 and 8, and referred them to the drafting group.

Article 6. Specific exclusions

1. This Convention does not apply to the following contracts in liner transportation:
 - (a) Charter parties; and
 - (b) Other contracts for the use of a ship or of any space thereon.
2. This Convention does not apply to contracts of carriage in non-liner transportation except when:
 - (a) There is no charter party or other contract between the parties for the use of a ship or of any space thereon; and
 - (b) A transport document or an electronic transport record is issued.

[See also paragraphs 62-63, A/CN.9/510 (9th Session of WG III) under article 80 at p. 716]

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

(d) Draft article 2(3)

77. There was broad agreement in the Working Group that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis. Such contracts would include those that, in practice, were the subject of extensive negotiation between shippers and carriers, as opposed to transport contracts that did not require (or where commercial practices did not allow for) the same level of variation to meet individual situations. The latter generally took the form of contracts of adhesion, in the context of which parties might need the protection of mandatory law.

78. Diverging views were expressed as to the best legislative technique to be used in excluding those contracts that should not be covered on a mandatory basis by the draft instrument. One view was that the traditional exception regarding charter parties should be maintained in the provision dealing with the scope of the draft instrument. It was suggested that such a traditional exception should be complemented by a treatment of specifically identified types of contracts in respect of which the provisions of the draft instrument should not be mandatory. However, it was also suggested that such contracts should not be dealt with in draft article 2 but in chapter 19 dealing with freedom of contract. Pursuant to that view, it was suggested that the references to “contracts of affreightment, volume contracts, or similar agreements” currently between square brackets should be moved to chapter 19, with the possible addition of a reference to “ocean liner service agreements (OLSAs)”. It was recalled that document contained detailed explanations regarding the practice of OLSAs and the reasons for which they should be excluded from the scope of the draft instrument. As to the possible inclusion of a definition of OLSAs, the following was proposed:

“(a) An “Ocean Liner Service Agreement” is a contract in writing (or electronic format), other than a bill of lading or other transport document issued at the time that the carrier or a performing party receives the goods, between one or more shippers and one or more carriers in which the carrier or carriers agree to provide a meaningful service commitment for the transportation by sea (which may also include inland transport and related services) of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agree to pay a negotiated rate and tender a minimum volume of cargo.

“(b) For purposes of paragraph (a), a “meaningful service commitment” is a service commitment or obligation not otherwise mandatorily required of a carrier under this Instrument.

“(c) For purposes of paragraph (a), a “liner service” is an advertised maritime freight transport service using vessels for the carriage of general cargo on an established and regular pattern of trading between a range of specified ports.

“(d) An Ocean Liner Service Agreement does not include the charter of a vessel or the charter of vessel space or capacity on a liner vessel.”

79. Another view was that paragraph (3) should be deleted and that the issue should be dealt with in the provisions of the draft instrument dealing with freedom of contract. In favour of avoiding a list of individual contracts to be excluded from the scope of the draft instrument, it was explained that such a list might be extremely difficult to agree upon. For example, in respect of charter parties, which were traditionally excluded from the scope of international conventions governing the carriage of goods by sea, it was stated that it might prove impossible to reach a common understanding as to the legal nature of a charter party and the manner in which such a document might be incorporated in subsequent contracts of carriage. It was stated that the dilution of the notion of “charter party” since 1924 (and the legal uncertainty in that regard) had only increased with the modernization of trade practices, a reason for which that notion should no longer be used in efforts to harmonize the law of international trade. Related notions such as “contracts of affreightment, volume contracts, or similar agreements” were described as even more imprecise and difficult to define than charter parties. Pursuant to that view, it was suggested that no attempt should be made to define such contracts in the draft

instrument. Instead, it was suggested that the Working Group should focus on the preparation of a general standard establishing the conditions under which a contract might be regarded as “freely negotiated”, in which case the provisions of the draft instrument should apply only as suppletive rules.

80. The Working Group expressed broad support for the idea that further attempts should be made to defining sets of criteria to be applied when determining the mandatory application of the draft instrument. Instead of defining types of contracts to be excluded from the application of the draft instrument, it might be easier to define situations where it would be inappropriate for the draft instrument to apply mandatorily. The following were described as situations where freedom of contract should prevail: the situation where a contract is freely negotiated; the situation where the focus of the contract is on the use of the vessel and not on the carriage of goods; the situation of non-liner trade; and the situation where the object of the chartering is the whole or a large part of the vessel. It was acknowledged that, even if such criteria could be devised, a margin of uncertainty to be decided upon by courts was unavoidable.

81. Yet another view was that, while the freedom of contract might need to receive broad recognition under the draft instrument, the mandatory nature of the instrument should be made clear in respect of third parties, where such third parties held rights under the draft instrument.

82. After discussion, the Working Group requested the Secretariat to prepare a revised draft, with possible variants, to reflect the above views and suggestions to the extent possible.

[* * *]

(f) Draft article 2(5)

84. Subject to possible reconsideration of the placement of paragraph (4) after discussion of chapter 19, the Working Group found the substance of the draft provision to be generally acceptable.

[See also paragraphs 81-90 and 105-109, A/CN.9/572 (14th Session of WG III) under General Discussion, Chapter 2 at pp. 76 and 80]

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Proposed redraft of article 3

63. The Working Group considered the proposed redraft of article 3 (see paragraph 52 above).

Derogations from the scope of application of the draft instrument

Proposed draft article 3, paragraphs 1 and 2

64. It was observed that the proposed redraft of article 3(1) was intended mainly to exclude contracts of carriage in non-liner transportation from the scope of application of the draft instrument. The Working Group heard that the intent of the proposed redraft of article 3(2) was

to create an exception to the proposed redraft of article 3(1) with respect to certain types of carriage in non-liner transportation, where the current practice saw the issuance of a transport document or electronic transport record. The rule in the proposed redraft of article 3(2), under which these contracts would fall under the scope of application of the draft instrument, was described as consistent with the Hague-Visby Rules insofar as bills of lading were concerned. In addition, the effect of the proposed redraft of article 3(2) would be to extend the traditional rule to cover all cases where a transport document or electronic transport record was issued.

Proposed draft article 3, paragraph 3

65. Clarification was sought on the use of the words “terms that regulate each shipment” and “terms of a volume contract” in proposed draft article 3(3) of the draft instrument. It was indicated that the reference to the “terms that regulate each shipment” was meant to circumvent the difficulties that arose from the “shipment” being a mere performance under the contract of carriage, while defining the scope of application of the draft instrument required reference to contractual stipulations. In view of the absence of an individual contract governing each individual shipment, reference had to be made to those stipulations in the volume contract that governed each individual shipment. The purpose of subparagraph (b) was to make it clear that only those terms of the volume contract governing individual shipments fell under the scope of application of the draft instrument. Conversely, the terms or stipulations of the volume contract that did not regulate individual shipments remained outside the scope of application of the draft instrument. As to volume contracts regulating shipments exempted from the scope of application of the draft instrument (such as, for instance, when charter parties were used for the individual shipments), they would equally remain outside the scope of application of the draft instrument.

Conclusions reached by the Working Group on proposed draft article 3

66. After discussion, the Working Group decided that:

- The proposed text for draft article 3 should be inserted in the draft instrument for continuation of the discussion at a future session in light of the views and clarifications expressed above.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

129. The Working Group was reminded that two alternative texts of draft article 9 had been submitted for its consideration (see A/CN.9/WG.III/WP.61, para. 23 and A/CN.9/WG.III/WP.70, para. 6). It was indicated that the aim of the two drafting proposals was to improve the clarity of the text as set out in A/CN.9/WG.III/WP.56, while not affecting the substance of the draft provision relating to specific exclusions from and inclusions in the scope of application of the draft convention. The first proposal would retain the substantive elements of the text in a different formulation, and the second would simplify paragraph (b) by stating that draft article 10 would not apply “(b) to contracts of carriage in non-liner transportation, except where the contract of carriage is documented only by a transport document or an electronic transport record that also evidences the receipt of the goods”.

130. It was explained that the text of draft article 9 contained in A/CN.9/WG.III/WP.61, para. 23, aimed at simplifying the provision by stressing the difference between liner and non-

liner transportation. In response to a query, it was also explained that the suggested text of draft article 9 no longer referred specifically to volume contracts, since they were included as contracts of carriage by virtue of slightly adjusted definitions (see A/CN.9/WG.III/WP.61, para. 16), and because their nature as volume contracts was relevant only in regard to the freedom of contract provisions where they were mentioned, and not in respect of the scope of application provisions. Some doubts remained about the treatment of volume contracts in the provision as set out in A/CN.9/WG.III/WP.61, and it was thought that further consideration of the issue might be necessary.

131. Appreciation was expressed for the simplified version of draft article 9 proposed in A/CN.9/WG.III/WP.70, which was preferred by some. However, it was thought that the slightly greater detail of the provision set out in A/CN.9/WG.III/WP.61 would probably result in a greater likelihood of it being more accurately interpreted.

132. Some drafting adjustments were suggested resulting from concerns regarding common commercial usage of terms, including possible clarification of the treatment of the carriage of goods in the bulk and parcel trade, since it was thought that courts in the future might refer to the characteristics of a trade rather than to the transport documents or the underlying party relationships in determining the applicability of the draft convention. Concerns were reiterated over the failure to specifically mention contracts of affreightment and similar contracts. Finally, drafting suggestions were made to clarify the intention and application of the provisions set out in paragraph 2(b)(i) and (ii).

Conclusions reached by the Working Group regarding draft article 9:

133. After discussion, the Working Group decided that:

- The text of draft article 9 contained in A/CN.9/WG.III/WP.61, para. 23, should replace the text of draft article 9 of the draft convention contained in A/CN.9/WG.III/WP.56.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 6. Specific exclusions

19. The Working Group noted that draft article 6 corresponded to draft article 9 of A/CN.9/WG.III/WP.56. A suggestion was made that as charterparties were not part of regularly scheduled transport, paragraph (1)(a) should be deleted and instead a reference should be made to wording such as “contract for the use of space on a vessel”.

20. It was noted that draft article 6 represented a compromise text and caution was expressed about reopening matters settled in that provision. It was noted that, in general, there was a distinction between liner transportation and charterparties but that charterparties were occasionally used in liner carriage and thus the draft convention should address these new developments. As well, it was recalled that the Working Group had previously agreed that the coverage under the new convention should be at least as broad as what was already covered under the Hague and Hague-Visby Rules, which also applied to contracts of carriage under bills of lading in non-liner transportation.

21. For purposes of clarification, a number of drafting proposals were made. It was proposed to delete the term “contracts” in subparagraph (1)(b) of draft article 6 and replace it

with “other contractual arrangements” and to delete the term “contract” in subparagraph (2)(a) of draft article 6 and replace it with “other contractual arrangement between the parties”. As well it was proposed that the words after “thereon”, namely “between the parties, whether such contract is a charterparty or not” be deleted. While there was support for these proposals, the Working Group agreed that the Secretariat should first ascertain whether they in fact merely clarified and did not have substantive effect on the scope of draft article 6. The Working Group accepted the provision, subject to drafting clarification.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

18. A concern was expressed that paragraph 2(a) of draft article 6 did not clarify whether the contract referred to a contract concluded between or applicable between the parties. It was also observed that the draft provision referred to a contract “between the parties”, whereas draft article 7 referred to a contract between the carrier and a party “that is not an original party to the charterparty or other contract of carriage excluded from the application of this Convention.” In response, it was pointed out that the parties referred to in paragraph 2(a) of draft article 6 included the carrier and any party making a claim under the draft convention and to whom the charterparty or other contract referred to in that provision might apply, for instance as a result of succession. Draft article 7, in turn, was intended to make it clear that draft article 6 would not prevent the application of the draft convention to parties that had not themselves been involved in the negotiation of a contract to which the convention did not apply, such as the holder of a bill of lading issued pursuant to the terms of a charterparty and who had not themselves adhered to the charterparty. It was said that a time charter is an example of a charterparty that may not affect the relationship between the parties. The Working Group approved the substance of draft article 6 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 6. Specific exclusions

26. The Commission approved the substance of draft article 6 and referred it to the drafting group.

Article 7. Application to certain parties

Notwithstanding article 6, this Convention applies as between the carrier and the consignee, controlling party or holder that is not an original party to the charter party or other contract of carriage excluded from the application of this Convention. However, this Convention does not apply as between the original parties to a contract of carriage excluded pursuant to article 6.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]**(e) Draft article 2(4)**

83. Subject to possible reconsideration of the placement of paragraph (4) after discussion of chapter 19, the Working Group found the substance of the draft provision to be generally acceptable. It was decided that the words “[contract of affreightment, volume contract, or similar agreement]” should be retained in square brackets for further discussion. The Working Group took note of suggestions for possible improvement of the text. One suggestion was to add the words “or the consignee” at the end of the paragraph. Another suggestion was to delete the reference to “negotiable” transport document or electronic record to cover also the case where a non-negotiable document or electronic record had been issued.

[See also paragraphs 91-96 and 105-106, A/CN.9/572 (14th Session of WG III) under General Discussion, Chapter 2 at p. 76]

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Issue 6: Should a documentary or non-documentary approach be adopted for the protection of third parties in draft article 5 as set forth in A/CN.9/WG.III/WP.44?**

35. The Working Group was reminded that it had most recently considered the issue of protection of third parties and a previous draft of draft article 5 as set forth in A/CN.9/WG.III/WP.44 at its fourteenth session (see A/CN.9/572, paras. 91-96 and 105). Based on these discussions, a few amendments to the text of draft article 5 of A/CN.9/WG.III/WP.44 were suggested and the discussion continued on the basis of the following text:

“Article 5

“If a transport document or an electronic record is issued pursuant to a charter party or a contract under Article 3(1)(c), then [such transport document or electronic record shall comply with the terms of this Instrument and] the provisions of this Instrument apply to the contract evidenced by the transport document or electronic record [from the moment at which it regulates] [in] the relationship between the carrier and [the person entitled to rights under the contract of carriage] [the consignor, consignee, controlling party, holder or person referred to in article 31], provided that such person is not [a] [the] charterer or [a] [the] party to the contract under Article 3(1)(c).”

36. The Working Group discussed whether the documentary approach to the protection of third parties should be retained (see A/CN.9/572, para. 96); and, if so, which third parties would be subject to protection under the draft instrument. A number of delegations expressed support for a documentary approach. It was stated that the need to protect reliance by third parties would arise only in the presence of a document. It was suggested that the documentary approach better provided a commercially viable solution and was more in line with trade practice. It was also stated that in some legal systems reliance was attached to documents other than bills of lading, as well as to documents held by the shipper, and that practice also involved

the circulation of non-negotiable instruments. It was indicated that these circumstances called for broadening the scope of application of the draft instrument relating to the protection of third parties. However, the contrary view was also expressed that the scope of application of draft article 5 as set forth in A/CN.9/WG.III/WP.44 was too broad.

37. Significant support was also expressed for a non-documentary approach. It was stated that it was not possible to understand the rationale for protecting third party holders of non-negotiable instruments. It was also stated that in some trades, and, specifically, in the short shipping trade, commercial practice did not foresee the issuance of any type of document, that in other trades the documents never left the hands of the carrier, and that the documentary approach would deprive third parties involved in such trades of any protection. It was further pointed out that the carrier and the shipper were in a position to decide whether to issue a document and to choose the type of document, and that a documentary approach would thus make the protection of third parties dependent on the decision of the parties to the contract.

38. Another line of reasoning in support of a non-documentary approach indicated that freedom of contract could be allowed only insofar as it was limited to parties to the contract and that third parties might even be unaware of these contractual provisions. It was suggested that it was illogical to base the protection of third parties on the existence of a document. Moreover, it was stated that reliance by third parties was justifiable only when the document provided conclusive evidence, such as for negotiable bills of lading, while no premium on reliance was due to parties willing to take a risk on the basis of less secure documents.

39. It was further suggested that the non-documentary approach was more open to the possible future needs of electronic commerce, and also in light of the fact that electronic transport records might not bear any resemblance to bills of lading. The contrary view was also held, in light of the reference to electronic transport records in draft article 5 as set forth in A/CN.9/WG.III/WP.44, and of the general position of the draft instrument in support of any possible technological development.

40. In contrast, it was stated that the non-documentary approach had a very broad scope of application and that its adoption would have unforeseeable consequences, while the documentary approach was well known and the consequences of its application were easily predictable.

Relationship between the scope of application of draft article 5 of A/CN.9/WG.III/WP.44 and protection of third parties

41. It was indicated that draft article 5 as set forth in A/CN.9/WG.III/WP.44 operated only in favour of third parties to charter parties and other contracts excluded from the scope of application of the draft instrument, and that draft article 5 could be considered a scope of application provision whose effect was to extend protection to third parties otherwise excluded. However, it was also stated that there was no need to place third parties to such contracts in a position more favourable than the parties to the same contracts. In response, it was indicated that the long-standing practice to provide protection to third-party holders of bills of lading issued under charter parties should not be discontinued. It was added that, historically, freedom of contract had been introduced in international maritime transport instruments through the exemption of certain contracts such as charter parties from the scope of application of these instruments, such as, for example, article V of the Hague Rules, which did not intend to protect third parties but merely to exclude charter parties. Further, it was suggested that, while it was

possible to achieve the same result by including those excluded contracts in the scope of application of the draft instrument and allowing for freedom of contract, both techniques required provisions for the protection of third parties.

42. It was further indicated that draft article 5 in the text of A/CN.9/WG.III/WP.44 omitted the reference to volume contracts contained in the text of draft article 2(4) as set forth in A/CN.9/WG.III/WP.36, because it was held that, in practice, transport documents were not issued under framework volume contracts, but only under the individual shipments that were performed under the volume contracts

Documents requirements under the documentary approach

43. On the assumption that a documentary approach would be adopted, the Working Group discussed matters relating to the types of documents that should trigger the protection of third parties. While there was some consensus that bills of lading would suffice for this purpose, concerns were expressed regarding receipts, and different opinions were expressed with regard to “intermediary” non-negotiable documents such as sea waybills. It was suggested that the language contained in draft article 3(2) as set forth in A/CN.9/WG.III/WP.44 could provide useful guidance to clarify this matter.

Conclusions reached by the Working Group on issue 1

44. After discussion, the Working Group decided that:

- The current text, as it appears in paragraph 35 above, should be taken as a basis for further refinement to reconcile the two positions on the basis of a new text to be elaborated by the informal drafting group for the further consideration of the Working Group;
- Failing such drafting effort, text reflecting both positions should be kept in square brackets in the draft instrument for continuation of the discussion at a future session.

[* * *]

Proposal for the insertion of draft article 4

67. The Working Group considered the proposed text of draft article 4 (see para. 52 above) Protection of third parties when transport documents or electronic transport records are issued under a contract exempted from the scope of application of the draft instrument

68. It was indicated that the intended effect of the proposed draft of article 4 was to provide protection to third parties under the draft instrument in cases where a transport document or electronic transport record was issued pursuant to a contract that remained outside the scope of application of the draft instrument under its draft article 3(1)(a), (b) or (c). It was further indicated that the mechanism proposed in draft article 4 was similar to the one in place under the Hague-Visby Rules for cases when bills of lading were issued. However, adjustments to that mechanism were necessary in light of the adoption of a contractual approach to identify the third parties in need of protection pursuant to the draft instrument, and also in view of the need to refer not only to bills of lading but also to all transport documents or electronic transport records in accordance with the wishes of the Working Group.

69. The view was expressed that the proposed draft of article 4 should provide protection only to holders of negotiable documents and to “good faith” holders of non-negotiable

documents, in the sense that third-party holders of such non-negotiable documents are likely to be unaware of the actual nature of the relationship between shipper and carrier, and thus in need of protection. It was also indicated that, while the practice had developed a category of transport documents, such as sea waybills, that could be referred to for descriptive purposes as “quasi-negotiable” documents, it was not possible to adequately define such transport documents, thus the proposed draft of article 4 used the broader “transport document or an electronic transport record” category.

70. It was suggested that some tramp trade might fall under the definition in draft article 3(1)(d) of the draft instrument, and that, in order to protect third parties holding documents issued in this trade, reference to draft article 3(1)(d) should be added at the end of the proposed draft of article 4. It was also suggested that, in the case where a consignee assigned its rights to a charterer, further clarification might be required as to whether the charterer would be bound by the terms of the charter party or would be protected as a third party. However, the view was also expressed that a special situation such as that described should not be addressed in the draft instrument.

Notion of transport document and receipts

71. It was suggested that the notion of transport document in the proposed draft of article 4 needed clarification. A view was expressed that the application of the draft instrument to third parties should not be conditional upon the existence of a transport document.

72. Although the term “transport document” defined in draft article 1(k) included a mere receipt of goods, it was explained that the issuance of such documents did not trigger the application of the draft instrument to a third party because proposed draft article 4 provided that “the provisions of this instrument apply to the contract evidenced by or contained in the transport document or electronic transport record”. It was further indicated that the proposed draft of article 4 applied to contracts in non-liner trade exempted from the scope of application of the draft instrument, and that in practice in this trade a receipt would rarely be issued, and then most often in cases where the shipper and the consignee were legally or economically the same entity. However, it was also suggested that a receipt might well provide evidence of a contract, and that third-party holders of a receipt would fall under the scope of application of the proposed text for draft article 4 of the draft instrument insofar as the receipt evidenced the contract.

Conclusions reached by the Working Group on proposed draft article 4

73. After discussion, the Working Group decided that:

- The proposed text for draft article 4 should be used as a basis for continuation of the discussion at a future session;
- The suggestion to insert a reference to draft article 3(1)(d) at the end of draft article 4 should be considered in the text to be prepared by the Secretariat, as should any necessary clarification of the treatment of receipts.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 10. Application to certain parties

134. It was recalled that draft article 10 of the draft convention as set out in A/CN.9/WG.III/WP.56 aimed at providing protection under the draft convention to certain third parties when a contract, such as a charterparty in non-liner transportation, was not within the scope of application of the draft convention. It was also recalled that text intended to clarify draft article 10 was contained in paragraph 36 of A/CN.9/WG.III/WP.61, and the proposal that the Working Group consider text contained in paragraph 6 of A/CN.9/WG.III/WP.70 was withdrawn.

135. A concern was raised that draft article 10 did not deal with protection of third parties under the draft convention, but rather with the extension of the scope of application of the draft convention to third parties, and to an increase in their liabilities and responsibilities. It was added that, for example, draft article 34, which was referred to in square brackets in draft article 10, imposed certain liabilities on the documentary shipper. In response, it was noted that draft article 34 also entitled the documentary shipper to the rights and immunities of the shipper under draft chapters 8 and 14. A suggestion was made for an amendment to clarify the fact that provisions binding a third party bill of lading holder to a charterparty arbitration agreement would be respected.

Documentary or non-documentary approach

136. It was indicated that two alternative approaches could be taken to establish the parties to whom the draft convention would apply by virtue of draft article 10: one alternative based on the issuance of a transport document or an electronic transport record and another alternative based on listing the third parties in draft article 10 without requiring the issuance of a transport document or an electronic transport record. It was observed that while the text in A/CN.9/WG.III/WP.56 had adopted a documentary approach, the text of draft article 10 proposed in A/CN.9/WG.III/WP.61 had adopted a non-documentary approach. It was explained that the proposal for a non-documentary approach was based on the understanding that there had been a preference expressed earlier by the Working Group for the documentary approach unless the list of third parties that would be included in draft article 10 could clearly be established.

137. It was suggested that the adoption of a non-documentary approach in draft article 10 could better serve the future needs of commercial practice by removing its reliance on a document or an electronic record, and allowing for developments in electronic commerce. It was added that the concern to maintain a documentary requirement in draft article 10 appeared to have less urgency in the draft convention in light of the fact that the document referred to could also be non-negotiable. However, some hesitation was expressed with respect to abandoning the documentary approach in draft article 10 without careful consideration of the possible consequences of such a major change in the current system.

Retention of a reference to the person referred to in article 34

138. It was noted that draft article 10 in A/CN.9/WG.III/WP.61 contained in square brackets a reference to the documentary shipper as identified in draft article 34. Some preference was expressed for the inclusion of such a reference in the list of persons in draft article 10, since that person was not a party to the contract of carriage, but would assume certain obligations of the shipper, and should have a right to the protection offered by inclusion in draft article 10. However, the contrary view was also held that the documentary shipper assumed all of the liabilities and responsibilities of the shipper pursuant to draft article 34, and including a specific

reference to the documentary shipper in draft article 10 could cause difficulties in interpretation if the documentary shipper were treated differently from the shipper.

Variant A or Variant B in draft paragraphs 10(a) and (b)

139. It was further noted that draft paragraphs 10(a) and (b) in A/CN.9/WG.III/WP.61 contained two sets of bracketed language: Variant A referring to the original parties of the contract of carriage, and Variant B referring to the carrier and shipper. It was suggested that reference to “carrier” and “shipper” would be preferable as these terms were defined in the draft convention, while that was not the case for “original parties”. However, the view was also expressed that the terms “carrier” and “shipper” might create interpretative difficulties in light of the terms used in commercial practice, for example, in the case of charterparties, where the party was not the shipper or the carrier, but rather an original party to the contract.

Conclusions reached by the Working Group regarding draft article 10:

140. After discussion, the Working Group decided that:

- The text of draft article 10 contained in A/CN.9/WG.III/WP.61, paragraph 36, should replace the text of draft article 10 of the draft convention contained in A/CN.9/WG.III/WP.56;
- The consideration of retaining the reference to “the person referred to in draft article 34” in draft article 10 of the draft convention should be deferred until after the consideration of draft article 34; and
- The references to the original parties of the contract of the carriage (Variant A) should be retained in draft paragraphs 10(a) and (b) and the references to carrier and shipper (Variant B) should be deleted.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 7. Application to certain parties

22. A question was raised as to whether the reference to consignors in draft article 7 was appropriate as it gave the impression that the draft convention regulated the relationship between the carrier and consignor. Even though it was agreed that the draft convention did not regulate the relationship between the carrier and consignor in all cases, the Working Group noted that the draft convention did regulate that relationship in some specific cases and therefore, it was important to mention the consignor in article 7. It was suggested that the draft article should be reviewed and possibly a cross reference to draft article 79 should be included to ensure that draft article 7 did not impact adversely on any arbitration agreement contained in a bill of lading held by a third party. That proposal was supported. The Working Group accepted the provision, subject to any necessary cross-reference.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 7. Application to certain parties

20. The Working Group approved the substance of draft article 7 with the deletion of the reference to “consignor” and referred it to the drafting group.

21. With regard to the term “consignor” used in draft article 7, it was proposed that the concept of “consignor” as defined in paragraph 10 of draft article 1 should be deleted so as to make the draft convention less complicated (see A/CN.9/WG.III/WP.103). It was further suggested that any reference to “consignor” in the draft convention should be deleted accordingly. The rationale for the proposal was the following: (i) the consignor did not have any obligations and had only one right under the draft convention, which was the right to obtain a receipt upon its delivery of the goods to the carrier pursuant to subparagraph (a) of draft article 37; (ii) there were no practical difficulties reported regarding the issuance of a receipt for the consignor that might require it to be dealt with on a uniform basis in the draft convention; (iii) confusion with other transport conventions and some national laws could be avoided; and (iv) the term “transport document” could also be simplified and be aligned with actual maritime practice. Broad support was expressed for this proposal.

22. A contrary suggestion was made that the definition of “consignor” should be retained and that additional provisions on the rights and obligations of the consignor should be added to the draft convention. It was explained that the rights and obligations of the contractual shipper and the consignor (the actual shipper) should be dealt differently, as the rights and obligations of the latter only arose upon the delivery of the goods to the carrier. It was further explained that the relationship between the contractual shipper and the consignor had raised substantial legal issues in certain national legal systems. More specifically, under FOB trade, it would not always be the case that there would be a documentary shipper and, thus it would be impossible for the consignor to be deemed a documentary shipper. However, the prevailing view was that the aforementioned concern should be dealt with most appropriately by domestic law, especially sales law, and the sales contract itself, which would determine to what extent the consignor would be entitled to receive documents.

23. Although broad support was expressed for the deletion of the reference to “consignor” in the draft convention, it was suggested that subparagraph (a) of draft article 37 should be retained in some form so as to protect the right of the FOB seller to obtain non-negotiable transport documents.

24. With regard to the term “consignor” used in draft article 7, the Working Group agreed that the definition provided for in paragraph 10 of draft article 1 should be deleted, as well as any other reference to “consignor” in the draft convention. However, the Working Group further agreed to discuss the suggestion made with regard to subparagraph (a) of draft article 37 at a later stage in its deliberations.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 7. Application to certain parties

29. The Commission approved the substance of draft article 7 and referred it to the drafting group.

CHAPTER 3. ELECTRONIC TRANSPORT RECORDS

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

2. Electronic communications (draft articles 2, 8 and 12)

35. Considerable support was expressed in favour of the policy on which the treatment of electronic communications in draft articles 2, 8 and 12 was based. The attention of the Working Group was drawn to the need for reviewing the draft instrument with a view to ensuring consistency with the text of the UNCITRAL Model Law on Electronic Commerce, with respect to both substance and terminology.

36. The Working Group was generally in agreement with the establishment of a functional equivalence between existing transport documents such as negotiable or non-negotiable bills of lading and electronic communication systems put in place to replace such documents in an electronic environment. It was pointed out, however, that one purpose of the draft instrument was to establish stand-alone rules, on the basis of which the legal value of electronic communications exchanged as substitutes for paper-based documents would be directly recognized, without necessarily referring to the traditional concepts of paper-based transport documentation. In that respect, the draft instrument could be described as going beyond merely recognizing the functional equivalence between paper documents and their electronic counterparts. As an additional benefit expected from such an approach, the draft instrument would thus alleviate the inconvenience that might result from the current disparities between jurisdictions in the interpretation of a notion such as “bill of lading”, which could cover negotiable and non-negotiable documents.

37. As to the contents of the specific rules embodied in draft article 2, various suggestions were made. One suggestion was that a mechanism should be provided to identify with sufficient clarity the originator of the electronic record or records that would be used as a substitute for a bill of lading. Another suggestion was that the draft instrument should establish requirements for the storage of electronic records in a manner that would preserve the integrity of their contents. More generally, it was suggested that the draft instrument should address the means through which the transferability function associated with negotiable bills of lading could be replicated in an electronic environment. It was stated that a mere reference to “adequate provisions” in the agreements to be concluded between the parties would not be sufficient to address the issue of negotiability, which might also need to be considered in factual situations where no prior agreement had been made between the parties with respect to electronic communications. In that connection, the view was expressed that the draft instrument should require agreements to use electronic communications to be made expressly by the parties. Yet another suggestion was that the draft instrument should provide rules to solve possible conflicts that might arise between the paper and the electronic version of transport documents issued for the purposes of the same contract of carriage, in particular if not all the originals of a paper bill of lading were surrendered prior to the issuance of an electronic version.

38. The Working Group took note of those various suggestions for continuation of the discussion regarding electronic communications at a later stage on the basis of the provisions contained in draft articles 2, 8 and 12.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Electronic commerce issues

158. The Working Group heard that, following its completion of the UNCITRAL Model Law on Electronic Signatures in 2001, the Commission had asked that Working Group IV (Electronic commerce) consider three possible future areas of work. These were: the preparation of an international instrument dealing with issues of electronic contracting; undertaking a comprehensive survey of possible legal barriers to the development of electronic commerce in existing uniform law conventions and trade agreements; and addressing the issues raised by the negotiability and transfer of rights in goods.

159. The Working Group heard that the Working Group on Electronic Commerce had reached the conclusion that, as negotiability and transfer of rights was a delicate area of law that would require very specific solutions, it should not be dealt with in the draft convention on the use of electronic communications in international contracts (annex to A/CN.9/571). The Working Group heard that the development of that convention and the survey in respect of existing international instruments had been undertaken simultaneously and, at its forty-fourth session, the Working Group on Electronic Commerce had completed its consideration of the draft convention on the use of electronic communications in international contracts.

160. The Working Group was informed that the draft convention contained two provisions of interest in the context of the current work being undertaken by the Working Group. Draft paragraph 2(2) of that draft convention expressly excluded “any transferable document (including a bill of lading) or instrument entitling the bearer or beneficiary to claim delivery of the goods or payment of a sum of money”. Also, draft paragraph 19(2) provided that the draft convention applied “to electronic communications in connection with the formation or performance of a contract or agreement to which another international convention, treaty or agreement applies, unless the State has declared, that it will not be so bound”. It was noted that, notwithstanding the exemption provided under draft paragraph 2(2), draft paragraph 19(2) had the effect that a contract of carriage, which was not of itself a document of title, might be covered by the provisions of the draft convention. The Working Group was invited to consider the implications of that provision.

161. The Working Group was also informed that, whilst the Working Group on Electronic Commerce had not yet had an opportunity to formally consider the electronic communications chapter and related provisions in the draft instrument currently being prepared, a number of delegations within that Working Group had expressed informal views on those areas in the draft instrument. These views included concerns with the notion used in the draft instrument of “negotiable electronic transport document” in view of the difficulties of achieving functional equivalence between paper documents of title and their electronic equivalent, and in particular, guaranteeing the uniqueness of electronic records. Additional aspects that might require further

consideration included provisions on authentication of communications between the parties, in particular, in view of the cross-border nature of the draft instrument.

162. It was suggested that, given the areas of complementarity and mutual interest both in the draft convention and in the draft instrument, the work of both Working Groups could be assisted by the holding of an intersessional informal meeting of experts from both the electronic commerce and transport law fields. The Working Group agreed to that suggestion.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Revised provisions on electronic commerce

180. The Working Group heard that a joint meeting of experts of Working Group III on transport law and of Working Group IV on electronic commerce was held in February 2005. Following those discussions, the joint meeting of experts suggested that the provisions of the draft instrument with respect to electronic commerce, as they appeared in A/CN.9/WG.III.WP.32, should be slightly revised. The Working Group considered those proposed revised provisions on electronic commerce as they appeared in A/CN.9/WG.III.WP.47.

Definitions (draft article 1)

Draft article 1(f) “Holder”

181. Concerns were expressed with respect to the identity of the “holder” in draft article 1(f), and that the definition seemed to include parties who were not always holders. The view was expressed that any drafting difficulties could be resolved, but that the intention of the definition was that subparagraph (i) dealt with paper documents and covered all parties, while subparagraph (ii) concerned electronic transport records, where the issue was not physical possession, but control, and which could include the shipper and the consignee. It was observed that general drafting improvements could be made to subparagraph (ii), such as the inclusion of certain holders such as the documentary shipper in draft article 31. It was also suggested that draft article 1(f)(ii) should specifically indicate to whom the electronic transport record would be transferable.

Draft article 1(o) “Electronic transport record”

182. Support was expressed in the Working Group for the definition of “electronic transport record”. A suggestion was made that the last paragraph could be simplified.

Draft article 1(p) “Negotiable electronic transport record”

183. In response to a question, it was clarified that the phrase “consigned to the order of the shipper or to the order of the consignee” in subparagraph (i) was intended to include the situation where goods were consigned to a named party. A drafting suggestion was made to substitute the phrase “including, but not limited to” for the phrase “that indicates” in subparagraph (i).

Draft article 1(q) “Non-negotiable electronic transport record” and draft article 1(r) “Contract particulars”

184. The Working Group had no comment on draft articles 1(q) or (r).

Conclusions reached by the Working Group on the definitions in draft articles 1(f), (o), (p), (q) and (r)

185. After discussion, the Working Group decided that:

- There was general support for the definitions in draft articles 1(f), (o), (p), (q) and (r), subject to the drafting suggestions set out above in paragraphs 181 to 184.

Chapter 2: Electronic communication

Draft article 3

186. The Working Group next considered draft article 3. It was explained that paragraph 2 of this draft article was a new provision that was intended to explicitly state what was implicit in the draft instrument, that issuance, possession and transfer of a negotiable document had the same effect as the issuance, control and transfer of an electronic transport record. The Working Group agreed to change the word “communication” to “communications” in paragraph (a), pursuant to footnote 19.

Conclusions reached by the Working Group on proposed draft article 3

187. After discussion, the Working Group decided:

- To change the word “communication” to “communications” in paragraph (a), and to otherwise accept the text of draft article 3 for inclusion and further discussion in the draft instrument.

Draft article 4

188. The Working Group next considered draft article 4. In response to a question it was clarified that, if more than one original of the negotiable transport document was issued, all of them would have to be collected before the negotiable electronic transport record could be issued in substitution.

Conclusions reached by the Working Group on proposed draft article 4

189. The Working Group approved of the text for further discussion and for inclusion in the draft instrument.

Draft article 5

190. The Working Group next considered draft article 5. There was support for the view that the list of articles which contained references to notices and consents should not be considered closed, since other provisions might have to be included, such as draft articles 88a and 61 bis.

Conclusions reached by the Working Group on proposed draft article 5

191. The Working Group approved of the text for further discussion and for inclusion in the draft instrument, subject to the insertion of additional articles referring to notices and consents.

Draft article 6

192. The Working Group next considered draft article 6 of the draft instrument.

Draft article 6(1)—Inclusion of registry systems in the draft instrument

193. The Working Group considered the issue set out in footnote 31 of A/CN.9/WG.III/WP.47, where it was suggested that the Working Group might wish to add,

after the word “shall” in the chapeau, the phrase “or of the rights represented by or incorporated into that record”. This change was suggested in light of concerns that draft article 6, when read with the relevant definitions, envisaged the use of a technology whereby the electronic transport record would be transferred along the negotiation chain, thereby potentially excluding some non-token technologies such as registry systems.

194. There was general agreement in the Working Group that, as a principle, it did not wish to exclude registry systems from the draft instrument. However, concerns were raised that the inclusion of the suggested phrase risked confusing the concepts of transfer of documents under draft article 59, and transfer of rights under draft article 62. There was support for that view.

195. It was suggested that an avenue for bringing registry systems and other nontoken technologies clearly within the application of the draft instrument could be to employ the notion of transfer of control of an electronic transport record as the equivalent of the transfer of the record itself. Other possibilities for compromise were suggested, such as adjusting the relevant definitions in draft article 1.

Security

196. A suggestion was raised to add into draft article 6(1) language to the effect that a secure or a reliable method should be used for the transfer. However, the view was expressed that adding text of this sort to the provision could generate unnecessary case law to interpret it, and that the concept of security was already implicit in the text of the draft article. Some concern was expressed regarding whether, in light of this explanation, the word “assurance” should be used in paragraph (1)(b). By way of further explanation, it was thought that the word “assurance” referred to the integrity of the record, rather than to the system that controlled it, and that it would not, therefore, cause ambiguity.

Conclusions reached by the Working Group on draft article 6(1)

197. After discussion, the Working Group agreed that:

- A small drafting group should be struck to amend the existing text of draft article 6(1), taking into account the above discussion regarding possible methods to render the provision technologically neutral

Draft article 6(2)

198. Support was expressed for draft article 6(2). The Working Group heard that the phrase “readily ascertainable” had been used in order to indicate without excessive detail that the necessary procedures must be available to those parties who have a legitimate interest in knowing them prior to entering a legal commitment. It was suggested that providing further detail in the draft instrument was unnecessary, since a more detailed definition would depend upon the type of system and the type of electronic record used, and that it could thus impede future technological development.

Conclusions reached by the Working Group on draft article 6(2)

199. The Working Group approved of the text of draft article 6(2) for further discussion and for inclusion in the draft instrument.

Chapter 8: Transport documents and electronic records**Draft article 33—Issuance of the transport document or electronic transport record**

200. The Working Group next considered draft article 33, on which it had no comment.

Draft article 35—Signature

201. The Working Group next considered draft article 35. A number of questions were raised in respect of this provision of the draft instrument.

Definition of “electronic signature”

202. The view was expressed that there should be a specific definition of “electronic signature” in the draft instrument, and a view was expressed that, otherwise, States that did not have national law on this topic could have a legal vacuum. It was felt that the definition “electronic signature” in draft article 35 did not add anything to the concept set out in other international instruments, nor did it deal in any specific fashion with transport law. It was suggested that, in the interests of uniformity, the draft instrument should adopt a definition of “electronic signature” based on other UNCITRAL instruments such as the Model Law on Electronic Signatures (2001) and the Model Law on Electronic Commerce (1996). However, a better starting point was thought to be the more modern approach taken in article 9(3) of the recently-concluded draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577).

203. Other views were expressed that the term “electronic signature” should not be defined, and that it should be left to national law. However, it was suggested that leaving the matter to national law could lead to disharmony, and that an effort should be made to find a unifying international standard. Further, it was thought that, in order to be commercially practicable, a definition of “electronic signature” should be uncomplicated and inexpensively met in practice. It was proposed that the best policy would be to have a functional definition of “electronic signature”, rather than to lock in to a specific definition, and to leave the exact standard to national law or to the commercial parties themselves, as long as the functional requirements were met. There was support for this proposal, particularly in light of ensuring future flexibility for technology that had not yet emerged.

Which law should govern?

204. It was suggested that, if national law was the applicable law, rules would have to be established to determine the choice of law to govern the electronic signature. One view was expressed that this should be the law governing the place of the document, while another view suggested that the proper applicable law would be the one governing the procedures in draft article 6.

Conclusions reached by the Working Group on proposed draft article 35

205. After discussion, the Working Group decided that:

- A small drafting group should be struck to consider revising the existing text of draft article 35, taking into account the concerns expressed above.

Draft articles containing electronic commerce aspects**Right of Control—Draft article 54, Transfer of rights—Draft article 59, Transfer of rights—Draft article 61 bis**

206. The Working Group next considered only the electronic commerce aspects of draft article 54 with respect to the right of control, and draft articles 59 and proposed article 61 bis regarding the transfer of rights. The Working Group did not have any specific comment relating to the electronic commerce aspects of these draft articles as they appeared in A/CN.9/WG.III/WP.47. Proposed redraft of certain provisions pertaining to electronic commerce

207. Based upon the discussion in the Working Group (see above, paras. 180 to 205), an informal drafting group composed of a number of delegations prepared a revised version of certain of the provisions relating to electronic commerce as they appeared in A/CN.9/WG.III/WP.47. Draft article 1(f) was revised to delete the enumeration of persons in subparagraph (ii) in favour of the phrase “the person”, and the phrase “issued or” was added prior to the word “transferred”. Further, it was thought that the closing sentence of draft article 1(o) could not be shortened without losing its necessary content. Draft article 6(1)(a) was deleted in favour of the following phrase, “(a) the method to effect the issuance and the transfer of that record to an intended holder”, and the word “consignee” in draft article 6(1)(d) was deleted in favour of “holder”. In addition, the second sentence of draft article 35 was deleted in favour of the sentence, “Such signature must identify the signatory in relation to the electronic transport record and indicate the carrier’s authorization of the electronic transport record.” Further, the word “other” was deleted from draft article 61 bis (2). Finally, in addition to the consequential changes to draft article 6(1)(a) noted above, in order to address the issue raised with respect to ensuring technological neutrality (see above, paras. 192 to 195), the following new definition was proposed for inclusion in draft article 1:

“Article 1(xx)

“The issuance and the transfer of a negotiable electronic transport record means the issuance and the transfer of exclusive control over the record. [A person has exclusive control of an electronic transport record if the procedure employed under article 6 reliably establishes that person as the person who has the rights in the negotiable electronic transport record.]”

208. It was further explained that the informal drafting group inserted square brackets around the closing sentence in proposed article 1(xx) to indicate only that further thought must be given to the wording of the text, but not to indicate any uncertainty regarding the necessity of its inclusion.

209. The Working Group made general comments with respect to the redrafted provisions. The view was expressed that further thought should be given to the question of whether the second part of draft article 1(f)(ii) with respect to “exclusive control” was necessary. It was also thought that the intention behind proposed draft article 1(xx) should be explained in an explanatory note to the draft instrument. Support was expressed for the approach taken in the redraft of article 35 as being flexible and accommodating many different legal systems.

Conclusions reached by the Working Group on proposed redraft of electronic commerce provisions

210. The Working Group approved the approach taken in the proposed revisions to the electronic commerce provisions for inclusion in the draft instrument.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Chapter 3 – Electronic Transport Records

23. The Working Group was reminded that its most recent consideration of draft chapter 3 on electronic transport records was at its fifteenth session (see A/CN.9/576, paras. 180 to 210). The consideration by the Working Group of the provisions of chapter 3 was based on the text as found in A/CN.9/WG.III/WP.81.

Draft article 1 definitions relevant to chapter 3

24. The Working Group considered the text of the definitions in draft article 1 that were thought to be closely connected to the text of chapter 3: paragraph 16 on “transport document”; paragraph 17 on “negotiable transport document”; paragraph 18 on “non-negotiable transport document”; paragraph 20 on “electronic transport record”; paragraph 21 on “negotiable electronic transport record”; paragraph 22 on “non-negotiable electronic transport record”; and paragraph 23 on the “issuance” and “transfer” of a negotiable electronic transport record. It was recalled by the Working Group that those definitions had been the result of expert consultations with Working Group IV on electronic commerce, and that, along with the entire chapter, those provisions were considered to be both carefully drafted and of a very technical nature. A view was expressed that the definition of “non-negotiable transport document” as found in draft article 1(18) could possibly be deleted as redundant, but a preference was articulated for retaining the provision in order to maintain the goal of having an electronic equivalent for any paper document in the draft convention.

Conclusions reached by the Working Group regarding draft article 1 definitions relevant to chapter 3

25. The Working Group was in agreement that the definitions in draft article 1 set out in the paragraph above were acceptable as found in A/CN.9/WG.III/WP.81.

Draft article 8. Use and effect of electronic transport records; Draft article 9. Procedures for use of negotiable electronic transport records; Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record; Draft article 59(2)

26. The Working Group next considered the text of draft chapter 3, consisting of draft articles 8, 9 and 10, as well as the text of draft article 59(2), which, it was recalled, had been discussed together as part of the group of provisions in the draft convention concerning electronic commerce when the Working Group had last considered the chapter. It was recalled that those provisions had also been the result of expert consultations with Working Group IV on electronic commerce, and that they were considered to be both carefully drafted and of a very technical nature.

Conclusions reached by the Working Group regarding chapter 3 and draft article 59(2)

27. The Working Group was in agreement that the provisions of chapter 3 and of draft article 59(2) were acceptable as set out in A/CN.9/WG.III/WP.81.

Article 8. Use and effect of electronic transport records

Subject to the requirements set out in this Convention:

(a) Anything that is to be in or on a transport document under this Convention may be recorded in an electronic transport record, provided the issuance and subsequent use of an electronic transport record is with the consent of the carrier and the shipper; and

(b) The issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Draft article 3**

186. The Working Group next considered draft article 3. It was explained that paragraph 2 of this draft article was a new provision that was intended to explicitly state what was implicit in the draft instrument, that issuance, possession and transfer of a negotiable document had the same effect as the issuance, control and transfer of an electronic transport record. The Working Group agreed to change the word “communication” to “communications” in paragraph (a), pursuant to footnote 19.

Conclusions reached by the Working Group on proposed draft article 3

187. After discussion, the Working Group decided:

- To change the word “communication” to “communications” in paragraph (a), and to otherwise accept the text of draft article 3 for inclusion and further discussion in the draft instrument.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 8. Use and effect of electronic transport records**

27. The Working Group approved the substance of draft article 8 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 8. Use and effect of electronic transport records**

35. The Commission approved the substance of draft article 8 and referred it to the drafting group.

Article 9. Procedures for use of negotiable electronic transport records

1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:
 - (a) The method for the issuance and the transfer of that record to an intended holder;
 - (b) An assurance that the negotiable electronic transport record retains its integrity;
 - (c) The manner in which the holder is able to demonstrate that it is the holder; and
 - (d) The manner of providing confirmation that delivery to the holder has been effected, or that, pursuant to articles 10, paragraph 2, or 47, subparagraphs 1 (a) (ii) and (c), the electronic transport record has ceased to have any effect or validity.
2. The procedures in paragraph 1 of this article shall be referred to in the contract particulars and be readily ascertainable.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Draft article 6**

192. The Working Group next considered draft article 6 of the draft instrument.

Draft article 6(1)—Inclusion of registry systems in the draft instrument

193. The Working Group considered the issue set out in footnote 31 of A/CN.9/WG.III/WP.47, where it was suggested that the Working Group might wish to add, after the word “shall” in the chapeau, the phrase “or of the rights represented by or incorporated into that record”. This change was suggested in light of concerns that draft article 6, when read with the relevant definitions, envisaged the use of a technology whereby the electronic transport record would be transferred along the negotiation chain, thereby potentially excluding some non-token technologies such as registry systems.

194. There was general agreement in the Working Group that, as a principle, it did not wish to exclude registry systems from the draft instrument. However, concerns were raised that the inclusion of the suggested phrase risked confusing the concepts of transfer of documents under draft article 59, and transfer of rights under draft article 62. There was support for that view.

195. It was suggested that an avenue for bringing registry systems and other nontoken technologies clearly within the application of the draft instrument could be to employ the notion of transfer of control of an electronic transport record as the equivalent of the transfer of

the record itself. Other possibilities for compromise were suggested, such as adjusting the relevant definitions in draft article 1.

[See also paragraphs 206-210, A/CN.9/576 (15th Session of WG III) under articles 1(21) and (22) at p. 48]

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 9. Procedures for use of negotiable electronic transport records or the electronic equivalent of a non-negotiable transport document that requires surrender

28. It was noted that reference to “the electronic equivalent of a non-negotiable transport document that requires surrender” in the title and in paragraph 1 of draft article 9 might require deletion should the Working Group in its further deliberation decide to delete or revise draft article 49. The Working Group noted that references to “the consignee” in subparagraphs (c) and (d) of paragraph 1 had been added so as to accurately include in draft article 9 coverage of an electronic equivalent of a non-negotiable transport document that requires surrender. The Working Group agreed that those subparagraphs should be revised if draft article 49 were to be deleted. Subject to those deliberations, the Working Group approved the substance of draft article 9 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 9. Procedures for use of negotiable electronic transport records

36. The Commission approved the substance of draft article 9 and referred it to the drafting group.

Article 10. Replacement of negotiable transport document or negotiable electronic transport record

1. If a negotiable transport document has been issued and the carrier and the holder agree to replace that document by a negotiable electronic transport record:
 - (a) The holder shall surrender the negotiable transport document, or all of them if more than one has been issued, to the carrier;
 - (b) The carrier shall issue to the holder a negotiable electronic transport record that includes a statement that it replaces the negotiable transport document; and
 - (c) The negotiable transport document ceases thereafter to have any effect or validity.
2. If a negotiable electronic transport record has been issued and the carrier and the holder agree to replace that electronic transport record by a negotiable transport document:
 - (a) The carrier shall issue to the holder, in place of the electronic transport record, a negotiable transport document that includes a statement that it replaces the negotiable electronic transport record; and
 - (b) The electronic transport record ceases thereafter to have any effect or validity.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Draft article 4

188. The Working Group next considered draft article 4. In response to a question it was clarified that, if more than one original of the negotiable transport document was issued, all of them would have to be collected before the negotiable electronic transport record could be issued in substitution.

Conclusions reached by the Working Group on proposed draft article 4

189. The Working Group approved of the text for further discussion and for inclusion in the draft instrument.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record

29. The Working Group approved the substance of draft article 10 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 10. Replacement of negotiable transport document or negotiable electronic transport record

37. The Commission approved the substance of draft article 10 and referred it to the drafting group.

CHAPTER 4. OBLIGATIONS OF THE CARRIER

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

3. Liability (draft articles 4, 5 and 6)

(a) Liability of the carrier and period of responsibility

39. In keeping with its decision to restrict its consideration to a general examination of themes, the Working Group undertook a preliminary analysis of the general approaches taken in draft articles 4, 5 and 6. It was generally agreed that the provisions as drafted were an essential component of the draft instrument and represented a basis upon which to found any discussion of the applicable regime for the obligations and liabilities of the carrier. It was pointed out that the provisions as drafted sought to maintain a number of important features that existed in international conventions and national laws currently in force. It was also generally agreed that draft articles 4, 5 and 6 should be read together, particularly since the extent of the obligations and liabilities of the carrier dealt with in draft articles 5 and 6 respectively, depended on the time at which the period of responsibility of the carrier commenced and ended as set out in draft article 4. A view was expressed that draft articles 4, 5 and 6 tended to reduce the liability of the carrier compared to articles 4 and 5 of the Hamburg Rules. Under that view, it was suggested that, at least for use in those countries that had ratified the Hamburg Rules, the provisions of draft articles 4, 5 and 6 of the draft instrument might need to be reviewed to be brought in line with articles 4 and 5 of the Hamburg Rules.

Article 11. Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.
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[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(a) Paragraph 5.1

113. It was recognized that draft article 5.1 set out the basic obligation of the carrier to carry the goods to the place of destination and deliver them to the consignee. There was general agreement that the text as currently drafted, appropriately described some of the principal obligations of the carrier and was a sound basis on which to commence discussions. However, several suggestions were made for possible improvements of the text. One suggestion was that the obligation of the carrier should be more fully expressed by including a reference requiring the carrier to deliver the goods in the same condition that they were in at the time that they were handed over to the carrier. It was said that, if that additional reference were to be included, the

relationship between draft article 5.1 and draft article 6.1 (which dealt with the liability of the carrier) might require further examination. The suggestion was objected to on the grounds that, in some circumstances, goods would change character during the course of carriage due to their inherent nature, which might alter as time passed. Examples were given, such as circumstances involving partial evaporation of the goods or processing of the goods while at sea. It was stated in response that the natural consequences of the passing of time should not serve as a pretext to exonerate the carrier from any obligation to preserve the initial condition of the goods. In the context of that discussion, it was pointed out that listing some but not all of the carrier's additional obligations among the primary obligation expressed in draft article 5.1 was unsatisfactory. It was also suggested that, in revising draft article 5, further attention might need to be given to the relevant provisions of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways (CMNI).

114. Another suggestion was that the draft article, which was said to set out an incomplete description of the carrier's obligations, should also mention the requirement that the carrier should take charge of the goods. In that respect, it was suggested that, in more fully describing the carrier's obligations under draft article 5.1, reference might need to be made to draft article 4.1, which established the period of responsibility of the carrier.

115. Yet another suggestion was that the provision, whilst respecting to some extent the contractual freedom of the parties, should not leave the description of the obligations of the carrier entirely to contractual freedom, thus allowing the obligations of the carrier to be defined in adhesion contracts unfavourable to the shipper. It was pointed out that, under some existing national laws, the fundamental obligations of the carrier were set out in mandatory legislation that would not allow any deviation through contractual agreement. Reference was made to the comment in paragraph 59 of A/CN.9/WG.III/WP.21, which stated that the provisions of the draft instrument should "make clear that the terms of the contract do not stand alone". It was suggested that this point should be more clearly expressed in the draft provision. A widely shared view was that the extent to which the obligations of the carrier could be displaced through contractual agreement might need to be further considered in the context of draft article 17.

116. Notwithstanding the concerns and suggestions expressed in the course of the discussion, the Working Group provisionally agreed to retain the text of article 5.1 as drafted. It was widely thought that the above-mentioned concerns and drafting suggestions should be revisited at a later stage.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 13. Carriage and delivery of the goods

50. The Working Group proceeded to consider article 13 as set out in A/CN.9/WG.III/WP.81. It was questioned why the phrase "place of destination" was used rather than the phrase "place of delivery" which was used elsewhere in the draft convention, such as in subparagraph 1(c) of draft article 5. Support was expressed for the principle that there should be consistency in the use of terminology in the draft convention unless the use of different terminology was justified. In response, it was said that the use of the term "place of destination" was appropriate in the current context to clarify the main obligations of the carrier

and distinguish it from the place of unloading which was often erroneously seen as a synonym of the place of destination. That view was supported.

Conclusions reached by the Working Group regarding draft article 13

51. The Working Group was in agreement that the text in draft article 13 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 11. Carriage and delivery of the goods

30. The Working Group approved the substance of draft article 11 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 11. Carriage and delivery of the goods

38. The Commission approved the substance of draft article 11 and referred it to the drafting group.

Article 12. Period of responsibility of the carrier

1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.
2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.
 (b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.
3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:
 - (a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or
 - (b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.

[For deliberations on the period of responsibility of the carrier and door-to-door

scope of application of the Convention, see General Discussion, Chapter 2, at p. 71]

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

3. Liability (draft articles 4, 5 and 6)

(a) Liability of the carrier and period of responsibility

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40. Referring to the policy underlying draft article 4.1.1, it was observed that the draft provision seemed to be based on the principle that the carrier's liability was linked to a concept of custody by the carrier of the goods (which was initiated by the receipt of goods and ended by their delivery). A widely shared view was that, in any case, the concept of custody had prevailed in international instruments relating to other modes of transport and the same should occur in the context of the draft instrument. In that connection, some reservations were expressed with the approach taken in draft articles 4.1.2 and 4.1.3 according to which the precise moment of the receipt and delivery of goods was a matter of contractual arrangements between the parties or a matter to be decided upon by reference to customs or usages. The view

was expressed that such contractual flexibility was in contradiction with modern transport conventions such as the COTIF and the CMNI, that it introduced an element of uncertainty in the mandatory liability regime of the draft instrument, and that it might even open some possibility of manipulation of the moment when the liability began and ended. It was argued that such a concept of contractual flexibility might undermine the aim of having the draft instrument cover door-to-door transport. However, support was expressed for opinions that the time and location of the delivery of the goods should be left to the carrier and the shipper (both of whom were commercial parties capable of assessing the risks and implications of their agreement on the matter). Such freedom of contract was necessary to reflect the fact that the moment when the custody of the goods began and ended depended on circumstances such as practices prevailing in different ports, characteristics of the vessel and the goods, the loading equipment and similar elements. It was said that there was nothing wrong with leaving the parties free to agree when the custody of the goods should begin and end, as long as the effective custody of the goods by the carrier and its liability for them were coextensive. It was noted that, also under article 4(1) and (2) of the Hamburg Rules (under which the liability began when the goods were taken over at the port of loading and ended when they were delivered at the port of discharge), it was implicit that the carrier and the shipper had a degree of latitude in agreeing whether the taking over and delivery occurred, for instance, under the tackle of the ship or at some other point in the port. It was observed that the rules on liability should be analysed with respect to both the port-to-port option and the door-to-door option. In relation to draft article 4.2.1, some delegations expressed the view that they could not approve of extending the maritime regime to the pre- and post-sea carriage in the way it was proposed in the draft article. It was stated that there were also other options regarding the elements of a network system. The regime applicable to nonlocalized damages should be analysed in view of applicable regimes covering land transport.

[16th Session of WG III (A/CN.9/591 and Corr.1) ; referring to A/CN.9/WG.III/WP.56]

Draft article 11. Period of responsibility of the carrier

General discussion

190. The Working Group was reminded that it had last considered the period of responsibility of the carrier and draft article 14(2) regarding FIO(S) clauses at its ninth session (see A/CN.9/510, paras. 39 to 40, and para. 43). The Working Group considered the text of these provisions as found in annexes I and II of A/CN.9/WG.III/WP.56.

191. The Working Group heard that, in the responses to the informal questionnaire in A/CN.9/WG.III/WP.57, most of the respondents approved of the general approach taken by draft paragraphs 11(1), (2) and (4).

Draft paragraph 11(1)

192. General satisfaction was expressed with the text and the approach taken in draft paragraph 11(1). As a general comment, it was observed that care should be taken that consistent terminology was used throughout the draft convention, particularly in respect of terms such as “place of delivery”, “time and location of delivery”, “place of receipt”, and the like. A suggestion was made to delete the closing phrase “to the consignee” as unnecessary and

potentially confusing in light of the fact that the carrier sometimes effected delivery by delivering the goods to an authority, such as a port authority, rather than to the consignee. There was some support for this suggestion. However, contrary views were also expressed that deletion of the phrase could be problematic, since draft article 13 stated that delivery to the consignee was a core obligation of the carrier, and it was suggested that special cases such as delivery to authorities or to persons other than the consignee should be included in draft paragraphs 11(3) and (5). Support was expressed for the suggestion that the text of draft paragraph 1 should remain unchanged and that concerns raised regarding parties to whom the carrier could deliver other than the consignee could be considered with respect to draft paragraph 11(5).

193. It was observed that draft article 46, concerning the carrier's duty of care in looking after goods left in its custody could be seen as related to draft paragraph 1, and the question was raised whether draft paragraph 1 should be made subject to both draft articles 12 and 46. In response, the view was expressed that the draft convention was structured in such a way that draft article 11 concerned the period of responsibility of the carrier pursuant to the contract of carriage. By way of contrast, it was noted that draft article 46 dealt with the period before the carrier was able to make delivery, but that it was focussed on a time at which the carrier no longer had any responsibilities pursuant to the contract of carriage. It was suggested that this distinction should be made clearer, and that it could be further discussed when the Working Group considered draft article 46.

Conclusions reached by the Working Group regarding draft paragraph 11(1):

194. After discussion, the Working Group decided that:

- The text of draft paragraph 11(1) would be maintained, but the decision whether to delete the phrase “to the consignee” would be taken only after the Working Group had considered draft paragraph 11(5).

Draft paragraph 11(2)

195. The Working Group expressed its general satisfaction with draft paragraph 11(2). It was suggested that some minor drafting changes could be made to improve the clarity of the paragraph, such as the inclusion of the phrase “the carrier's” after the phrase “time and location of” in the second sentence.

Conclusions reached by the Working Group regarding draft paragraph 11(2):

196. After discussion, the Working Group decided that:

- The text of draft paragraph 11(2) should be maintained, but that detailed drafting changes to improve the clarity of the paragraph should be considered by the Secretariat.

Draft paragraph 11(4)

197. It was observed that while draft paragraphs 11(2) and 11(4) both contained default rules for identifying the time and location of receipt and delivery, respectively, the second sentences of those paragraphs differed. While the second sentence of draft paragraph 11(2) referred to a precise moment when receipt of the goods occurred, it was observed that there was no equally precise moment established in the second sentence of draft paragraph 11(4) for the delivery of the goods. Some support was expressed for the view that drafting should be included in

paragraph 4 to make the moment of the delivery as precise as the moment of receipt in paragraph 2.

198. It was also noted that draft paragraphs 11(2) and 11(4) differed in that draft paragraph 4 did not refer to an identifiable location. A suggestion was made that draft paragraph 11(4) should refer to the location of discharge as a reasonable one. There was some support for this suggestion. However, a doubt was raised regarding how it would be decided when and where the goods were delivered if the goods were discharged in an unreasonable place, or whether that decision would be left to a court. It was also pointed out that there would be no default rule regarding the time and location of delivery when the goods were delivered in an unreasonable place, if the suggestions were adopted.

199. By way of explanation of the differences between draft paragraphs 11(2) and 11(4), it was noted that in port-to-port carriage, goods were seldom delivered all at once, and that there was usually a time period between the actual delivery of the goods to the carrier and their loading. The view was expressed that in such circumstances, it was reasonable to expect that this period would be within the carrier's period of responsibility. It was further explained that it would be rare in the case of a port-to-port carriage that resort would be had to the default rule in the final sentence of draft paragraph 4, since most ports had customs or practices, but that in such exceptional cases, it was decided to use the rule that the period of responsibility should end when and where the carriage ended.

200. There was support for the view that the Secretariat should be requested to make adjustments to the text of draft paragraph 11(4) in order to reflect the concerns expressed in the Working Group and to ensure its consistency with draft paragraphs 1 and 2. Caution was voiced, however, that in that exercise, regard should be had to the possible interpretation of the final phrase of the paragraph to mean that delivery took place when and where the container was unpacked.

Conclusions reached by the Working Group regarding draft paragraph 11(4):

201. After discussion, the Working Group decided that:

- The text of draft paragraph 11(4) should be maintained, but that drafting changes to ensure the consistency of the paragraph with the rest of the draft article should be considered by the Secretariat, in addition to consideration of whether a requirement of 'reasonableness' should be added to the location of delivery.

Draft paragraphs 11(3) and (5)

202. General satisfaction was expressed with the text and the approach taken in draft paragraphs 11(3) and (5). One suggestion was made to clarify the final phrase of draft paragraph 5 with text such as "the time and location of such handing over is the time and location of the delivery of the goods", but it was thought that general drafting would accomplish that goal. Further, it was thought that the suggested deletion of the phrase "to the consignee" in reference to draft paragraph 11(1) (see above, para. 192) was no longer necessary in light of revisions to be considered with respect to draft paragraphs 11(2) and (4).

Conclusions reached by the Working Group regarding draft paragraphs 11(3) and (5):

203. After discussion, the Working Group decided that:

- The text of draft paragraphs 11(3) and (5) would be maintained, with any necessary drafting adjustments for greater precision and consistency.

Draft paragraph 11(6) and draft paragraph 14(2): FIO(S) clauses

204. It was observed that draft paragraph 11(6) was intended to operate in concert with draft paragraph 14(2) in an effort to provide a solution for the treatment of FIO(S) clauses, which, in some States, determined the period of the responsibility of the carrier. There was support for the view that draft paragraph 6 would not be acceptable if draft paragraph 14(2) was deleted, but that read together with draft paragraph 14(2), the two provisions established an acceptable approach to FIO(S) clauses. It was explained that the combined effect of these provisions was to clarify the responsibilities of the shipper and the carrier who agreed that the loading, stowing and discharging of the goods would be carried out by the shipper. In that case, the shipper would be liable for any loss due to its failure to effectively fulfil those obligations, and the carrier would retain responsibility for other matters during loading and discharge, such as a duty of care regarding the goods, since the carrier's period of responsibility would be governed by the contract of carriage.

205. In addition, it was observed that the current text of draft paragraph 14(2) restricted the obligations that could be contracted out by the carrier to the shipper or other parties to those listed in draft paragraph 14(2). Further, the view was expressed that draft paragraph 11(6) was helpful since it made clear that loading and discharging took place during the period of responsibility of the carrier.

206. It was noted that FIO(S) clauses were most commonly used in non-liner carriage, which fell outside the scope of application of the draft convention, but that the draft convention could be applicable to contracts of carriage in non-liner transport by way of the operation of draft article 10. A concern was expressed that allowing for FIO(S) clauses in the draft convention would lead to their spread from the non-liner to the liner trade, and increase the potential for their abuse, but it was suggested that commercial realities made this unlikely. In this context, it was suggested that, as a matter of drafting, the reliance on FIO(S) clauses could be restricted to the non-liner trade. Other concerns were raised that the operation of draft paragraphs 11(6) and 14(2) could limit the parties' current freedom of contract regarding FIO(S) clauses in the non-liner trade, particularly with respect to the allocation of risk. In light of this possibility, it was suggested that the FIO(S) clause should define the period of responsibility of the carrier.

207. Some drafting modifications were proposed. It was suggested that the phrase "and shall be the responsibility of" be inserted after the phrase "performed by" in first sentence of draft paragraph 14(2). It was also suggested that the word "initial" should be added before the word "loading", and that the word "final" should be added before the word "discharging" in draft paragraph 14(2) in order to make it consistent with draft paragraph 11(6) and to exclude intermediate ports. However, it was emphasized that the focus in the current discussion should be on the overall approach established by the combined operation of draft paragraphs 11(6) and 14(2) to establish a compromise solution for FIO(S) clauses. In that spirit, there was support for the suggestion that the square brackets around draft paragraph 14(2) be removed, and the text retained for further discussion. It was further observed that, in light of the Working Group's approval of the approach outlined in draft paragraphs 11(6) and 14(2), the square brackets around the phrase "[actually performed]" in draft subparagraph 17(3)(i) should be removed and the text retained. It was thought that this revision to draft subparagraph 17(3)(i) could render

unnecessary the suggestion noted above to include the phrase “and shall be the responsibility of” in draft paragraph 14(2).

Conclusions reached by the Working Group regarding draft paragraph 11(6):

208. After discussion, the Working Group decided that:

- The text of draft paragraph 11(6) should be maintained;
- The square brackets around draft paragraphs 14(2) and 17(3)(i) should be deleted and the text maintained; and
- Drafting changes to ensure the consistency of the paragraph with the rest of the draft article, as well as general drafting improvements should be considered by the Secretariat.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 11. Period of responsibility of the carrier

28. The Working Group was reminded that its most recent consideration of draft article 11 on the period of responsibility of the carrier was at its sixteenth session (see A/CN.9/591, paras. 190 to 208). The Working Group proceeded to consider draft article 11 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1

29. Clarification was requested regarding the different definitions of “carrier” (draft article 1(5)) and of “performing party” (draft article 1(6)) in the draft convention, such that the definition of “performing party” included employees, agents and subcontractors, while the definition of “carrier” did not. The question was raised whether this might cause ambiguity regarding when the period of responsibility commenced if the goods were received by the employee or agent of the carrier, and not by the carrier itself. It was explained that the draft convention had specifically attempted to avoid agency issues, but that at times, it was thought to be important to stress that a particular provision was intended to include carriers acting through their agents, and thus the term “carrier or performing party” had been used, but that as a general matter, the employees of carriers would be included in the provision by virtue of their inclusion in the definition of performing parties.

Paragraph 2

30. Concern was expressed regarding the text of draft paragraph 2, since it was thought that the text as currently drafted confused the contractual time and location of receipt and delivery with the actual time and location of receipt and delivery. The view was expressed that, in any event, the location of delivery was irrelevant for the purposes of determining the period of responsibility of the carrier, and it was suggested that adjustments should be made to the text of draft paragraph 2 to reflect that view. However, there was support for the view that both the time and location of receipt for carriage and delivery were important to the definition of the period of responsibility, and that, in any event, setting the parameters of those terms was important for other provisions in the draft convention. It was further explained that draft paragraph 2 was intended as a further clarification of draft paragraph 1, and there was agreement that that relationship should be more clearly set out.

31. A question was also raised regarding whether the text of draft paragraph 2(b) created a potential gap in the period of responsibility of the carrier, since unloading of the goods by the carrier to a warehouse owned by the carrier would signal the end of the period of responsibility of the carrier pursuant to draft paragraph 2(b), but it was suggested that the period should extend to the time when the consignee actually collected the goods. In response, it was explained if there were storage by the carrier, it would likely be pursuant to an agreement between the shipper and the carrier, or pursuant to custom or usage, and that if there were no such agreement or custom, storage of the goods would fall within draft article 50 which was intended to work in conjunction with draft article 11 to avoid any gap in the responsibility of the carrier.

Drafting suggestions

32. In order to clarify the relationship between draft paragraphs 1 and 2, it was suggested that the phrase “For the purposes of paragraph 1 of this draft article” be added at the beginning of draft paragraph 2. Further, it was noted that draft article 2(b) referred to “discharge or unloading”, while draft article 4(b) referred only to “discharge”, and it was suggested that reference to “discharge” should be deleted, and that the term “unloading” should be used in both instances. Finally, clarification was requested regarding the consequences of a contract of carriage that violated draft paragraph 4, and modifications were suggested to the provision to the effect that a provision in the contract of carriage would be void to the extent that it violated the provisions of draft paragraph 4.

Conclusions reached by the Working Group regarding draft article 11

33. The Working Group was in agreement with the intended purpose of draft article 11 as set out in A/CN.9/WG.III/WP.81, and agreed with the drafting suggestions set out in the paragraph above. In addition, the Secretariat was requested to consider possible improvements that could be made to draft paragraph 1, in order to clarify the relationship between draft paragraphs 1 and 2 of the provision, and to consider how to revise the text to ensure that the period of responsibility of the carrier would not commence if the shipper failed to deliver the goods to the carrier as stipulated in the contract of carriage.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 12. Period of responsibility of the carrier

Proposal to re-insert a revised version of draft article 11(2) from A/CN.9/WG.III/WP.81

31. In considering the text of draft article 12 as contained in A/CN.9/WG.III/WP.101, it was observed that the Secretariat had revised the text of the draft provision following its consideration by the Working Group at its 19th session (see A/CN.9/621, paras. 28-33). Support was expressed for the drafting changes that had been made in order to clarify the relationship between paragraphs 1 and 2 of the provision as it appeared in article 11 of A/CN.9/WG.III/WP.81, by moving aspects of paragraph 2 regarding the ascertainment of the time and location of delivery for insertion into draft article 45 in chapter 9 on delivery of the goods. However, some concern was expressed that certain aspects of paragraph 2, as it had appeared in article 11 of A/CN.9/WG.III/WP.81, regarding the actual time and location of

receipt and delivery should be retained in article 12 of the current text. To that end, it was proposed that former paragraph 11(2) of A/CN.9/WG.III/WP.81 should be reinserted in the current text as paragraph 1 bis, with the following revised first sentence substituted for the first sentence of the chapeau: “For the purposes of paragraph 1, receipt or delivery shall be receipt or delivery as defined in the contract of carriage, or, failing such agreement, as defined by the customs, practices, or usages of the trade.”

32. While some sympathy was expressed for the concerns raised regarding the determination of the time and place of receipt and delivery in the period of responsibility in draft article 12 in order to avoid any possible gap in the period of responsibility, it was observed that the proposal would render the provision too detailed, such that it would be necessary to set out every possible combination of contractual and actual receipt and delivery. It was suggested that such a precise solution would be unworkable in the context of the draft convention. As such, there was agreement in the Working Group that the more general approach taken in the current text of draft article 12(1) was preferable to such a specific enumeration of possibilities, and the proposal was not accepted.

33. Another proposal made to consider the adoption of the period of responsibility provisions as set out in article 4 of the Hamburg Rules was not taken up by the Working Group.

Deletion of “and subject to article 14, paragraph 2” in paragraph 3

34. Concerns were raised regarding the interaction of the phrase “and subject to article 14, paragraph 2” in the chapeau of paragraph 3, and the phrase “and without prejudice to the other provisions in chapter 4” in draft article 14, paragraph 2. In particular, it was suggested that the presence of both phrases in the draft convention could raise a conflict between the two provisions that would have unintended consequences. In order to ensure that draft articles 12(3) and 14(2) operated as intended, so as not to allow for the period of loading or unloading pursuant to draft article 14(2) to be outside the carrier’s period of responsibility, as currently the case in some jurisdictions, it was proposed that the phrase “and subject to article 14, paragraph 2” in the chapeau of paragraph 12(3) be deleted. The Working Group agreed with that proposal.

Reference to the “consignor” in draft article 12(2)(a)

35. In light of the decision of the Working Group to delete the concept of the “consignor” from the text of the draft convention (see paras. 21 to 24 above), it was suggested that the term “consignor” should be deleted from draft article 12(2)(a) and replaced with another term. Strong support was expressed in the Working Group for that proposal, and there was support for the suggestion that the phrase “the consignor” could be replaced with the phrase “the shipper or the documentary shipper”. However, concerns were raised that the alternative terms suggested might create additional complications, and could cause confusion in some jurisdictions. An additional proposal was made that the reference to the “consignor” could be dealt with by adjusting the text to delete the phrase “require the consignor to hand over the goods” and to insert in its stead the phrase “requires the goods to be handed over”. There was support in the Working Group for that suggestion.

36. Another concern was raised that further refinement of the provision might be necessary in order to define the start of the period of responsibility, for example, in cases where the carrier had received the goods for transport, but was required to turn the goods over to an

authority for inspection prior to having them returned to the carrier for transport. It was suggested that in such a situation, it might be unclear when the carrier's period of responsibility began. While there was some support for that concern, it was generally felt that the clarification was not necessary and that a sensible reading of the draft article would affirm the carrier's responsibility whenever it had actual custody of the goods, but not when they were in the custody of an authority.

“under ship's tackle” clause

37. No affirmative responses were received to a query whether delegations were of the view that “under ship's tackle” clauses would still be admissible given the current text of the draft convention.

Conclusions reached by the Working Group regarding draft article 12

38. Subject to the following adjustments, the Working Group approved the substance of draft article 12 and referred it to the drafting group:

- The substitution of the phrase “requires the goods to be handed over” for the phrase “require the consignor to hand over the goods” in draft article 12(2)(a); and
- The deletion of the phrase “and subject to article 14, paragraph 2” in the chapeau of paragraph 12(3).

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 12. Period of responsibility of the carrier

39. Concerns were expressed in the Commission regarding the possible effect of paragraph 3 of draft article 12, which stated that a provision was void to the extent that it provided that the time of receipt of the goods was subsequent to the beginning of their initial loading under the contract of carriage, or that the time of delivery of the goods was prior to the completion of their final unloading under the contract of carriage. In particular, the view was expressed that paragraph 3 could thus be taken to mean that a provision would be valid that provided for an exemption of the carrier from liability for loss or damage that occurred prior to the loading of the goods on the means of transport, or following their having been unloaded, despite the fact that at such time the carrier or its servants had custody of the goods. In order to avoid that result, the following text was suggested to replace paragraph 3:

“3. For the purposes of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:

“(a) The time of receipt of the goods is subsequent to the time when the carrier or any person referred to in article 19 has actually received the goods; or

“(b) The time of delivery of the goods is prior to the time when the carrier or any person referred to in article 19 has actually delivered the goods.”

40. Some support was expressed for that proposal and for adjusting the text. However, support was also expressed for an alternative interpretation of paragraph 3, such that the carrier should be responsible for the goods for the period set out in the contract of carriage, which could be limited to “tackle-to-tackle” carriage. Those that agreed with the above interpretation of paragraph 3 were generally of the view that the text of the provision should be retained as drafted. However, there was general agreement in the Commission that nothing in the draft Convention prevented the applicable law from containing a mandatory regime that applied in respect of the period prior to the start of the carrier’s period of responsibility or following its end.

41. Another interpretation was that paragraph 3 did not modify paragraph 1, but only aimed at preventing the carrier, even if it had concluded an agreement on the basis of draft article 14, paragraph 2, from limiting its period of responsibility to exclude the time after initial loading of the goods or prior to final unloading of the goods. To that end, a suggestion was made that paragraph 3 could be moved to a position in the text immediately following paragraph 1 and that it could also be helpful to replace the opening phrase of paragraph 3 “For the purposes of determining the carrier’s period of responsibility” with the words “Subject to paragraph 1”. Some support was expressed for that possible approach.

42. There was agreement in the Commission that the different views that had been expressed on the possible interpretation of paragraph 3 illustrated that there could be some ambiguity in the text. However, the Commission was of the view that it might be possible to clarify the text so as to ensure a more uniform interpretation. The Commission agreed that revised text to resolve the apparent ambiguity in paragraph 3 should be considered, and that it would delay its approval of draft article 12 until such efforts had been pursued.

43. Following extensive efforts to clarify the text of paragraph 3 to resolve the apparent ambiguity in the text, the Commission took note that it had not been possible to reconcile the different interpretations of the provisions. In keeping with its earlier decision, the Commission approved the substance of draft article 12 and referred it to the drafting group.

44. An additional view was expressed with respect to the interrelationship between draft article 12 and the right of control. In particular, it was noted that draft article 52, paragraph 2, made it clear that the right of control existed during the period of responsibility and ceased when that period expired. Concern was expressed that if draft article 12, paragraph 3, operated to allow the parties to agree on a period of responsibility that began after the receipt of the goods for carriage or ended before delivery, there could be a corresponding gap in the right of control between the time of receipt and the start of the period of responsibility and between the end of the period of responsibility and the delivery of the goods. The Commission took note of that concern.

*Transport beyond the scope of the contract of carriage [Deleted]**Article 13. Transport beyond the scope of the contract of carriage*

On the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport that is not covered by the contract of carriage and in respect of which it does not assume the obligation to carry the goods. In such event, the period of responsibility of the carrier for the goods is only the period covered by the contract of carriage.

[Last version before deletion: Annex to A/CN.9/645]

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(b) Mixed contracts of carriage and forwarding**

41. Views were expressed regarding the possibility that the carrier and the shipper might expressly agree that the carrier, upon performing its contract obligations, would, as an agent, arrange for a connecting carriage (a possibility that was expressly addressed in draft article 4.3). Misgivings were expressed about that possibility as it was considered that it opened a way to subcontracting for a part of the carriage and excluding liability for that subsequent carriage by stipulating that the carrier arranged for it as an agent. While sympathy was expressed for that view (in particular where standard printed contract conditions were used to shorten the period of liability without taking into account the concrete context in which the carrier's liability was to end and the carrier assumed the role of an agent), views were expressed that it was not reasonable for legislation to attempt to prevent parties from agreeing that one of the parties would act as an agent for the other if that was a considered and joint decision by the parties.

42. It was also observed that other transport conventions did not provide for a possibility of the carrier acting as an agent (or quasi freight forwarder) for the cargo owner, and that the draft instrument should not allow for such a possibility. However, in response it was noted that even if that possibility was not envisaged in the legislation, it was not excluded that the parties could agree to it, and that, in order to protect the interests of the parties, it was useful to clarify the practice and establish conditions designed to prevent abuse.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 12. Transport not covered by the contract of carriage**

34. The Working Group was reminded that its most recent consideration of draft article 12 on transport not covered by the contract of carriage was at its ninth session (see A/CN.9/510, paras. 41 to 42). The Working Group proceeded to consider draft article 12 as contained in A/CN.9/WG.III/WP.81.

35. The Working Group was reminded that two alternatives for the second sentence of the provision appeared in the text in square brackets, for consideration by the Working Group.

36. As a general remark, the view was expressed that the text of draft article 12 seemed unusual, since it seemed to suggest that the carrier was doing a favour for the shipper rather than providing a service, and that in so doing, the carrier could limit any potential liability it incurred in fulfilling that service. It was also suggested that draft article 12 appeared in general to allow carriers to offer additional services to shippers. However, it was said that the provision might give rise to abuses by carriers wishing to avoid responsibility for the proper provision of that service. In response, it was observed that draft article 12 was intended to cover the situation where the shipper specifically requested the additional service, in the form of a so called “mixed contract”, that is, partly one of carriage, and partly one of freight forwarding, that could be covered by a single transport document. In addition, it was clarified that the intention of the draft article was, in fact, to emphasize that the scope of the draft convention was limited to coverage of the contract of carriage, but through this specific provision the draft convention would accommodate the situation where the carrier performed additional services for the shipper beyond the contract of carriage, at the risk and for the account of the shipper. By including a provision such as draft article 12, the intention was not to eliminate the carrier’s obligation in the performance of the additional service, but to emphasize that any liability arising from it was not pursuant to the contract of carriage, and was thus necessarily outside the scope of the draft convention. However, such additional service as performed by the carrier would still be subject to liability under other applicable legal regimes.

37. Some strong views were expressed in support of the deletion of draft article 12. However, it was noted that the draft provision was intended to eradicate a form of abuse, where the carrier would include standard form clauses in the contract of carriage to the effect that the carrier was only liable if it carried the goods on its own vessel. While such provisions were said to be less common today, it was suggested that draft article 12 was intended to protect shippers from such abuse, and that its deletion could allow this abusive practice to persist, creating ambiguity and unfairness. The prevailing view in the Working Group was in favour of retaining the draft provision.

The first variant of the second sentence

38. Support was expressed for the approach taken in the first variant of the second sentence set out in square brackets, particularly since requests by shippers for through bills of lading were increasingly a part of modern maritime carriage and in keeping with industry practice, for example, in cases where the carrier could not perform the inland carriage or the shipper’s own merchant haulage arrangements were required, but where a documentary credit required that the transport be covered by a single transport document. There was support in the Working Group for the approach taken in the first variant of the second sentence of the text, that when the carrier acted as agent of the shipper outside of the carrier’s obligations in the contract of carriage, the carrier should only be responsible as agent, and should not be subject to the draft convention with respect to those additional services.

39. However, concern was expressed that the text of the first variant was not clear as drafted, and a number of modifications to it were suggested. One suggestion was that the carrier should be liable for the entire period for which it arranged the additional carriage on behalf of the shipper. The view was also expressed that the text was unclear regarding whether the carrier had any liability to a third party document holder, and it was suggested that this type of provision could create a problem regarding the identity of the carrier, which might be dealt with under draft article 38. There was agreement within the Working Group that the drafting of

the provision should be improved and clarified. One suggestion to assist in the clarification of the provision was to make clear in the title that it concerned a “mixed contract.” It was also noted that the provision used two different terms, “specified transport” and “additional transport”, and it was suggested that a review should be had in order to make consistent use of terminology.

40. Additional concern was raised regarding the apparent creation of an additional obligation of the carrier, which could entitle it to limit its liability for a breach of an obligation “under this Convention” pursuant to text of draft article 62(1), even though the breach of obligation did not arise from the contract of carriage. A solution proposed to remedy this problem was to adjust the first variant to read: “If the carrier arranges the additional transport as provided in such transport document or electronic transport record, the carrier is deemed to do so on behalf of the shipper.” Support was expressed in the Working Group for this proposed adjustment to the text of the first variant as set out in the second sentence of draft article 12.

The second variant of the second sentence

41. Some support was expressed for the approach taken in the second variant of the second sentence set out in square brackets. However, some modifications to that text were suggested, such as including in it the phrase, “unless otherwise agreed” in order to ensure that the text was only a default provision. An additional view was expressed that certain aspects of the second variant could be retained and expressed in the text of the provision as redrafted from the first variant. However, the Working Group did not take up the second variant of the second sentence in draft article 12.

Location of draft article 12 in the text

42. It was suggested that draft article 12 should be moved to another location in the text, possibly for insertion in chapter 5 following draft article 18.

Conclusions reached by the Working Group regarding draft article 12

43. After discussion, the Working Group decided that:

- The text of draft article 12 should be retained in the draft convention, incorporating the approach taken in the first variant of the second sentence, but clarifying the text considerably in light of the concerns set out in paragraphs 34 to 41 above; and
- Consideration should be given to the proper placement of the provision in the text of the draft convention.

Revised text of draft article 12

44. In light of the decisions made by the Working Group with respect to the text of draft article 12 (see above, para. 43), the Working Group continued its deliberations on the following revised text of the provision:

“Article 12. Transport not covered by the contract of carriage

“On the request of the shipper, the carrier may agree to issue a single transport document or electronic transport record that includes specified transport [that is not covered by the contract of carriage] [in respect of which it is not the carrier]. In such event, the responsibility of the carrier covers only the period of the contract of carriage. If the carrier arranges the transport that is not covered by the contract of

carriage as provided in such transport document or transport record, the carrier does so on behalf of the shipper.”

45. It was explained that the revised text of draft article 12 contained alternative text in two sets of square brackets, and that the first set of square brackets contained text taken from draft article 12 as it appeared in A/CN.9/WG.III/WP.81, while the second set contained what was intended to express the same principles, but in clearer drafting. Further, the second sentence of the revised provision was said to be taken from the first variant of the text as it appeared in A/CN.9/WG.III/WP.81, as preferred by the Working Group, while the third sentence was included in order to describe, but not to regulate, the legal relationship between the carrier and the shipper, when the carrier arranged for additional carriage.

46. Support was expressed in the Working Group for the second variant in square brackets as being clearer than the first, and as being somewhat more in keeping with the text of the similar provision in article 11 of the Hamburg Rules, that referred to “a named person other than the carrier”. While there remained some expressions of a preference to delete the draft provision from the text, the Working Group was reminded that it had already made the decision to retain the concept of the text of draft article 12, subject only to redrafting. Some support was also expressed in the Working Group in favour of the first alternative in square brackets.

47. A suggestion was made to include both phrases in square brackets in the text, joining them with the word “and”, in order to make the meaning of the provision as clear as possible. There was broad support for this approach in the Working Group. Concern was raised that including both phrases might lead to confusion, since courts might conclude that the two phrases had different content or that both had to be satisfied in order to meet the requirements of the provision. There was some sympathy for that concern, and it was suggested that greater clarity could be achieved by inserting text along the lines of “and in respect of which is therefore not the carrier” after the first variant.

48. By way of further clarification, it was noted that the third sentence of the revised text was intended to make clear that if the carrier arranged transport that was not covered by the contract of carriage, the carrier who entered into the contract for that particular additional carriage would be the carrier for that leg, and that that carrier would be liable for the carriage under applicable law.

Conclusions reached by the Working Group regarding revised draft article 12

49. After discussion, the Working Group decided that:

- The alternative phrases in square brackets should both be retained and made conjunctive, possibly using text such as “and in respect of which is therefore not the carrier”, and the square brackets around them deleted;
- The text of revised draft article 12 was otherwise acceptable to the Working Group.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 13. Transport beyond the scope of the contract of carriage**

39. Concerns were raised regarding the clarity of the text of draft article 13, particularly with respect to the phrase in the first sentence “and in respect of which it is therefore not the carrier”, and regarding the whole of the second sentence and the meaning of the phrase “the period of the contract of carriage”. Although some support was expressed for the provision as drafted, there was strong support for the view that the current text was unclear, and several proposals were made with the goal of addressing those concerns.

40. Some support was expressed for the suggestion that draft article 13 should simply be deleted from the text. In support of that view, it was suggested that the provision could result in a situation where the carrier would not be responsible for the additional transport, thus potentially causing harm to a third party holder or consignee in good faith.

41. However, the Working Group supported the retention of draft article 13 in order to provide for current practice in the industry whereby at the shipper’s request, the carrier agreed to issue to the shipper a transport document for the entire transport of the goods, notwithstanding that the carrier had arranged on behalf of the shipper for a portion of the transport to be carried out by another carrier. In such cases, the carrier had no obligation regarding the goods for that portion of the transport that was performed by another carrier.

42. With a view to retaining such a provision in the text, the Working Group agreed with a proposal that the first sentence of draft article 13 could be clarified by substituting the phrase “and in respect of which it does not assume the obligation to carry the goods” for the phrase “and in respect of which it is therefore not the carrier”. Further, it was agreed that the second sentence should be replaced with the following clearer text: “In such event, the carrier’s period of responsibility is only the period covered by the contract of carriage”. Although there was some support for the retention of the principle in the third sentence that, in such cases, the carrier acted on behalf of the shipper, so as to ensure that the carrier used appropriate care in choosing a carrier for the additional transport, there was agreement in the Working Group that improved drafting was not possible, and that the best alternative was simply to delete the third sentence.

Conclusions reached by the Working Group regarding draft article 13

43. Subject to the following adjustments, the Working Group approved the substance of draft article 13 and referred it to the drafting group:

- The phrase “and in respect of which it is therefore not the carrier” in the first sentence should be substituted for the phrase “and in respect of which it does not assume the obligation to carry the goods”;
- The second sentence should be replaced with: “In such event, the carrier’s period of responsibility is only the period covered by the contract of carriage.”; and
- The third sentence should be deleted.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 13. Transport beyond the scope of the contract of carriage**

45. Some concerns were expressed in the Commission with respect to a perceived lack of clarity in draft article 13. In particular, concerns were expressed regarding how a single transport document could be issued when the transport would be undertaken by both the carrier and another person. It was felt by some that the text was in contradiction with the basic principle of the draft Convention in that the carrier could issue a transport document for carriage beyond the contract of carriage but would be responsible for only a portion of the transport. In addition, it was observed that problems could arise with respect to the provision in draft article 43 that the transport document was *prima facie* evidence of the carrier's receipt of the goods if the transport document could include specified transport that was not covered by the contract of carriage. Given the perceived difficulties of draft article 13, it was proposed that it should be deleted. There was some support in the Commission for that proposal.

46. However, there was also support for the view that draft article 13 reflected an important commercial practice and need, and that it should be maintained in the text as drafted. In particular, it was said that there was a long-standing commercial practice where, as a consequence of the underlying sales agreement in respect of the goods, shippers required a single transport document, despite the fact that a carrier might not be willing or able to complete the entire transport itself. In such cases, it was said to be important that shippers should be able to request that the carrier issue a single transport document, and that carriers should be able to issue such a document even though it included transport beyond the scope of the contract of carriage. However, of greater commercial significance due to their frequency were said to be cases of "merchant haulage", where the consignee of the goods preferred to perform the final leg of the transport to an inland destination. It was observed that strong industry support for such a provision had been expressed during internal consultations undertaken by a number of delegations. In addition, it was observed that draft article 13 was operative only at the request of the shipper, thereby protecting the shipper's interest from any unscrupulous activity by the carrier.

47. Concerns were expressed that the simple deletion of draft article 13 could have a detrimental effect on merchant haulage. If merchant haulage were performed in the absence of draft article 13, it could be found to conflict with draft article 12, paragraph 3. Further, if there were loss of or damage to the goods during the final stage of the transport, it might be expected that such loss or damage should be the responsibility of the consignee. However, as draft article 43 stated that the transport document was conclusive evidence of the carrier's receipt of the goods as stated in the contract particulars, and in contrast to the outcome pursuant to the Hague-Visby Rules, the carrier could unfairly be held responsible for loss or damage occurring during the final leg of the transport that was performed by another party. A possible remedy for this potential problem was said to be that paragraph 2 of draft article 14 could be adjusted to allow the consignee and the carrier to agree to merchant haulage. However, it was observed that that approach could be problematic owing to other concerns in respect of draft article 14, paragraph 2.

48. A proposal was made that text could be added to draft article 13 to clarify that the portion of the carriage that the carrier was not performing itself should be specified, for example through the use of text such as “for the remaining part of the transport the carrier shall act as forwarding agent on behalf of the shipper”. However, it was observed that such an approach had been considered and not adopted by the Working Group, in the interests of avoiding regulation by the draft Convention of agency or forwarding matters.

49. The view was also expressed that the deletion of draft article 13 was unlikely to alter commercial practice in this regard, but that it could cause uncertainty with respect to current practice. In any event, it was observed that if draft article 13 were deleted, care should be taken to ensure that draft article 12, paragraph 3, did not prevent the commercial practice of merchant haulage agreements. While it was observed that the deletion of draft article 13 was unlikely to stop merchant haulage, there was support in the Commission for a clear rule in the draft Convention permitting such a practice.

50. Another proposal was made that draft article 13 could restrict its application to non-negotiable transport documents. However, it was observed that such a restriction would represent a major change in current commercial practice and would thus be more undesirable than deletion of the provision.

51. It was observed that, in the light of the diverging views in the Commission, two options seemed possible. The first was to simply delete draft article 13, but to ensure that the travaux préparatoires were clear in indicating that its deletion did not intend to indicate that the long-established commercial practice was no longer allowed. The second option was that the Commission could attempt to redraft draft article 13 in order to retain its purpose but address the concerns that had been raised in regard to its current text. It was further observed that any attempt to redraft the text should make it clear that the provision was operative only at the express request of the shipper, and that it might be possible to redraft the text in order to clarify the carrier’s obligation in respect of the shipper in such cases.

52. The Commission agreed that revised text for draft article 13 should be considered and that it would delay its final consideration of draft article 13 until such efforts had been pursued.

53. Following extensive efforts to clarify the text of draft article 13 to resolve the concerns that had been raised with respect to it, the Commission took note that it had not been possible to agree on a revised text for the provision. In keeping with its earlier decision, the Commission agreed that draft article 13 should be deleted, taking note that that deletion did not in any way signal that the draft Convention intended to criticize or condemn the use of such types of contract of carriage.

Article 13. Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.
2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(c) Obligations of the carrier**

43. [* * *] Also it was suggested that if door-to-door coverage was ultimately accepted, the inclusion of draft article 5.2.2 should be reviewed. It was recalled that draft article 5.2.2 was intended to make provision for FIO (free in and out) and FIOS (free in and out, stowed) clauses. Support was expressed for the inclusion of this draft article because it resolved current legal uncertainty as to whether the carrier under a FIO or FIOS clause only became liable once the cargo was loaded or stowed. Furthermore, it was said that, in view of the fact that, in some legal systems, adopting FIO(S) clauses meant that the mandatory harmonized regime governing the liability of the carrier did not apply, the benefit of dealing with FIO(S) clauses in the draft instrument was that it would put beyond doubt the principle that the carrier owed an obligation of due diligence even where the parties had agreed on such a clause. Some concern was expressed that, in allowing contracting out, draft articles 5.2.2 might undermine the principle of uniformity.

[* * *]

(b) Paragraph 5.2.1

117. An explanation was sought as to the relationship between draft article 5.2.1 and draft article 6.1, which dealt with the basis of liability of the carrier. In particular, concern was expressed as to the use of the words “properly and carefully”. Furthermore, it was suggested that the carrier's obligation to carry and deliver the goods was already set out in draft article 5.1. It was also suggested that, if the provision were to apply to door-to-door transportation, it might need to be redrafted accordingly, since the current text appeared to use maritime transport terminology by its reference to loading, handling, stowing, carrying, keeping, caring for and discharging the goods. A concern was also expressed as to the extension of the corresponding requirement to the entire duration of the door-to-door transportation through the reference to draft article 4.1. Regarding the use of the words “properly and carefully”, a widely shared view was that such wording, which originated in the Hague Rules and had enjoyed the benefit of extensive interpretation through case law worldwide, should be preserved in the draft instrument and possibly extended (together with the remainder of the provisions contained in draft article 5, with the exception of draft article 5.4) to the nonmaritime segments of door-to-door transportation.

118. With respect to the duration of the period during which the carrier was responsible under draft article 5, the view was expressed that the reference to “the period defined in article 4.1” should be replaced by a reference to the period running from the time that the goods were taken over by the carrier until the time of their effective delivery. Making that period “subject to article 4.2” was said to be irrelevant. It was explained that the words “subject to article 4.2” had been intended as, and should be replaced by a reference to article 4.3. It was widely felt that, although the Working Group had not taken a final decision on the sphere of the application of the draft instrument, further attention would need to be given as to how the draft instrument would interplay with other unimodal transport conventions.

119. Notwithstanding that there was some support for omitting draft article 5.2.1, the Working Group provisionally agreed to retain the draft article given the extensive experience with analogous provisions in existing conventions such as article 3(2) of the Hague Rules. It was also agreed that further study of the draft article should be undertaken to assess the interplay and the consistency between draft article 5.2.1 and draft article 6, as well as the effect of the various possible definitions of the period during which the obligation in draft article 5.2.1 would apply. The Secretariat was requested to prepare a revised draft, with possible alternative wordings reflecting the views and concerns expressed.

(c) Paragraph 5.2.2

120. It was noted that draft article 5.2.2 was designed to accommodate the practice of FIO (free in and out) and FIOS (free in and out, stowed) clauses, which were used in bulk cargo charter party trade, but were rare in liner trade. It was observed that the reason for agreeing on FIO(S) clauses were usually that the cargo owner could perform the operations at a lower price (e.g., because of volume rebate given by the stevedore company); alternatively, such clauses were agreed where the cargo owner was in a better position to undertake certain operations (e.g., because of its particular experience with loading and stowing certain type of cargo). Those reasons might also be combined. It was said that in particular when FIO(S) clauses were agreed for the second reason it was reasonable that they should in some way diminish the carrier’s liability for those operations. However, it was responded that the circumstances in which shippers participated in the loading operations differed, depending on circumstances such as the size of the company, the type of cargo, circumstances in the port, the technology used in safekeeping the goods and that it was inconceivable that a treaty should in a general way allow the carrier to be relieved of its liability for loading and unloading when such clauses were used.

121. It was observed that, even if cargo was loaded by the shipper in the context of a FIO(S) clause, it was much less likely that the consignee would perform unloading operations (in such a case the effect of the clause, which covered both loading and unloading operations, was that unloading was done by the carrier or someone else on behalf of the cargo owner). That possibility (which was envisaged in the text by the words “or on behalf of the shipper, the controlling party of the consignee”) was criticized in that the carrier should not be able to perform an operation “on behalf” of the cargo owner and be able to diminish its liability for it.

122. It was stated that under some legal systems the clause in current practice only affected the question as to who was to bear the costs of operations and in principle did not diminish the liability if the carrier. The overriding obligation of the carrier to keep the ship and other cargo safe was said to be in line with that approach.

123. The view was expressed that FIO(S) clauses might be appropriate for maritime (port-to-port) carriage but had no place in the global transport service of door-to-door transport contracts where it would be agreed that loading and unloading operations in an intermediary port should be performed by the cargo owner and that the agreement would shift the risk of those operations on the cargo owner in the midst of the service. It was thus suggested that the draft provision should be deleted. That view received considerable support and it was considered that the impact of those clauses on door-to-door operations needed to be evaluated.

124. According to others, however, the clauses should be recognized as dividing the responsibilities and risks between the shipper and the carrier, and as a consequence the clause should exonerate the carrier to the extent that the shipper undertook to carry out those obligations. Contractual freedom in that respect was desirable and had the beneficial effect of allowing the parties to carry out their business at the lowest possible costs by placing the obligations of loading and unloading on the persons that were best placed to carry them out.

125. It was noted that the draft provision referred in a broad manner to the obligations of article 5.2.1, which included also carrying, keeping and caring for goods. Wide support was expressed for the suggestion that the carrier should not be able to delegate contractually to the shipper such a broad array of obligations arising from the transport contract.

126. It was noted that pursuant to the current draft provisions a FIO(S) clause did not need to be expressly agreed or specifically negotiated, which raised public policy concerns. It was stated in response that, to the extent the manner of agreeing on such a clause was unclear, it should be clarified that they should be expressly agreed upon and also that a transfer to third persons had to be by express consent (but it was added that such a clarification did not mean that the clause did not transfer the liability for those operations to the cargo owner).

127. Different views were expressed as to what should be the appropriate rule for the draft instrument. There was general agreement with the proposition that even if the parties agreed on a FIO(S) clause, the draft instrument continued to apply. Support was expressed for the suggestion that the clause did not only affect the question of the costs of loading and unloading operations but also that thereby the carrier's responsibility for those operations was contractually diminished (otherwise the contractual freedom in this area was not apt to achieve optimum commercial benefits). Considerable support, however, was given to the suggestion that the clause should only affect the question as to who should bear the costs of loading and unloading operations and that the application of the clause should not diminish the carrier's liability for those operations. No final conclusion was reached on this point, but it was accepted that the point needed to be clarified in the draft instrument. After discussion it was decided that the provision should be placed between square brackets as an indication that the concept had to be reconsidered by the Working Group including as to how it related to the provisions on the liability of the carrier. It was suggested that a written information about the practice of FIO(S) clauses should be prepared for a future session of the Working Group to assist it in its considerations.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft paragraph 11(6) and draft paragraph 14(2): FIO(S) clauses

204. It was observed that draft paragraph 11(6) was intended to operate in concert with draft paragraph 14(2) in an effort to provide a solution for the treatment of FIO(S) clauses, which, in some States, determined the period of the responsibility of the carrier. There was support for the view that draft paragraph 6 would not be acceptable if draft paragraph 14(2) was deleted, but that read together with draft paragraph 14(2), the two provisions established an acceptable approach to FIO(S) clauses. It was explained that the combined effect of these provisions was to clarify the responsibilities of the shipper and the carrier who agreed that the loading, stowing and discharging of the goods would be carried out by the shipper. In that case, the shipper would be liable for any loss due to its failure to effectively fulfil those obligations, and the carrier would retain responsibility for other matters during loading and discharge, such as a duty of care regarding the goods, since the carrier's period of responsibility would be governed by the contract of carriage.

205. In addition, it was observed that the current text of draft paragraph 14(2) restricted the obligations that could be contracted out by the carrier to the shipper or other parties to those listed in draft paragraph 14(2). Further, the view was expressed that draft paragraph 11(6) was helpful since it made clear that loading and discharging took place during the period of responsibility of the carrier.

206. It was noted that FIO(S) clauses were most commonly used in non-liner carriage, which fell outside the scope of application of the draft convention, but that the draft convention could be applicable to contracts of carriage in non-liner transport by way of the operation of draft article 10. A concern was expressed that allowing for FIO(S) clauses in the draft convention would lead to their spread from the non-liner to the liner trade, and increase the potential for their abuse, but it was suggested that commercial realities made this unlikely. In this context, it was suggested that, as a matter of drafting, the reliance on FIO(S) clauses could be restricted to the non-liner trade. Other concerns were raised that the operation of draft paragraphs 11(6) and 14(2) could limit the parties' current freedom of contract regarding FIO(S) clauses in the non-liner trade, particularly with respect to the allocation of risk. In light of this possibility, it was suggested that the FIO(S) clause should define the period of responsibility of the carrier.

207. Some drafting modifications were proposed. It was suggested that the phrase "and shall be the responsibility of" be inserted after the phrase "performed by" in first sentence of draft paragraph 14(2). It was also suggested that the word "initial" should be added before the word "loading", and that the word "final" should be added before the word "discharging" in draft paragraph 14(2) in order to make it consistent with draft paragraph 11(6) and to exclude intermediate ports. However, it was emphasized that the focus in the current discussion should be on the overall approach established by the combined operation of draft paragraphs 11(6) and 14(2) to establish a compromise solution for FIO(S) clauses. In that spirit, there was support for the suggestion that the square brackets around draft paragraph 14(2) be removed, and the text retained for further discussion. It was further observed that, in light of the Working Group's approval of the approach outlined in draft paragraphs 11(6) and 14(2), the square brackets around the phrase "[actually performed]" in draft subparagraph 17(3)(i) should be removed and the text retained. It was thought that this revision to draft subparagraph 17(3)(i) could render

unnecessary the suggestion noted above to include the phrase “and shall be the responsibility of” in draft paragraph 14(2).

Conclusions reached by the Working Group regarding draft paragraph 11(6):

208. After discussion, the Working Group decided that:

- The text of draft paragraph 11(6) should be maintained;
- The square brackets around draft paragraphs 14(2) and 17(3)(i) should be deleted and the text maintained; and
- Drafting changes to ensure the consistency of the paragraph with the rest of the draft article, as well as general drafting improvements should be considered by the Secretariat.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 14. Specific obligations

52. The Working Group considered draft article 14 as contained in A/CN.9/WG.III/WP.81. It was proposed to add the words “and is the responsibility of” following the words “is to be performed by” in paragraph 2. It was said that these words were necessary given that paragraph 2 provided a derogation from draft article 14, paragraph 1 and should extend to permitting such derogation when the parties agreed that it should be responsibility of the shipper. In response, it was said that the current wording of draft article 14 represented a compromise and that the inclusion of a reference to the responsibility of the shipper would be confusing, in particular in the context of Chapter 8, which dealt with the obligations of the shipper to the carrier.

53. It was also said that the wording in paragraph 2 was overly broad and should be restricted so as to preclude carriers from routinely disclaiming liability for damage to the goods that occurred during the operations contemplated in the draft article. In response, it was said that the provision was not too broad, since it focused on very specific tasks, and was clearly restricted to loading, handling, stowage or discharge of the goods. It was suggested that draft article 14 should be read in the context of subparagraph 17(3)(i) which provided an exoneration of the responsibility of the carrier for any loss or damage caused to the goods when the shipper carried out those tasks.

Conclusions reached by the Working Group regarding draft article 14

54. The Working Group was in agreement that the text in draft article 14, as set out in A/CN.9/WG.III/WP.81, was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 14. Specific obligations

44. There were expressions of concern that paragraph 2 of draft article 14 was too broad in scope and would eventually shift to the shipper or the consignee the responsibility for the performance of obligations that traditionally had to be performed by the carrier under existing

international instruments and domestic laws on carriage of goods by sea. That paragraph, it was noted, deviated for instance from the Hague-Visby Rules, where only the carrier had the obligation of loading, handling, stowing or unloading of the goods. It was also said that such an innovative provision should be amended so as to preclude carriers from routinely disclaiming liability for damage to the goods that occurred during the operations contemplated in the draft article. The potential risk involved in abuse of those clauses was said to be significant, as experience showed that most damage in international maritime carriage occurred during loading or unloading. Another concern raised in connection with paragraph 2 was that it was not clear whether and to what extent the types of clauses it contemplated would affect the carrier's period of responsibility. There was strong support for the deletion of paragraph 2 so as to solve those problems.

45. Another concern was that draft paragraph 2 allowed for clauses that would require the consignee to unload the goods. There was support for the suggestion that the reference to the consignee should be deleted from paragraph 2 of the draft article, so as to protect the consignee, who was not a party to the contract of carriage, from the effects of clauses that it had not negotiated. At the very least, it was said, the draft article should require the consignee's consent in order to be bound by those clauses.

46. In response, it was noted that paragraph 2 of the draft article contained a useful provision that clarified an area of the law where there were significant discrepancies among legal systems in a manner that adequately took into account commercial practice. In practice, shippers often undertook, through "free-in-and-out" or "free-in-and-out, stowed" clauses ("FIO(S)" clauses), to undertake some or all of the carrier's responsibilities in respect of loading, handling, stowing and unloading goods. It was noted that FIO(S) clauses were most commonly used in non-liner carriage, which fell outside the scope of application of the draft convention, but that the draft convention could be applicable to contracts of carriage in non-liner transport by way of the operation of draft articles 6, paragraph 2, and 7. It was observed that in some jurisdictions FIO(S) clauses were understood as merely allocating the liability for the cost incurred with loading and unloading cargo, whereas in other jurisdictions they were regarded as a contractual limitation to the period of the responsibility of the carrier. In addition, it was observed that paragraph 2 was not meant to create any obligations on the part of the consignee.

47. There was wide support for the view that, as the Working Group had agreed to delete the words "subject to article 14, paragraph 2" from paragraph 3 of draft article 12 (see above, para. 34), it was now sufficiently clear that under the draft convention a FIO(S) clause did not reduce the carrier's period of responsibility for the goods. It was explained that the combined effect of these provisions was to clarify the responsibilities of the shipper and the carrier who agreed that the loading, stowing and discharging of the goods would be carried out by the shipper. In that case, the shipper would be liable for any loss due to its failure to effectively fulfil those obligations, and the carrier would retain responsibility for other matters during loading and discharge, such as a duty of care regarding the goods, since the carrier's period of responsibility would be governed by the contract of carriage. Furthermore, article 18, subparagraph 3(i) expressly provided that the carrier would only be released of liability for damage that occurred during loading or unloading under a FIO(S) clause if it was not the carrier itself that had performed those functions. Another reason for retaining the text, it was said, was that the responsibility for loading and unloading of cargo and the liability for costs incurred as a result of

those activities, was a matter that the parties were free to allocate through the sales contract, a freedom which the draft convention should not curtail.

48. During the discussion, three proposals were suggested to achieve a compromise regarding the different views: (i) to add the requirement of the consent of the consignee to the agreement mentioned in paragraph 2 of draft article 14; (ii) to delete “or the consignee”; and (iii) to revise the last sentence of paragraph 2 of draft article 14 to specify that it referred to an agreement that had been negotiated separately and that was not part of the original contract.

Conclusions reached by the Working Group regarding draft article 14

49. Notwithstanding the proposals to revise or delete paragraph 2 of draft article 14, the Working Group decided to retain draft article 14 in its current form as there was not enough support for such modification. The Working Group, therefore, approved the substance of draft article 14 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 14. Specific obligations

54. Concerns were expressed in the Commission with respect to the title of the draft provision. It was observed that the term “specific obligations” did not seem appropriate, particularly as translated into some of the language versions, as the provision itself set out very standard obligations of the carrier. It was suggested that the title of the provision should be “general obligations” or possibly “obligations in respect of the goods”. While the view was also expressed that the existing title of the provision was appropriate, there was some support for changing the title along the lines suggested.

55. A proposal was made to include in paragraph 1 the requirement that the carrier carefully receive and mark the goods. However, it was observed that marking the goods was generally felt to be the shipper’s obligation, and the proposal was not taken up.

56. Support was expressed for a proposal to delete paragraph 2 of draft article 14, which regulated FIOS (free in and out, stowed) clauses. Concern was expressed that paragraph 2 required the consignee to perform certain obligations without requiring that it consent to such performance. Concern was also expressed that a traditional responsibility of the carrier was now being left to freedom of contract. However, it was observed that the intention of the provision was not to establish obligations for the consignee, but rather to allow for common commercial situations in which the carrier and the shipper agreed that the shipper would perform obligations usually required of the carrier, and for which the carrier should therefore not be held responsible should loss or damage result. For example, it was noted that shippers often preferred to load and stow the goods themselves for a variety of commercial reasons, including superior technical knowledge, or the possession of special equipment. It was stated that paragraph 2 was a positive step in terms of settling the law in the area of FIOS clauses, which was quite unclear.

57. A suggestion was made that paragraph 2 could be limited to non-liner transportation as, in liner trade, the carrier typically performed the listed obligations itself in respect of the

containers. It was noted that draft article 83, subparagraph (b), could cover those cases where the shipper itself undertook the handling of the goods in liner transportation. However, it was observed that in some situations, as for example with respect to irregular or non-containerized goods such as large machinery, special equipment or particular products, FIOS clauses were employed in the liner trade as well. Accordingly, the suggestion was not taken up.

58. At the conclusion of its consideration of the draft provision, the Commission approved the substance of draft article 14 and referred it to the drafting group.

Article 14. Specific obligations applicable to the voyage by sea

The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to:

- (a) Make and keep the ship seaworthy;
- (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and
- (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(c) Obligations of the carrier

43. In respect of draft article 5.4, strong support was expressed for imposing upon the carrier an obligation of due diligence that was continuous throughout the voyage by retaining the words that were currently in square brackets “and during” and “and keep”. Among views that were expressed in favour of imposing such an obligation, it was pointed out that, with improved communication and tracking systems allowing a carrier to closely follow the voyage of a vessel, a continuing obligation of due diligence was appropriately adapted to modern business practices. However, it was suggested that the degree of diligence would or should depend on the context, to the effect that, for example, the duty of the carrier would be different depending on whether the vessel was at sea or in port. In addition, it was suggested that the content of such a duty of due diligence should be drafted so that account could be taken of evolving standards such as the International Management Code for the Safe Operation of Ships and for Pollution Prevention (1993, “the ISM Code”) and evolving international standards that might be developed, in particular, by the International Maritime Organization. Notwithstanding the broad support for a continuing obligation of due diligence, a concern was raised that the extension of the carrier’s obligation to exercise due diligence in respect of the whole voyage put a greater burden on carriers and could lead to the associated costs being passed on in the form of higher freights. [* * *]

(e) Paragraph 5.4

131. The Working Group recalled its preliminary discussion regarding draft article 5.4 (see above, para. 43) and confirmed its broad support for imposing upon the carrier an obligation of due diligence that was continuous throughout the voyage by retaining the words that were currently between square brackets “and during” and “and keep”. However, a concern was reiterated that the extension of the carrier’s obligation to exercise due diligence in respect of the whole voyage put a greater burden on carriers and could lead to the associated costs being passed on in the form of higher freights.

132. It was observed that the wording of draft article 5.4 was inspired by the Hague Rules and its retention would preserve the benefit of extensive experience and a body of case law regarding the interpretation of that provision in maritime transport. It was pointed out, however, that the text of draft article 5.4 made it unsuitable for other modes of transport.

133. It was suggested that improvements would need to be introduced in the text to clarify the allocation of the burden of proof regarding the carrier’s obligation of due diligence. In particular, a question was raised as to whether the shipper, in addition to bearing the burden of proof as to the cause of loss or damage to the goods under draft article 6.1.3, would also have to prove failure by the carrier to exercise due diligence under draft article 5.4.

134. Another question was raised as to the duration of the period of responsibility of the carrier under draft article 5.4, which was imposed on the carrier “before” the voyage by sea, without specifying a point in time for the beginning and the end of the period. It was suggested that the obligation of due diligence of carrier should not come to an end at the time of arrival of the ship at the port of its destination but at least until the goods had been discharged. To that effect, it was suggested that the words “and keep” should not be retained in subparagraphs (a) and (c). Instead, a sentence should be added at the end of draft article 5.4 along the following lines: “The obligations set out above must be fulfilled throughout the period during which the goods are on board the ship and during discharge of the goods from the ship”.

135. Another suggestion was made that wording along the following lines should be added to accommodate the specific needs arising from the transport of chilled and frozen products: “Following delivery of goods which have been carried under controlled temperatures (whether in containers, or otherwise), the carrier must, if requested so to do by any of the persons referred to in article 13.1, make available within 14 days of being so requested copies of such documentary evidence and or electronically stored information (such as recording charts or downloaded electronically stored data) which it has relating to the temperatures at which the goods have been carried”.

136. After discussion, the Working Group agreed that the current text of draft article 5.4 constituted a workable basis for continuation of its deliberations. The Working Group took note of the various suggestions that had been expressed in respect of the draft provision. It was generally agreed that the draft provision would need to be further considered in light of similar or comparable provisions in other unimodal transport conventions.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]**5. Obligations of the carrier in respect of the voyage by sea (draft article 13)**

146. By way of introduction, the Working Group was reminded that draft article 13 had undergone only editorial changes in A/CN.9/WG.III/WP.32. The Working Group commenced its examination of draft article 13 with paragraph 1. It was noted that three sets of square brackets remained in the text of this paragraph, and that removing the square brackets and retaining the text would make the carrier's duty of due diligence for seaworthiness a continuing obligation.

147. Strong support was expressed in the Working Group that the square brackets be removed and the text be retained in order to make the carrier's obligation of due diligence for seaworthiness a continuing obligation. The view was expressed that making this obligation a continuous one was in keeping with the modernization of the law governing the carriage of goods by sea, and with the International Safety Management code and safe shipping requirements.

148. Several drafting suggestions were made with respect to draft article 13(1). It was observed that different language had been used with respect to the duties expressed in subparagraphs (a), (b) and (c), such that (a) and (c) used the phrase "make [and keep]", while (b) did not contain such a phrase. The concern was expressed that this could be erroneously interpreted to suggest that the obligation in subparagraph (b) to "properly man, equip and supply the ship" was not a continuing obligation. In response, it was stated that, in any event, the phrase "before, at the beginning of, [and during] the voyage" in the chapeau of draft article 13(1) was sufficient to ensure that this mistake was not made. While it was conceded that this phrase in the chapeau assisted in the interpretation of subparagraph (b) as a continuing obligation, it was suggested that the lack of the phrase "and keep" in that subparagraph could still result in an improper interpretation. Support was expressed for this view. Another drafting suggestion made was that gender-neutral language such as "crew" or "staff" could be considered instead of the phrase "man ... the ship" used in subparagraph (b).

149. Some support was expressed for the view that the text in square brackets should be deleted so as to ensure that the carrier's obligation to keep the ship seaworthy existed only prior to and at the beginning of the voyage. It was observed that this would continue the approach taken in article III.1 of the Hague and Hague-Visby Rules, and it was suggested that this approach had worked well to date. It was suggested that making the obligation to provide a seaworthy vessel a continuing obligation would place too great a burden on the carrier, and that it would considerably alter the overall allocation of risk between the carrier and cargo interests in the draft instrument. The view was also expressed that there were practical problems associated with making the seaworthiness obligation a continuing one, since a ship could experience problems in the middle of the ocean, and it might not be possible to make it seaworthy until it put into a port of call. While it was acknowledged that practical problems could arise for the carrier if seaworthiness was made a continuing obligation, it was observed that the duty of seaworthiness was one of due diligence rather than an absolute duty of the carrier, and the view was expressed that this would only amount to an obligation to take reasonable steps during the voyage. A preference was expressed that the standard that should

apply to the carrier during the course of the voyage should be one of negligence, rather than the higher standard of due diligence.

150. It was proposed that instead of a continuing obligation, the Working Group could adopt the charter party “doctrine of stages” where a vessel must be seaworthy at the beginning of each stage of a voyage. There was some support for this proposal. However, the view was expressed that such “doctrine of stages” was already reflected in the draft instrument, since the carrier was under an obligation to provide a seaworthy ship at the beginning of each voyage of the goods, not of the vessel. The view was that, since the draft instrument applied to the contract of carriage of the goods, the carrier was under an obligation to exercise due diligence with respect to each contract of carriage. An additional suggestion made was that the carrier’s duty to “properly and carefully load, handle, stow, carry, keep, care for and discharge the goods” in draft article 11 would provide for sufficient continuing responsibility of the carrier.

151. Although there was strong support in favour of making the obligation of seaworthiness a continuing obligation, it was acknowledged that making the obligation a continuing one might be interpreted as significantly changing the allocation of risk in the draft instrument. There was general agreement that, if seaworthiness was to be a continuing obligation, an attempt should be made to rectify that balance with respect to the carrier in the Working Group’s consideration of other articles concerning the rights and interests of the carrier. One suggestion made was that this change in the carrier’s allocation of risk could be borne in mind during the Working Group’s discussion of draft article 14(3) on apportionment of liability in cases of multiple causation of damage. Concern was expressed that continuing the obligation of seaworthiness after the vessel sailed might be interpreted to continue the high degree of care appropriate when shore experts were available. It was suggested that the appropriate at-sea degree of care would be achieved by removing the error of navigation and management defence.

152. A question was raised with respect to the carrier’s obligation regarding containers, as mentioned in draft article 13(1)(c), and whether the contracts pursuant to which a carrier leased or provided containers were intended to be covered by the draft instrument. A view was expressed that the draft instrument was intended only to apply to contracts of carriage, and not to separate contracts for the lease or rental of containers. The contrary view was that the draft instrument should apply not only to the contract of carriage but also to related contracts, particularly those contracts that might be entered into for the execution of the contract of carriage. It was suggested that, without taking a stand as to whether such contracts related to the contract of carriage were covered by the draft instrument, the approach in draft article 13(1)(c) was in keeping with the position adopted in most courts that when the container was provided by the carrier, it should be qualified as part of the ship’s hold, and that the same obligation that the carrier had for the ship and the care of the holds should apply to those containers once the containers were loaded on board a ship. It was also noted that this approach was in keeping with draft article 1(j) definition of “goods” to include any “container not supplied by or on behalf of the carrier or a performing party”.

153. After discussion, the Working Group agreed that the carrier’s obligation of due diligence in respect of seaworthiness should be a continuing one, and that all square brackets in draft article 13(1) should thus be removed, and the text in them retained. The Working Group also requested the Secretariat to make the necessary changes to subparagraph (b) to ensure that this obligation was understood to be of a continuing nature. It was also agreed that making this

obligation a continuing one affected the balance of risk between the carrier and cargo interests in the draft instrument, and that care should be taken by the Working Group to bear this in mind in its consideration of the rest of the instrument.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Paragraph 1

58. A proposal was made to delete subparagraphs (b) and (c) of draft article 16(1) for the reason that the substance of both subparagraphs was already encompassed by subparagraph (a) which referred to making and keeping the ship seaworthy. However, support was expressed for maintaining separate subparagraphs. It was said that the formulation set out in subparagraphs (a), (b) and (c) represented the approach long taken in the Hague Rules and the Hague-Visby Rules. The only change that had been made was to render the carrier's obligation of a continuing nature, that is, one that applied throughout the voyage, rather than only before it started. It was cautioned that any departure from those well-known standards of due diligence could create problems in interpretation.

Conclusions reached by the Working Group regarding paragraph 1 of draft article 16

59. The Working Group agreed that the paragraph (1) of draft article 16 as set out in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 15. Specific obligations applicable to the voyage by sea

50. It was pointed out that, by making the carrier's obligation to provide a seaworthy ship a continuous one, the draft convention had made a significant step as compared to the Hague-Visby Rules, where such obligation only applied up to the beginning of the voyage. There was very wide support for the draft article, which was said to reflect the Working Group's recognition that present technological developments warranted a modernization of principles on responsibility. It was also noted, at the same time, that such a result had been the subject of some controversy and had only been achieved as a result of the spirit of compromise of those who had initially advocated the retention of the traditional rules on seaworthiness of the Hague-Visby Rules.

51. The Working Group approved the substance of draft article 15 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 15. Specific obligations applicable to the voyage by sea

59. The view was expressed that the draft article represented a significant increase in the carrier's liability, as it made the obligation to provide a seaworthy ship a continuing one rather than limiting it to the time before and at the beginning of the voyage by sea. The Commission took note of that view and of the countervailing view, for which there was some support, that the draft article still set the carrier's liability at a low standard, as it contemplated only an obligation to exercise due diligence to make the ship seaworthy, rather than a firm obligation to provide a seaworthy ship. In that connection, there was not sufficient support for a proposal to qualify the carrier's due diligence obligations to provide a seaworthy ship by including a reference to "prevailing standards of maritime safety".

60. It was noted that, as currently worded, draft article 15 seemed to suggest that a container might be regarded as an intrinsic part of the ship, which in most situations was not the case. In order to avoid misunderstanding, it was proposed to replace the words "including any containers" with the words "and any containers" in subparagraph (c) of the draft article, and to make the necessary grammatical adjustments in the provision. The Commission accepted that proposal.

61. In connection with the same provision, it was pointed out that, at its twenty first session, the Working Group had agreed to add references to "road or railroad cargo vehicle" in those provisions that mentioned containers, pallets and similar articles used to consolidate goods, where such addition was required by the context. Those additional words, it was suggested, should also be added to subparagraph (c) of draft article 15. However, the Commission did not accept that proposal, which was considered to be of little practical relevance in the context of the provision in question, as it was regarded as highly unlikely that a carrier would also supply a "road or railroad cargo vehicle" for the purpose of the voyage by sea.

62. The Commission approved the substance of draft article 15 and referred it to the drafting group.

Article 15. Goods that may become a danger

Notwithstanding articles 11 and 13, the carrier or a performing party may decline to receive or to load, and may take such other measures as are reasonable, including unloading, destroying, or rendering goods harmless, if the goods are, or reasonably appear likely to become during the carrier's period of responsibility, an actual danger to persons, property or the environment.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(d) Paragraph 5.3

128. The attention of the Working Group was drawn to the existence of rules regarding the transport of dangerous goods under other unimodal transport conventions such as COTIF, CMR and CMNI. In the context of door-to-door transportation, the interplay between the draft instrument and those conventions would need to be further studied.

129. With respect to the substance of draft article 5.3, support was expressed in favour of the principles on which the provision was based. A widely shared view was that a distinction might need to be drawn in the draft article according to whether or not the carrier had been informed about the nature of the goods. It was suggested that the scope of the provision might need to be restricted to circumstances where a specific danger resulted from the transport of certain goods or the carrier had not been informed of the dangerous nature of the goods. However, other delegations expressed the contrary view that regardless of knowledge, for safety reasons, the carrier should have a right to destroy the goods if necessary. Another suggestion was that the provision should deal with the issue of the possible compensation owed by the shipper to the carrier for the additional costs involved in the handling of the goods in the circumstances envisaged under draft article 5.3. Yet another suggestion was that the text of the draft article would need to indicate more clearly its relationship with the carrier's obligations to maintain the vessel as seaworthy under draft article 5.4. It was stated that the text of draft article 5.3 would also need to include safeguards against unjustified actions by the carrier. A concern was expressed that, as presently written the draft provision might be misleading, especially in view of the reference to draft article 5.3 included in draft article 6.1.3(x) providing for exclusions of liability of carrier. It was stated that a difficulty arose because the combined draft provisions attempted to deal at the same time with the right of the carrier to destroy the goods (without distinction according to whether or not the carrier knew of the dangerous nature of the goods) and with the obligations and liabilities of the shipper. It was stated that those issues were better dealt with in article 13 of the Hamburg Rules.

130. After discussion, the Working Group generally agreed that the text of draft article 5.3 required further improvement. As an alternative to the current text of the provision, the Secretariat was requested to prepare a variant based on the principles expressed in article 13 of the Hamburg Rules regarding the powers of the carrier in case of emergency arising in the transport of dangerous goods. It was also agreed that the issue of compensation that might be owed to the carrier or the shipper in such circumstances might need to be further discussed in the context of draft article 7.5.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 15. Goods that may become a danger

55. The Working Group recalled that the concept of “an illegal or unacceptable danger” to the environment that appeared in the text in A/CN.9/WG.III/WP.56 had been changed to refer to a “danger to the environment” as an effort to introduce a more objective standard for the carrier to apply in respect of goods that might become a danger. However, it was said that that formulation might set a lower standard than the standard that applied under other international maritime conventions and might make it too easy for the carrier, for example, to find a justification for destroying the goods. Notwithstanding a suggestion to revert to the language contained in A/CN.9/WG.III/WP.56 by restoring the words “an illegal or unacceptable danger” to the environment, the Working Group recalled that that formulation had been rejected for the reason that it would be difficult for the carrier to judge when a danger to the environment was “illegal” or “unacceptable” under the laws of the various jurisdictions in which carriers operated. Instead, it was proposed that the word “reasonably” be inserted before the words

“appear likely to” to introduce an objective standard against which a decision by the carrier to destroy allegedly dangerous goods could be measured.

56. A suggestion was made to add the words “and security of any country” at the end of draft article 15 to deal with matters that might not affect persons or goods but would nevertheless impact adversely on a country’s general security. That proposal did not receive sufficient support.

Conclusions reached by the Working Group regarding draft article 15

57. The Working Group agreed that the word “reasonably” be added before the words “appear likely to” in the text in draft article 15 as set out in A/CN.9/WG.III/WP.81. Subject to that amendment, the Working Group was in agreement that the text of draft article 15 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

52. The draft article did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 16. Goods that may become a danger

63. A proposal was made to limit the carrier’s rights under draft article 16 by providing that the carrier could take any of the measures contemplated in the draft article only if it was not aware of the dangerous nature of the goods. The carrier, it was further suggested, should also be required to explain the reasons for taking any of those measures and to show that the actual or potential danger posed by the goods could not have been averted by less drastic measures than the ones actually taken.

64. There was not sufficient support for those proposals. On the one hand, it was felt that requiring the carrier to justify the reasons for any measures taken under the draft article was unnecessary, as the carrier would be required to do so in court in case the measures were challenged by the cargo interests. On the other hand, it was pointed out that draft articles 16 and 17 were important to confirm the carrier’s authority to take whatever measures were reasonable, or even necessary, under the circumstances to prevent danger to persons, property or the environment. The carrier did not enjoy unlimited and uncontrolled discretion under draft article 16, which merely made it clear that measures reasonably taken by the carrier to avoid danger posed by the goods did not constitute a breach of the carrier’s obligations to care for the goods received for carriage. However, the carrier’s release of liability under draft article 18, subparagraph 3 (o), was not an absolute one as, in any event, the measures taken by the carrier under draft articles 16 and 17 were subject to the standard of reasonableness stated in those provisions and otherwise inherent to the carrier’s duty of care for the cargo under the draft Convention. It was also said that limiting the carrier’s rights under the draft article to situations where the carrier could prove that it was not aware of the dangerous nature of the goods would

be tantamount to shifting the risk of carrying dangerous goods from the shipper to the carrier, a result which should not be condoned in the draft Convention.

65. The Commission approved the substance of draft article 16 and referred it to the drafting group.

Article 16. Sacrifice of the goods during the voyage by sea

Notwithstanding articles 11, 13, and 14, the carrier or a performing party may sacrifice goods at sea when the sacrifice is reasonably made for the common safety or for the purpose of preserving from peril human life or other property involved in the common adventure.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(f) Paragraph 5.5

137. Questions were raised as to the need and purpose of draft article 5.5, including its relationship with chapter 15, which dealt with general average.

138. It was stated that draft chapter 15 referred to the adjustment of general average and to the applicability of contractual rules dealing with details for such adjustment, whereas draft article 5.5 expressed a general principle of law, which, on the one hand, expressed the rule generally recognized in legal systems that the sacrifice of property of others was justified in certain circumstances and, on the other hand, provided a juridical basis for general average as dealt with in draft chapter 15. It was argued that the expression of that principle, notwithstanding possible drafting improvements, was useful since it might facilitate the operation of the York-Antwerp Rules (1994) on general average. It was further stated that draft article 5.5 provided an exception (in addition to the one stated in draft article 5.3) to the duty of care as specified in the other provisions of draft chapter 5. Various statements were made that draft article 5.5 was consistent with the promotion of safety at sea.

139. However, strong objections were raised against the draft article, both as regards its overall approach, the principles it expressed as well as to its drafting. Some of those criticizing the draft provision considered that it should be deleted, while others were of the view that the Working Group should improve the wording of the draft provision and retain it, whether in its present place or by connecting it with draft article 15.

140. It was considered that draft article 5.5 established a new power, which so far had not been expressed in legal texts of a similar nature, without clarifying and circumscribing the limits of the power. It was considered that general average was a traditional and well-established legal concept and that it was inappropriate to add to it a sweeping legal provision such as the one in draft article 5.5. Moreover, draft article 5.5 went beyond the traditional concept of general average (in particular because it was not restricted by the notion of peril endangering the common adventure at sea), was unjustifiably favourable to the carrier and also that draft article 15 (which was closely based on article 24 of the Hamburg Rules) was

sufficient to deal with the situations where the carrier had to sacrifice goods for the common safety of a common maritime adventure.

141. By way of explanation it was said that if the sacrifice of goods was caused by unseaworthiness of the vessel and if a causal link was established between the unseaworthiness and the need for sacrifice, the carrier would be liable. However, it was said in reply that the draft article placed the cargo owner in a difficult position given the liability provision in draft article 6.1.3 (according to which the carrier was presumed not to be at fault for loss or damage to goods); in particular the burden of proof that the cargo owner had to discharge was difficult.

142. It was noted that the draft article did not refer to the preservation of the vessel or the cargo from a common peril, which was an essential element of a general average situation. Such incomplete treatment of the right to sacrifice goods was said to be undesirable and might lead to unpredictable consequences. It was also not clear, as a matter of drafting, what the relationship was between the draft article and draft article 15. Moreover, it was reported that the York-Antwerp Rules (1994) were under consideration for a possible revision, which was said to be a further reason against including untested legislative provisions in the draft instrument. It was said that, as a matter of drafting approach, it was preferable to positively state duties of care of the carrier (and combine those duties with presumptions of non-liability) and that it was less desirable to positively state a right to disregard a duty of care. In any case, if any general principles were to be required regarding general average, it was said to be preferable to deal with them in the context of draft article 15.

143. After considering the differing views, it was noted that the Working Group was divided between those who favoured the elimination of draft article 5.5 and those that preferred it to be kept. Those that favoured keeping the provision considered that it was in need of further study and clarification (as the discussion had indicated). As an indication that the Working Group was not in a position to decide whether to keep the draft provision and an indication that further consideration of its substance and drafting was necessary, the Working Group decided to place the draft article between square brackets.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

154. The Working Group next turned its attention to draft article 13(2) of the draft instrument with respect to the carrier's sacrifice of goods for the common safety or for the preservation of other property. Support was expressed for the view that this provision should be retained in its current form and location in the draft instrument, and that the square brackets surrounding it should be removed. It was suggested that this provision set out a necessary exception to the carrier's general duty of care that had long been recognized and accepted. It was further suggested that the provision contained adequate safeguards for cargo interests, since any decision to sacrifice goods had to be reasonably made for the common safety or for the preservation of property. Another view was expressed that the inclusion of this provision could assist in redressing the shift in the allocation of risk that resulted from the continuing seaworthiness obligation in draft article 13(1). One refinement proposed to the wording of draft article 13(2) was that it should also refer to the protection of human life, while another refinement proposed was to make explicit a reference to imminent peril.

155. Support was also expressed for the view that draft article 13(2) should be deleted in its entirety. It was observed that that provision differed markedly from article IV.6 of the Hague and Hague-Visby Rules with respect to the disposal of dangerous goods and should not be retained. It was also suggested that the sacrifice of goods was already adequately covered by the general average provisions in chapter 17 of the draft instrument, and by the general duty of care of the carrier.

156. Concerns were expressed with respect to the interaction of draft article 13(2) with the general average provisions in chapter 17 of the draft instrument, particularly since draft article 13(2) did not refer to the preservation of the vessel or the cargo from imminent peril, which was an essential element of general average. Support was expressed for the proposal that if draft article 13(2) was retained, it should be moved to the chapter on general average, but that care should be taken not to prejudice or alter the rules on general average. Additional support was expressed for the view that the square brackets around draft article 13(2) should be maintained.

157. Given the level of support expressed for the rule, the Working Group decided to maintain draft article 13(2) in square brackets in its current location, with a view to considering at a later stage whether it should be moved to chapter 17 on general average. The Secretariat was also requested to consider drafting suggestions to include in the provision references to the preservation of human life and to the presence of imminent danger.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Paragraph 2

60. The Working Group recalled that it had previously approved the substance of paragraph 2 but that the location of the paragraph was still to be determined. It was noted that the purpose of draft article 15, which focussed on destroying or rendering harmless dangerous goods, was entirely different from the purpose of draft article 16, paragraph 2, whereby goods not necessarily of a dangerous nature were sacrificed in the interests of common safety.

61. Some support was expressed for including paragraph 2 in chapter 17 on general average if that chapter were to be retained in the final text of the draft convention. A suggestion was made to place the paragraph in the article on deviation if the chapter on general average were ultimately not retained. It was pointed out that although the exercise of the rights under paragraph 2 by the carrier might give rise to claims in general average in some cases, it would not do so in all cases. Thus it was said that it might be more appropriate to place the text in paragraph 2 in a separate article. That proposal was supported.

Conclusions reached by the Working Group regarding paragraph 2 of draft article 16

62. The Working Group agreed that the text contained in paragraph 2 of draft article 16 and set out in A/CN.9/WG.III/WP.81 was acceptable, that the square brackets should be deleted and the text therein be retained in a separate article, possibly numbered as article 16 bis.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

53. There was not sufficient support for a suggestion to re-insert the phrase “or inland waterways” following the phrase “at sea” in the draft article. Accordingly, the Working Group approved the substance of draft article 17 and referred it to the drafting group. One delegation renewed its concerns regarding draft article 17 and its relationship with draft article 87.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 17. Sacrifice of the goods during the voyage by sea

66. The Commission approved the substance of draft article 17 and referred it to the drafting group.

CHAPTER 5.

LIABILITY OF THE CARRIER FOR LOSS, DAMAGE OR DELAY

Article 17. Basis of liability

1. The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, if the claimant proves that the loss, damage, or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility as defined in chapter 4.
2. The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18.
3. The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:
 - (a) Act of God;
 - (b) Perils, dangers, and accidents of the sea or other navigable waters;
 - (c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;
 - (d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person referred to in article 18;
 - (e) Strikes, lockouts, stoppages, or restraints of labour;
 - (f) Fire on the ship;
 - (g) Latent defects not discoverable by due diligence;
 - (h) Act or omission of the shipper, the documentary shipper, the controlling party, or any other person for whose acts the shipper or the documentary shipper is liable pursuant to article 33 or 34;
 - (i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;
 - (j) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
 - (k) Insufficiency or defective condition of packing or marking not performed by or on behalf of the carrier;
 - (l) Saving or attempting to save life at sea;
 - (m) Reasonable measures to save or attempt to save property at sea;

- (n) Reasonable measures to avoid or attempt to avoid damage to the environment; or
 - (o) Acts of the carrier in pursuance of the powers conferred by articles 15 and 16.
4. Notwithstanding paragraph 3 of this article, the carrier is liable for all or part of the loss, damage, or delay:
- (a) If the claimant proves that the fault of the carrier or of a person referred to in article 18 caused or contributed to the event or circumstance on which the carrier relies; or
 - (b) If the claimant proves that an event or circumstance not listed in paragraph 3 of this article contributed to the loss, damage, or delay, and the carrier cannot prove that this event or circumstance is not attributable to its fault or to the fault of any person referred to in article 18.
5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:
- (a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried, or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods; and
 - (b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.
6. When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

44. In respect of draft article 6.1.1 regarding the liability of the carrier, there was strong support for the view that the basis for liability should be the fault committed by the carrier rather than a strict liability. In respect of the exceptions to the liability as set out in article 6.1.2, it was noted that the exceptions to liability resulting from error in navigation or management of the ship (paragraph (a)) or from fire on the ship, unless caused by the fault or privity of the carrier (paragraph (b)) expressly created grounds for exoneration of the carrier by way of a deeming provision. A strong argument was made that, given that a central aim of the draft instrument was modernisation, the exemption from liability for errors in navigation or management in the ship was out of date, particularly in light of other conventions dealing with other modes of carriage, which did not include such an exemption. However, in opposition to the suggested deletion of draft article 6.1.2, a view was that marine transport did raise unique concerns and that deletion of such an existing cause of exemption might have economic impact on the parties. An argument for retention of the defence was made on the basis that it was not appropriate to compare sea with road, rail and air transport, notwithstanding technological advancements on vessel security and monitoring of vessels at sea. In respect of the exception relating to fire, some support was expressed for its retention, possibly in a form more closely

based on the approach taken in the Hague-Visby Rules, namely that the fire be on the vessel unless caused by the actual fault or actual privity of the carrier. It was observed, however, that the circumstances where fire should be considered as a cause for exoneration of the carrier, i.e., where it was the result of an action of the shipper or an inherent defect of the goods, was sufficiently covered under draft article 6.1.3(iii) and (vi).

45. With respect to the relative exceptions to the liability of the carrier listed in draft article 6.1.3, the Working Group noted that the draft provision was based on the Hague Rules. There was no consensus on whether the exceptions should be treated as exonerations from liability or whether they should be presumptions only. Nor was a consensus achieved as to the specific elements of the list. Doubts were expressed, in particular, with respect to the acceptability of the new exceptions contained in subparagraphs (ix) and (x) of the draft provision, which might need to be further considered in light of the decisions to be made with respect to the possibility to determine by contract the beginning or the end of the period of responsibility of the carrier. It was agreed that the draft provision would need to be discussed extensively at a later stage.

46. With respect to draft article 6.1.4, some preference was expressed in favour of the second alternative wording, which was said to be more reflective of a balanced approach to the obligations of the carrier and the shipper.

47. The Working Group decided that the general discussion of the issues of liability should be reopened at a future session on the basis of draft articles 4, 5 and 6 after more extensive consultations had taken place.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

(a) Subparagraph 6.1.1

30. It was noted that draft article 6 constituted the core rule of liability for carriers and should be read with draft articles 4 and 5 (which were also relevant in defining the carrier's obligations) and draft article 7 of the draft instrument (since draft article 6 mirrored the provisions regarding the shipper's obligations). It was also noted that paragraph 6.1 contained two types of exceptions to the liability of carrier as set out in subparagraphs 6.1.2 and 6.1.3. It was clarified that even if the carrier had acted in accordance with its obligations under draft article 5, for example by exercising due diligence as required under draft article 5.4, this would not necessarily mean that the carrier bore no fault under draft article 6.1. If, however, the carrier breached its obligations, for example under draft article 5.2.1 or 5.4, then this would constitute fault and the burden of proof would fall on the carrier to prove that there was no fault (if a prima facie case could be made).

31. Support was expressed for the content of subparagraph 6.1.1 and the requirement of fault-based liability on the carrier, namely that the carrier was liable unless it proved that the loss, damage or delay was not its fault nor that of any person referred to in subparagraph 6.3.2(a). It was suggested that subparagraph 6.1.1 was closer in substance to the approach taken in article 4.2(q) of the Hague and Hague-Visby Rules than the approach taken in article 5.1 of the Hamburg Rules, which required that the carrier proved that it, its servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences. However, there was some criticism that the reference to the "period of the carrier's

responsibility as defined in article 4” would allow the carrier to restrict its liability to a considerable extent. Some concern was expressed as to why it had been considered necessary to deviate from the language used in the Hamburg Rules. A suggestion was made that the basis of liability should be simplified by abolishing the standard of due diligence and replacing it with liability stemming from use of the vessel as such. It was suggested that the reason for the difference in wording from both the Hague Rules and the Hamburg Rules was to improve and provide greater certainty (e.g., as to the fact that the liability of the carrier was based on presumed fault, a matter that had required clarification by way of the common understanding adopted by the drafters of the Hamburg Rules). A contrary view was that combining different languages from both the Hague and Hamburg Rules might increase uncertainty as it was not clear how the provision would be interpreted.

32. It was stated that, whilst a higher standard of liability had been adopted in instruments dealing with other modes of transport (such as COTIF), a higher standard would not be acceptable in the maritime context. In this regard, support was expressed for features in addition to draft article 6.1, such as draft article 5, which set out the positive obligations of the carrier. It was noted that, if the draft instrument were to apply on a door-to-door basis, conflict with unimodal land transport conventions (such as COTIF and CMR) would be inevitable given that both imposed a higher standard of liability on the carrier. However it was suggested that these conflicts could be reduced by adopting suitable wording in draft article 6.4 as well as the language used in respect of the performing carrier. More generally, doubts were expressed as to whether default liability rules applicable in the context of door-to-door transport should be based on the lower maritime standard instead of relying on the stricter standard governing land transport.

33. In response to a question regarding the relationship between draft articles 5.2, 5.4 and 6.1.1, it was noted that if the carrier proved that the event that caused or contributed to the loss, damage or delay did not constitute a breach of its obligations under draft articles 5.2 and 5.4, it would be assumed not to be at fault.

34. Strong support was expressed for the substance of subparagraph 6.1.1. After discussion, the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made, and also to the need for consistency between the various language versions.

(b) Subparagraph 6.1.2

35. It was recalled that subparagraphs (a) and (b) set forth the first two of the traditional exceptions to the carrier’s liability, as provided in the Hague and Hague-Visby Rules. It was also recalled that there was considerable opposition to the retention of either. As regards subparagraph (a), it was pointed out that there was little support for the “management” element, which was simply productive of disputes as to the difference between management of the ship and the carrier’s normal duties as to care and carriage of the goods. It was also pointed out that a similar exception to the carrier’s liability based on the error in navigation existed in the original version of the Warsaw Convention and had been removed from the liability regime governing the air carriage of goods as early as 1955 as a reflection of technical progress in navigation techniques. It was widely felt that the removal of that exception from the international regime governing carriage of goods by sea would constitute an important step towards modernizing and harmonizing international transport law. It was emphasized that such

a step might be essential in the context of establishing international rules for door-to-door transport.

36. A view was expressed by a number of delegations that the general exception based on error in navigation should be maintained since, should it be removed, there would be a considerable change to the existing position regarding the allocation of the risks of sea carriage between the carrier and the cargo interests, which would be likely to have an economic impact on insurance practice. A related view was that, although it was probably inevitable to do away with the general exception based on error in navigation, subparagraph (a) should be maintained in square brackets pending a final decision to be made at a later stage on what was referred to as “the liability package” (i.e., the various aspects of the liability regime applicable to the various parties involved). After discussion, however, the Working Group decided that subparagraph (a) should be deleted.

37. With respect to subparagraph (b), strong views were expressed for the deletion of the traditional exception based on fire on the ship. It was pointed out that, as currently drafted along the lines of the Hague and Hague-Visby Rules, the exception would impose an excessive burden of proof on the shipper, since in most practical cases, it would be impossible for the shipper to prove that fire had been caused by the fault or privity of the carrier. As to the need to cover the situation where fire had been caused by the cargo itself, it was suggested that the issue might be sufficiently taken care of in the context of subparagraph 6.1.3.(vi) (“any other loss or damage arising from inherent quality, defect or vice of the goods”). However, the view was also expressed that further consultations with the industry were needed in order to assess the impact of the deletion of that exception on the general balance of liabilities in the draft instrument. Several delegations also supported the retention of subparagraph (b), as drafted. After discussion, the Working Group did not reach consensus on the deletion of subparagraph (b) and decided to maintain it within square brackets, subject to continuation of the discussion at a later stage.

(c) Subparagraph 6.1.3

38. The Working Group engaged in a general discussion of subparagraph 6.1.3, without entering into a review of each of the elements listed in subparagraphs (i) to (xi), which would be further considered after more discussion had taken place about the ways in which the draft instrument would address the issues of door-to-door transportation. It was recalled that subparagraph 6.1.3 was based on article 4.2 of the Hague and Hague-Visby Rules, which listed situations where the carrier was excused from liability for loss of or damage to the goods, generally for the reason that such loss or damage resulted from events beyond the control of the carrier. It was also recalled that, subparagraph 6.1.3 presented not only a modified but also a somewhat extended version of the excepted perils of the Hague and Hague-Visby Rules, in particular through the inclusion of exceptions that arose from circumstances under the control of the carrier.

39. Doubts were expressed by a number of delegations regarding the need for including such a list in the draft instrument in view of the general principle embodied in subparagraph 6.1.1, under which the carrier’s liability was based on fault. It was stated that such a catalogue could not provide an exhaustive list of those incidents that could occur during transport and possibly diminish the liability of the carrier. It was pointed out that texts such as the UNCTAD/ICC Rules contained no such list and that it would be more satisfactory to refer to

exonerations of the carrier's liability in cases involving force majeure or other circumstances that were inevitable and unpredictable in nature, damage resulting from inherent vice of the goods or fault of the shipper or of the consignee. The prevailing view, however, was that, although it might be superfluous in certain legal systems, such a list should be retained in view of the useful role it would play in many legal systems in preserving the existing body of case law. It was pointed out that the complete deletion of the catalogue might be taken by judges inexperienced in maritime law as indicating an intention to change the law. It was said that even if the list was not needed in some countries, it was useful in others and did no harm in those countries that did not need it. It was also pointed out that the approach taken in a set of mandatory rules such as those contained in the draft instrument could not rely on party autonomy as heavily as in contractual rules such as the UNCTAD/ICC Rules.

40. Regarding the structure of the list, a suggestion was made that it could be rationalized by grouping those situations where exoneration stemmed from events under the control of the carrier and those circumstances that were beyond the control of the carrier. In that context, serious doubts were expressed by a number of delegations as to whether circumstances under the control of the carrier should give rise to exonerations. Another suggestion was that subparagraph 6.1.3 should be phrased in the form of an illustrative list and not of a prescriptive provision.

41. Regarding the manner in which the carrier would avoid liability, it was pointed out that the excepted perils under subparagraph 6.1.3 appeared only as presumptions, and not as exonerations as in article 4.2 of the Hague and Hague-Visby Rules. The Working Group heard conflicting views as to whether the excepted perils should be retained as exonerations from liability or whether they should appear as presumptions only. In favour of adopting the presumption approach, it was stated that certain events were typical of situations where the carrier was not at fault; and that it was justifiable, where the carrier proved such an event, for the burden of proof to be reversed. However, in favour of maintaining the traditional exoneration approach, it was pointed out that not all of the perils listed in the subparagraph could be interpreted as applicable only where the carrier has not been negligent in incurring the excepted peril. For example, an "Act of God" and a peril of the sea could be defined as acts occurring without a carrier's negligence in circumstances that could not reasonably have been guarded against. To define them for a "presumption" regime without reference to absence of fault was not easy. New definitions might have to be evolved, referring only to serious external events that could raise a (rebuttable) presumption of non-liability. Such a process might involve loss of existing case law in some jurisdictions. Those two excepted perils had been listed in square brackets since they would not fit well in a presumption-based regime and it seemed likely that situations that might attract either of them could fairly easily be dealt with under the basic rule of subparagraph 6.1.1. The Working Group deferred a final decision as to whether the circumstances listed under subparagraph 6.1.3 would be treated by way of presumptions or by way of exonerations until such time as it had reviewed the contents of the individual subparagraphs (i) to (xi) and the drafting of the entire provision had been considered in more detail. In the context of that discussion, it was pointed out that, since exonerations were subject to proof being given of the carrier's fault, the difference between the presumption approach and the exoneration approach might be very limited in practice.

42. A concern was expressed that, as currently drafted, the chapeau of subparagraph 6.1.3 insufficiently addressed those cases where the carrier proved an event listed under

subparagraph 6.3.1 but there was also an indication that the vessel might not have been seaworthy. The shipper would then actually have the burden of proving unseaworthiness. This was believed to be inconsistent with subparagraph 6.1.1 and it was suggested that it might be preferable to treat the events listed as exonerations if, at the same time, the words “has been caused by one of the following events” could be replaced by “has been caused solely by one of the following events”. It was also suggested that the words “or contributed” should be deleted. Those suggestions were noted with interest.

43. Although no discussion took place regarding the individual subparagraphs (i) to (xi), the Working Group heard various suggestions and concerns in respect of those provisions. As a matter of drafting, it was suggested that the case of fire on the ship, should it be maintained under subparagraph 6.1.2, might need to be relocated under subparagraph 6.1.3. Regarding the substance of the provision, one suggestion was that the reference to quarantine restrictions should be deleted. Another suggestion was that, in view of the deletion of subparagraph 6.1.2(a), a new element should be listed in subparagraph 6.1.3, based on “compulsory pilotage”. While some support was expressed for exonerating the carrier from liability where it had been placed under an obligation to use possibly incompetent pilotage, the prevailing view was that reliance on pilotage should not exonerate the carrier from its liability, since the pilot should be regarded as assisting the carrier. Although the carrier might indeed be faced with compulsory pilotage or other rule imposed by port authorities, for example with regard to mandatory loading or unloading of goods, it would be unfair to burden the shipper with the consequences of such obligations, since the carrier, unlike the shipper, was actually involved and maintained control of such situations. It was pointed out that exonerating the carrier and creating a recourse against the pilot or any other provider of services to the carrier (mention was made of ice-breaking services) would inappropriately depart from established practice and unduly interfere with the contractual arrangements between the carrier and its suppliers of services. After discussion, the Working Group decided not to create any additional exception under subparagraph 6.1.3 at the current stage, on the grounds that the general rule expressed in subparagraph 6.1.1 sufficiently addressed those situations that were not expressly addressed in subparagraph 6.1.3.

44. Consistent with the view that events under the control of the carrier should not give rise to exonerations, concerns were expressed regarding the appropriateness of including subparagraphs (ix) and (x). It was observed that the discussion of those issues could be reopened in the context of a detailed discussion of subparagraphs (i) to (xi).

45. The Secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of the provision.

(d) Subparagraph 6.1.4

46. Subparagraph 6.1.4 presented the Working Group with two alternative texts with respect to concurrent causes of loss, damage or delay in delivery. The first alternative provided that, where the loss, damage or delay in delivery was caused by two events but the carrier was liable for only one of those events, the carrier was liable for the entire loss, except to the extent that it proved that the loss was caused by an event for which it was not liable. The second alternative stated that, where the loss, damage or delay in delivery was caused by two events, and the carrier was only liable for one of them, the carrier and the party seeking recovery for the loss shared the burden of showing the cause of the loss. The second alternative also

provided a fall-back provision to cover the rare situation where adequate proof was lacking, by providing that in these circumstances the two parties would share the loss in equal parts.

47. The Working Group discussed the text of the alternatives with respect to substance and form, focusing their interventions on general legislative policies.

48. While several views were expressed that either option was acceptable, and that the differences between the two options were largely irrelevant, strong support was expressed for the first alternative set out in subparagraph 6.1.4. It was noted that the first alternative was very clear and precise, and envisaged complete liability on behalf of the carrier, while leaving the carrier open to prove that it was not liable for the event causing the loss, damage or delay in delivery.

49. However, there was also strong opposition to the first alternative. A perceived problem with the first alternative was described as very serious. While this alternative was patterned after article 5.7 of the Hamburg Rules, it was suggested that it would not operate in the same fashion, due to the presumption of the absence of carrier fault in article 6.1.3 of the draft instrument, which could result in uncertainty regarding the interaction of draft articles 5 and 6.

50. It was pointed out that the second alternative better dealt with the situation where two concurrent causes resulted in the loss, yet the carrier was responsible for only one of the causes. For example, if the loss was due to both insufficient packing and improper handling of the goods, the first alternative would place the entire burden on the carrier to prove the allocation of loss between the two causes. In contrast, the second alternative would have both parties bear the burden of showing causation.

51. It was further argued that the second alternative was preferable given the Working Group's decision to eliminate error in navigation from the carrier's list of exemptions in subparagraph 6.1.2(a). In most cases of loss, the argument would be made that error in navigation contributed to the loss, which would be difficult for the carrier to disprove. Under the second alternative, if error in navigation were alleged, the cargo owner would bear the burden of proving it as a cause and its extent, and where it was impossible to allocate the cause, the loss would be shared equally. Thus, the heart of the second alternative was a shared burden of proof.

52. However, it was suggested that the second alternative was simplistic in its treatment of the situation where no evidence on the overall apportionment could be established, and the carrier would be liable for one-half of the loss. Concern was expressed that the basic rule regarding burden of proof had already been set out in subparagraphs 6.1.1, 6.1.2 and 6.1.3, and that the second alternative in subparagraph 6.1.4 appeared to reverse this regime. The suggestion was made that the second alternative as a whole had no parallel in any existing international or national regime for the carriage of goods by sea, and that it would substantially change the risk allocation between carrier and cargo interests. While it was conceded by proponents of the second alternative that this text did shift the burden of proof in favour of the carrier, it was argued that this was a policy choice which was especially appropriate in light of the abandonment of the error in navigation defence.

53. The issue of overriding obligations was raised in the Working Group in conjunction with the discussion of subparagraph 6.1.4. The example was given of the case where the combined causes of the loss were that of inherent vice in the goods, and of unseaworthiness of

the vessel. It was suggested that until it was clear whether the obligation of seaworthiness in article 5.4 of the draft instrument was an overriding obligation, it was not possible to allocate the causes for the loss. Opposing views were expressed that subparagraph 6.1.4 should be maintained in order to avoid the doctrine of overriding obligations, and that the doctrine itself did not exist in many legal systems. A further view was that it was questionable whether subparagraph 6.1.4 eliminated the doctrine of overriding obligations. If this was not the case, subparagraph 6.1.4 should make that position clear, for instance by commencing with the words “Without prejudice to draft article 5.1.4”.

54. While some delegations questioned whether it was necessary to envisage a special text on the issue of shared liability or contributing cause, it was widely felt that the apportionment of liability was an important issue that should be dealt with in the draft instrument. It was emphasised that most transport conventions contained such a clause governing the allocation of liability where loss was due to a combination of causes. It was also noted that the current rules dealing with concurrent causes resulted in an extremely heavy burden of proof on the carrier to prove that part of the loss was caused by an event for which the carrier was not liable. While intermediate solutions could be found to ease this heavy burden, this issue appeared to be ready for unification. However, it was suggested that both alternatives as drafted in subparagraph 6.1.4 were somewhat rigid in their treatment of this issue.

55. Other drafting difficulties were noted in both alternatives presented in subparagraph 6.1.4. Confusion was voiced over the ambiguous nature of the “event”, and whether it was intended to be limited to “cause”, and whether it would be limited to the list of presumptions in subparagraph 6.1.3. It was suggested that further study should be conducted on the issue of apportionment of liability due to a combination of causes of the loss.

56. The first alternative in subparagraph 6.1.4 received the strongest support in the Working Group, and the decision was made to maintain the first alternative in the draft instrument for continuation of the discussion at a later stage. However, the Working Group decided to preserve the second alternative as a note or in the comments to the draft text, to permit further consideration of that alternative at a later stage.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

4. Exemptions from liability, navigational fault, and burdens of proof (draft article 14)

(a) Paragraphs 1 and 2 of draft article 14

86. Information was provided to the Working Group that empirical data were being gathered with respect to the proposal in paragraphs 10 to 12 in A/CN.9/WG.III/WP.34 that the Hague-Visby liability limits should be maintained. It was suggested that the preliminary results of the analysis of containerized imports and exports to the United States, thought to be representative of the kind of goods that would be covered by the draft instrument, indicated that the average value of most cargo shipped was below the Hague-Visby per-package and weight limitations. Further analysis of this information was continuing with a view to presenting more refined results to the Working Group at its thirteenth session, and other delegations were encouraged to obtain relevant data from their domestic trade statistics for the information of the Working Group.

87. By way of general presentation of section III of A/CN.9/WG.III/WP.34 on exemptions from liability, navigational fault and the burdens of proof, the Working Group heard an explanation of the general approach taken. Paragraph 14 of A/CN.9/WG.III/WP.34 discussed whether the defences in draft article 14 of the draft instrument should be treated as exonerations or presumptions. It was suggested that in practice, there was no real difference between the two approaches since under the exoneration system, a carrier's right to rely on an exemption could still be lost if the cargo interests could prove the carrier's fault. It was proposed that the list of "excepted perils" in draft article 14 of the draft instrument should continue to be treated as exonerations in order to achieve greater predictability and uniformity in the application of the defences, given the substantial body of case law that had developed under the existing Hague and Hague-Visby approach. It was further suggested that with respect to the "excepted perils" themselves, the navigational fault defence should be eliminated and that the fire defence should be modified so as to accommodate the door-to-door nature of the draft instrument by limiting its operation to that of a maritime defence (see A/CN.9/WG.III/WP.34, paragraphs 13 and 16-17).

88. By way of further presentation, the Working Group heard the suggestion that a case for cargo damage was, in practice, a four-step process. In the first step, the cargo claimant was required to establish its prima facie case by showing that the cargo was damaged during the carrier's period of responsibility. In that first step, the cargo claimant was not required to prove the cause of the damage, and if no further proof was received, the carrier would be liable for unexplained losses suffered during its period of responsibility. In the second step, the carrier could rebut the claimant's prima facie case by proving an "excepted peril" under article IV.2 of the Hague and Hague-Visby rules, and that that peril was the cause of the damage to the cargo. In step three, the cargo claimant had the opportunity to prove that the "excepted peril" was not the sole cause of the damage, and that the carrier caused some of the damage by a breach of its duty to care for the cargo. Once the claimant had shown that there were multiple causes for the damage, the analysis proceeded to step four, in which liability for the damage was apportioned between the different causes. It was suggested that the first three steps of this approach had worked well since their inception in the Hague Rules, and that this general approach should be preserved in the draft instrument.

89. Finally, the Working Group was cautioned that the elimination of the exception based on navigational error could have unintended consequences. It was suggested that in most cases where goods were lost or damaged at sea, the claimant would generally have a plausible argument that the carrier might have been able to reduce the loss by having made a different navigational decision, and that thus a navigational error had been made. Under the current law, that argument would not succeed because navigational error was listed as an "excepted peril". However, it was suggested that if navigational error was deleted from the list of "excepted perils", as the Working Group had decided it should be, and if the burden of proof was not accordingly adjusted, the carrier would have to prove the apportionment of the cause of the loss, which was considered to be virtually an "insuperable burden". The view was expressed that the practical result would be that the carrier would be fully liable in most cases for all of the damage when there was any navigational fault, and that it could render irrelevant the "excepted peril" provisions in most cases where the damage occurred at sea. (This issue is discussed further in paragraphs 127 and 129 below, regarding the burden of proof.)

90. The Working Group agreed to proceed with its examination of variants A, B and C of draft article 14 as set out in A/CN.9/WG.III/WP.32, first with a discussion on the general approach, next with a discussion of the “excepted perils”, followed by a discussion on the burden of proof, and concluding with a discussion on concurrent causes of loss. Support was expressed for the general approach to draft article 14 outlined in paragraph 88 above. It was also suggested that the Working Group should, in its general discussion, decide on the preferred approach to the issue of the nature of the liability, be it strict or presumed fault or perhaps of another nature. Strong support was expressed for the view that the nature of the liability in draft article 14 should be based on presumed fault. In this regard, strong support was also expressed for the approach taken in the opening paragraph of variant A of draft article 14. In addition, the view was expressed that draft article 14 should not be examined in isolation, but that the balance of the allocation of risk between the parties should be looked at as a whole, and that draft article 13, with respect to the carrier’s obligation of due diligence, should also be examined in this context. The Working Group was in general agreement with the approach that the carrier should be responsible for unexplained losses occurring during its period of responsibility, but that the carrier should then have an opportunity to prove the cause of the damage. In light of this general agreement, it was suggested that it was unnecessary to use potentially charged words such as “fault”, “presumption” and “exoneration” in draft article 14, since they might be misinterpreted. A contrary view was expressed that the word “fault” need not be avoided, since it had been a part of the liability regime from the inception of the Hague Rules, and its meaning was unambiguous and not likely to cause confusion.

91. With respect to the discussion of variants A, B and C of draft article 14, strong support was expressed for variant A. The view was expressed that variant A was more in keeping with the classical approach to the liability of the carrier, and that it more clearly expressed that unexplained losses would remain the responsibility of the carrier. Certain refinements were suggested to the wording of variant A. One suggestion made was that paragraph 1 could be ended after the phrase “chapter 3”, and the rest of the paragraph deleted. The view was also expressed that the reference to article 15(3) in variants A and C was misleading and redundant, and that it should be deleted. There was some support for this suggestion. Another suggestion in this regard was to replace the phrase “person referred to in article 15(3)” with the phrase “performing party”. A further general suggestion was made that draft article 14 could follow the approach taken in existing unimodal transport conventions and start with a basic liability rule, for example, along the lines of “the carrier is liable for loss or damage to the goods occurring during the custody of the goods”, without a specific mention of fault, followed by a paragraph that set out the situations in which the carrier would be relieved from responsibility for the loss or damage.

92. Some support was expressed for variant B of draft article 14, particularly with respect to its treatment of the list of “excepted perils” as exonerations rather than presumptions. The suggestion was made that the overall approach of variant B was most like that in the Hague and Hague-Visby Rules, in that the carrier was not liable at all until the cargo claimant had proved that the loss occurred during the carrier’s period of responsibility, and that the list of “excepted perils” would then be applied, after which the cargo claimant would have an opportunity to rebut those exceptions, and prove that the loss resulted from another cause for which the carrier was liable, such as unseaworthiness. However, concern was expressed that variant B did not clearly express the carrier’s liability at all, and that paragraph 1 thereof stated that “the carrier is relieved from liability” without first having set out the carrier’s liability. The view was

expressed in response that variant B did not need a paragraph comparable to paragraph 1 of variants A and C due to the closing paragraph of variant B.

93. No support was expressed for variant C.

94. As a matter of drafting, concern was expressed with respect to the addition of the phrase “or contributed to” in variants A, B and C in regard to the parties who had “caused or contributed to the loss, damage or delay”. The view was expressed that this phrase suggested that if the carrier was in any way responsible for any portion of the loss, even only 5 per cent of it, then the carrier would be liable for the entire loss. It was proposed that this phrase should be deleted, or that it should be clarified that the carrier was liable only to the extent it had contributed to the loss or damage.

95. The Working Group expressed a preference, on the whole, for the approach taken in variant A of draft article 14.

96. An informal drafting group composed of a number of delegations prepared a redraft of draft article 14, based upon the discussion in the Working Group on variants A, B and C. The text of the first redraft of draft article 14 that was proposed to the Working Group for its consideration was as follows:

“Proposed revision of draft article 14

“1. Subject to paragraph 2, the carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the [shipper] proves that

“(a) The loss, damage, or delay; or

“(b) The occurrence that caused the loss, damage, or delay took place during the period of the carrier’s responsibility as defined in chapter 3.

“2. Subject to paragraph 3, the carrier is relieved of its liability under paragraph 1 if it proves:

“[(i) That it has complied with its obligations under draft article 13.1, or that its failure to comply has not caused the loss, damage, or delay, and]

“(ii) That neither its fault, nor the fault of its servants or agents, [nor the fault of a performing party] has caused [or contributed to] the loss, damage, or delay; or “that the loss, damage, or delay was caused by one of the following events:

“(a) [Fire defence]; or

“(b) ... ; or

“... [Insert all of the remaining items to be included on the list here.]

“3. If the [shipper] proves that the fault of the carrier, or the fault of its servants or agents, [or the fault of a performing party] also contributed to the loss, damage, or delay, then liability shall be apportioned in accordance with paragraph 4. [To the extent that the [shipper] proves that the loss, damage, or delay was caused by a failure of the carrier

“(a) To make [and keep] the ship seaworthy;

“(b) To properly man, equip, and supply the ship; or

“(c) To make [and keep] the holds and all other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) fit and safe for their reception, carriage, and preservation,

“then the carrier is relieved of liability if it proves that it complied with its obligation to exercise due diligence as required under draft article 13.1.]

“4. [Insert provision for apportionment of liability in cases of multiple causation; see draft article 14.3 & footnote 79 in WP.32.]”

97. By way of presentation, the Working Group heard that the proposed redraft of article 14 was not specifically intended to embrace either the exoneration or the presumption approach, but it was observed it was probably closer to a presumption approach. The Working Group also heard that, as redrafted, article 14(1) was substantially the same as paragraph 1 in variants A and C. One minor change was that the word “shipper” had been placed in square brackets in paragraphs 1 and 3 of the redrafted article 14 in order to signal that the term used should be brought into conformity with article 63 of the draft instrument regarding who had a right to sue under the contract of carriage. In contrast to variant A, B or C of the draft instrument, the redrafted article 14(1) clarified which party was required to establish the prima facie case that the loss or damage occurred during the carrier’s period of responsibility. It was further suggested that the redrafted version of article 14(1) was intended to reflect the Working Group’s consensus that the carrier should be held responsible for unexplained losses, and thus included subparagraph (a), for the situation when the cause of the loss was unknown, and subparagraph (b) for the situation where the cause of the loss was known.

98. By way of further presentation, the Working Group heard that redrafted article 14(2) was intended to allow the carrier to prove why it should not be liable, and that subparagraph (ii) included the list of “excepted perils”, while the opening phrase of subparagraph (ii) corresponded to article IV.2.q of the Hague and Hague-Visby Rules. It was stated that, since it was unclear where the obligation with respect to seaworthiness should be placed in the scheme, two alternative approaches were presented: one in subparagraph (i) of redrafted article 14(2), and the other in square brackets in redrafted article 14(3). The treatment of the seaworthiness obligation in redrafted article 14(2) was intended to present it as an overriding obligation, while the treatment of the seaworthiness obligation in redrafted article 14(3) was intended to reflect the alternative that it be treated as another issue to be proved by the cargo claimant, subject to the carrier’s ability to prove its due diligence. Redrafted article 14(3) was intended to cover the step where the cargo claimant could show that the carrier contributed to the loss by proving an additional cause. It was pointed out that, if the cargo claimant was successful in this regard, resort would then be had to redrafted article 14(4) which would deal with the apportionment of the liability for the loss based either upon draft article 14(3) of the draft instrument or on the language in footnote 79 of A/CN.9/WG.III/WP.32.

99. The Working Group welcomed the redrafted version of article 14 as a positive step that might represent a possible way forward. There was general agreement that the text would have to be digested and considered over the next few months prior to the thirteenth session of the Working Group. A view was expressed that a careful assessment of the redrafted provision should be made so as to avoid the imposition of new burdens on the cargo claimant. Another

concern raised was that the traditional way for the cargo claimant to prove that damage had occurred was for the claimant to present a clean bill of lading. However, it was explained that redrafted article 14(1) was intended to provide the cargo claimant with an option, in that subparagraph (a) covered the traditional method of presenting a clean bill of lading, while subparagraph (b) allowed the claimant to prove the occurrence where the damage to the cargo only manifested itself later. It was stated that, although there was a possibility that subparagraph (b) might be redundant, both possibilities (a) and (b) had been included in order to enhance the clarity of the provision.

100. Some requests were made for clarifications to the redraft. Concern was raised that redrafted article 14(1)(b) might not be broad enough to include damage that would take place over a continued period of time, such as damage caused by sea water. It was suggested that the phrase “the occurrence that caused the loss, damage or delay” should be changed to “the loss, damage or delay took place” in redrafted article 14(1)(b) in order to accommodate continuing damage to goods, and so as to make the claimant’s burden of proof more manageable in that the claimant would not have to prove the actual cause of the loss or damage, but only that it occurred during the period of the carrier’s responsibility. There was some support for this view. However, there was also support for the view that the current language in redrafted article 14(3) appropriately and adequately covered the situation of continuing damage. It was also suggested that redrafted article 14(1) did not make it clear whether the presumption of fault of the carrier was the basis for liability. In response, it was clarified that the principles in variant A of draft article 14 were reflected throughout the paragraphs of the redrafted provision, but not in one single paragraph.

101. With a view to maximizing the benefit of consultations that were expected to take place before the thirteenth session of the Working Group, the informal drafting group prepared a second redraft of draft article 14, based upon the discussion in the Working Group on variants A, B and C of article 14 and the first redraft of article 14. The text of the second proposed redraft of draft article 14 submitted to the Working Group for its consideration was as follows:

“Proposed revision of article 14

“1. The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the [shipper] proves that

“(a) The loss, damage, or delay; or

“(b) The occurrence that caused [or contributed to] the loss, damage, or delay

“took place during the period of the carrier’s responsibility as defined in chapter 3, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person mentioned in article [15(3)] caused [or contributed to] the loss, damage, or delay.

“2. [The carrier is not liable under paragraph 1 if [and to the extent] it proves that the loss, damage, or delay was caused by] [It is presumed that neither the carrier’s fault nor that of any person mentioned in article [15(3)] has caused the loss, damage, or delay, if [and to the extent] the carrier proves that the loss, damage, or delay was caused by] one of the following events:

“(a) [Fire]; or

“(b) ...; or

“... [Insert all the remaining items to be included on the lists here.]

“unless [and to the extent] the [shipper] proves that

“(i) The fault of the carrier or a person mentioned in article [15(3)] caused [or contributed to] the event on which the carrier relies under this subparagraph; or

“(ii) Any event other than those listed in this subparagraph contributed to the loss, damage or delay.

“3. To the extent that the [shipper] proves [that there was] [that the loss, damage, or delay was caused by],

“(i) The unseaworthiness of the ship;

“(ii) The improper manning, equipping, and supplying of the ship; or

“(iii) The fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for the reception, carriage, and preservation of the goods,

“then the carrier is liable under paragraph 1 unless it proves that,

“(a) It complied with its obligation to exercise due diligence as required under article 13(1). [; or

“(b) The loss, damage or delay was not caused by any of the facts mentioned in (i), (ii) and (iii) above.]

“[4. In case of concurring causes that each have caused part of the loss, damage or delay, then the court shall determine the amount for which the carrier is liable in proportion to the extent to which the cause attributable to its fault has contributed to the loss, damage or delay.] [The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis.]”

102. By way of presentation of the second redraft of article 14, the Working Group heard that paragraph 1 was an attempt to set out the basic rules with respect to the allocation of the burden of proof between the claimant and the carrier. It was explained that, as with the previous redraft of article 14, the claimant was required to prove that there had been a loss and that the loss could be attributed to the period of the carrier’s responsibility. The underlying approach was that the carrier should be held responsible for unexplained losses. It was observed that paragraph 2 of the second redraft contained two alternatives in square brackets in its chapeau, which reflected the continuing difference of views with respect to whether the “excepted perils” should be treated as exonerations from liability or presumptions of nonliability. The first of these alternatives was intended to reflect the exoneration approach, while the second was intended to reflect the presumption approach. It was further explained that the chapeau of paragraph 3 contained alternative language in square brackets that was intended to reflect a difference of views with respect to whether the claimant was required simply to prove the occurrence of the events in subparagraphs (i), (ii) and (iii), or whether it was necessary to prove that those events caused the loss, damage or delay. It was observed that paragraph 3(b) was in

square brackets to indicate that this language was necessary only if the first alternative in the chapeau of paragraph three was chosen by the Working Group. The Working Group also heard that the informal drafting group had not had sufficient time to consider appropriate language for paragraph 4 and that the text proposed simply represented an attempt to illustrate the alternative views of the Working Group.

103. There was general agreement in the Working Group that, like the first redraft of article 14, no firm decision could be made with respect to this second redraft before further consideration and consultations had taken place. However, a widely shared view was that this second redraft represented an improvement on previous drafts, and that it would be appropriate for the Working Group to use it as a basis for future work on article 14. One drafting observation made with respect to the redrafted article as a whole was that the phrase “shall be liable” and “is liable” were both used, and that consistency should be sought in this regard.

104. In reviewing paragraph 1 of the second redraft of article 14, the view was expressed that the paragraph substantially reflected the approach in variant A of article 14 that was favoured by most delegations. Strong support was expressed in the Working Group for the overall approach taken and the principles reflected in paragraph 1. A concern was raised that the provision was not clear enough with respect to the carrier’s ability to show that it was only partly at fault. There was support for the view that this should be clarified. In response to a suggestion, it was thought that the addition to paragraph 1 of the phrase “to the extent” similar to that in paragraph 2 would not be sufficient to alleviate this concern. In response to a concern with respect to how the claimant would meet its burden of proof in paragraph 1, it was reiterated that the claimant was in the best position to prove the damage and that it occurred during the carrier’s period of responsibility, since the claimant need only prove that the goods were delivered to the carrier in good condition and that the consignee received them in a damaged condition.

105. A few additional drafting changes were suggested with respect to paragraph 1. One proposed change was that the phrase “the carrier proves that neither its fault nor the fault of any person” required proof in negative terms, and that the drafting could be adjusted to require positive proof. It was noted in response that the Hague and Hague-Visby Rules used virtually identical wording in article IV.2.q, and that this was not a novel approach. A second change proposed was that the phrase immediately before subparagraph (a), “if the [shipper] proves that” should be deleted, but there was support for the proposal that the language should remain in the text so as to provide guidance with respect to which party had the burden of proof. A third change suggested was the word “shipper” that still appeared in square brackets could be replaced with the word “claimant”, which could then be defined with reference to article 63 of the draft instrument.

106. The Working Group next considered article 14(2) of the second redraft prepared by the informal drafting group. As with previous iterations of this paragraph, discussion in the Working Group again focused on whether the preferred approach to the list of “excepted perils” should be one of exoneration from liability or one based on presumption of non-liability. Similar views were presented to those expressed in paragraphs 87, 90, 97 and 102 above (see also para. 119 below). Again, there was support for the view that the presumption approach was preferable, while a minority view expressed a preference for the exoneration approach. The question was raised whether substituting a phrase such as “It is considered” for the phrase “It is presumed” in the second of the alternatives would alleviate the concerns of those who had

expressed views against a presumption approach. However, a widely held view was that there was no specific preference for one approach over the other, particularly if, as expected, the legal outcome would be the same with either approach.

107. A few drafting concerns were expressed with respect to paragraph 2. One view was that the language in paragraph 2(ii) was superfluous, while other views were expressed that this subparagraph was necessary since it encompassed different circumstances, where a shipper or claimant proved not only the fault of the carrier with respect to one of the “excepted perils”, but an additional event attributable to the carrier that did not appear on the list and that contributed to the loss or damage. A more widely shared concern was that the construction of the first alternative in paragraph 2 could cause confusion by inadvertently suggesting that the carrier had to prove that it was not liable for the loss, damage or delay under both paragraphs 1 and 2. There was support for the proposal that, if the first alternative in paragraph 2 was chosen by the Working Group, it should be clarified that paragraph 2 was intended to function as an alternative means to paragraph 1 by which the carrier could demonstrate its innocence. It was suggested that this intention should be made clear through the insertion of a phrase in paragraph 2 illustrating its relationship with paragraph 1.

108. The Working Group heard that in an attempt to bridge the gap between those delegations that favoured an exoneration approach to the “excepted perils”, and those that preferred a presumption approach, and based upon the discussion on variants A, B and C of draft article 14 and of the previous informal texts submitted for the consideration of the Working Group, one delegation had prepared a further redraft of paragraphs 2 and 4 of draft article 14. The text of the third redraft of paragraphs 1 and 2 of draft article 14 submitted to the Working Group for its consideration was as follows:

“2. If the carrier [, alternatively to proving the absence of fault as provided in paragraph 1] proves that the loss, damage or delay was caused by one of the following events:

“(i).....

Then its liability for such loss, damage or delay will arise only in the event the claimant proves that:

“(i) The fault of the carrier or of a person mentioned in article 14bis caused [or contributed to] the event on which the carrier relies under this paragraph; or

“(ii) An event other than those listed in this paragraph contributed to the loss, damage or delay.

“4. In case the fault of the carrier or of a person mentioned in article 14bis has contributed to the loss, damage or delay together with concurring causes for which the carrier is not liable, the amount for which the carrier is liable, without prejudice to its right to limit liability as provided by article 18, shall be determined [by the court] in proportion to the extent to which the loss, damage or delay is attributable to its fault.”

109. It was explained that the phrase in square brackets in the first line of this third redraft of paragraph 2 was intended to alleviate the concerns expressed above (see para. 107) with respect to making explicit the relationship between paragraphs 1 and 2. It was also indicated that the proposal was intended to include the full list of “excepted perils”, and that the second

alternative in the second redraft of article 14(4) (see para. 101 above) referring to the so-called “50-50” apportionment rule should be added after the first sentence in paragraph 4 of this third proposal (see below, paras. 140 to 144).

110. As with the previous drafts of article 14, there was general agreement in the Working Group that, while no firm decision could be made before further consideration and consultations had taken place, the third proposal represented a strong basis for bridging the gap between the preferred approaches to take with respect to the list of “excepted perils”. Unanimous support was expressed that the third redraft (in respect of paras. 2 and 4) and the second redraft (in respect of the remainder of draft article 14) should form the basis for future work on article 14(2), subject to those drafting suggestions indicated below. One view was expressed that, in addition to the redrafts, Variant A of article 14(1) and (2) as set forth in the note by the Secretariat (A/CN.9/WG.III/WP.32) should be maintained in the draft instrument for continuation of the discussion. While that view was not accepted by the Working Group, it was pointed out that the text of all variants, including Variant A in favour of which considerable support had been expressed, was reproduced in this report for further reference. In the context of that discussion, a suggestion was made that, as a general statement of policy, the draft instrument should contain a provision on compulsory insurance for carriers. Strong opposition was expressed to this suggestion.

111. A number of drafting improvements were suggested to paragraph 2 of the third proposed redraft. The Working Group heard that the text of paragraph 2(ii) could have the unintended consequence of suggesting that it was necessary for the shipper or claimant to prove both the additional cause for the loss and that it was outside the list of “excepted perils” in paragraph 2(i). There was support for the suggestion that a remedy for this inadvertent result could be to insert in paragraph 2(ii) after the phrase “an event other than those listed in this paragraph” the additional phrase “on which the carrier relies”.

112. Further drafting refinements that reflected previous discussions on the various article 14 redrafts were supported in the Working Group. It was agreed that the phrase “[and to the extent]” should be added after the opening “If” of paragraph 2, and that the phrase “only in the event” should be deleted in the text immediately following the list of “excepted perils”, and the phrase “if [and to the extent]” should be substituted in its place. A further refinement agreed upon was to clarify the relationship of paragraphs 2 and 3, and so as to avoid blocking recourse to paragraph 3. It was decided that the opening phrase “Without prejudice to paragraph 3”, should be added at the beginning of paragraph 2.

113. The Working Group further agreed that the square brackets surrounding the phrase in the opening line of paragraph 2 should be removed, to accommodate the concern expressed regarding possible misinterpretation of the relationship between paragraphs 1 and 2. An additional drafting suggestion was made that, instead of the phrase “then its liability ... will arise” in the text immediately following the list of excepted perils, a different phrase such as “then the carrier’s liability is maintained or continued”, or “then the carrier shall be liable for such loss, damage or delay” could be substituted. The Working Group requested the Secretariat to consider whether an appropriate text should be substituted in this regard, bearing in mind the caveat expressed that replacing the existing phrase with alternative language should not result in disregarding the intention that paragraph 2 was an alternative to paragraph 1.

114. It was also suggested that the relationship between paragraph 2 and paragraph 1 could be left unclear if the text in the third redraft remained as it was. In order to express the general agreement that in the situation where the shipper or claimant proved a cause for the damage attributable to the carrier but outside the list of “excepted perils” under subparagraph (ii) resort should be had back to paragraph 1, the Working Group agreed to add to subparagraph (ii) after its final period the sentence “In this case, liability is to be assessed in accordance with paragraph 1.”

115. One final drafting suggestion was made with respect to paragraph 2 of the third redraft. It was observed that the various drafting refinements outlined in the paragraphs above had clarified the relationship between paragraphs 1 and 2, and between paragraphs 2 and 3 of draft article 14, but that the counterproof provisions in subparagraphs (i) and (ii) of paragraph 2 might have become unclear. The suggestion was made to separate paragraph 2 into two separate sentences in order to clarify this potential problem. The Working Group requested the Secretariat to consider this potential problem and to suggest possible drafting improvements if it was deemed advisable.

116. After discussion, the Working Group approved the substance of the third redraft of article 14(2), subject to the drafting refinements agreed to in the paragraphs above, as the basis upon which to continue future work.

(b) Article 14 list of “excepted perils”

117. The Working Group next considered the list of “excepted perils” in draft article 14. There was support for the general view that the list of perils from draft article IV.2.c through article IV.2.q in the Hague and Hague-Visby Rules should be followed closely in order to preserve the certainty and predictability that had come with the development of a significant body of law on these issues. Two exceptions to this general approach were suggested, that of the deletion of article IV.2.a (error in navigation), and of a redrafting of article IV.2.b (fire exception) to reflect its limited application to the maritime leg of the transport. Support was also expressed for these proposals. A further suggestion was made to amend the notion of the overriding obligation of the carrier to provide a seaworthy ship in the Hague and Hague-Visby Rules so that the issue of the seaworthiness of the ship would become relevant only during the third step in an actual claim for cargo damage, i.e. when the cargo claimant could prove unseaworthiness as a cause of damage to rebut the carrier’s invocation of one of the “excepted perils”.

118. With respect to the use of the list of “excepted perils” from the Hague and Hague-Visby Rules generally, it was explained that the original rule was the result of a compromise position taken at the time in order to accommodate both the civil law and common law systems. Several views were expressed that the list of “excepted perils” was not necessary in many States, but that there was no objection to their continued inclusion in the draft instrument in order to accommodate all legal systems and to preserve the general body of law that had developed with the widespread use of the Hague and Hague-Visby Rules.

119. With respect to the issue of whether the list of “excepted perils” in draft article 14 should continue to be treated as exonerations or whether they should be treated as presumptions, support was expressed for both positions. A concern was expressed that treating the listed perils as exonerations might result in confusion, since such treatment could lead to an interpretation that once one of the listed perils had been proved by the carrier, the claimant

would have no right to rebut that exonerating evidence and prove that the event causing some or all of the damage was a result of the carrier's fault. One view expressed was the possibility that, for example, in the case of the subparagraph (d) exception for strikes, if the provision was treated as an exoneration rather than a presumption, a carrier could be exonerated for strikes that were a result of the carrier's own actions. It was widely felt that, irrespective of whether the exceptions to the general liability of the carrier were expressed by reference to the legal theory of exonerations or on the basis of a set of presumptions, it would be essential to preserve a rebuttal mechanism in the draft instrument.

120. The Working Group next considered the specific content of each of the listed perils. The view was expressed that the "act of God" exception in subparagraph (a) of all variants of draft article 14 was unnecessary due to the general force majeure provision set out in article IV.2.q of the Hague and Hague-Visby Rules and incorporated in the draft instrument. However, the view was expressed that if the "act of God" exception were deleted from the list of "excepted perils" it could risk erroneous judicial interpretation as a result of speculation regarding the reasons for its deletion from the list of "excepted peril" in the draft instrument. There was broad support for the proposal that the "act of God" exception should be maintained.

121. Support was expressed for the inclusion of piracy and terrorism in subparagraph (a) of the list of "excepted perils" in the draft instrument. While some doubts were expressed with respect to the precise definition of terrorism, it was observed that terrorism had been defined in a number of States. It was suggested that a precise definition of terrorism was unnecessary in any event, since it expressed a certain intention, and the important issue was whether the event was the fault of the carrier. The general view was that piracy and terrorism should be included in the list.

122. With respect to subparagraph (b) of the list of perils in the draft instrument, it was suggested that the square brackets be removed and the text be maintained, but that the language used should be the same as that used in the Hague and Hague-Visby Rules. There was support for this position, but the question was raised whether the phrase "including interference by or pursuant to legal process" could also include the situation where a cargo claimant arrested a ship. The suggestion was made to clarify the meaning of the phrase "interference by or pursuant to legal process".

123. With a view to broadening the scope of subparagraph (d) of the list of "excepted perils", the suggestion was made to add at the end of the subparagraph "for any cause whatsoever". However, doubts were raised as to this addition, since some strikes could be caused or contributed to by the acts of the carrier or the ship owner, such as where the owner refused the reasonable requests of the crew. It was suggested that the subparagraph might need to establish a distinction between general strikes and strikes that might occur in the carrier's business, and for which the carrier might bear some fault.

124. With respect to subparagraph (i) of the list of "excepted perils", it was suggested that although this subparagraph did not appear in the Hague or Hague-Visby Rules, it was appropriate to include it in the draft instrument.

125. Some specific issues were raised with respect to the formulation of the list. Uncertainty was expressed with respect to the precise meaning of the phrase "restraints of labour" in subparagraph (d) of the list. In a similar vein, the word "rulers" in subparagraph (b) was questioned as meaningless in light of modern political realities. It was proposed that

subparagraph (f) should clarify that the packing or marking should have been done “by the shipper”. In addition, there was support for the view that subparagraph (g) of the list in the draft instrument should make it clear that the latent defects referred to were those in the ship. Another suggested clarification of subparagraph (g) was that the phrase “not discoverable by due diligence” should be replaced by “not discoverable by vigilant examination”, although it was observed that the phrase “due diligence” came about as a result of the English translation of the words “diligence raisonnable” in the French text of the Hague Rules. Further, it was noted that if the phrase “due diligence” was used elsewhere, for example in draft article 13, it should also be repeated in subparagraph (g) in the interest of consistency. It was suggested that the phrase “or on behalf of the shipper” in subparagraph (h) should be deleted as confusing, since if the carrier handles the goods, it should be liable for any damage. It was also suggested that subparagraphs (a) and (b) should be broadened by adding the phrase “and all other events that are not the fault of the carrier”.

126. With regard to the fire exception currently in chapter 6 of the draft instrument, the view was expressed that the wording was unclear in that it seemed to lead to the conclusion that the fault of the carrier must be a personal fault. The question was raised whether this exception was necessary at all in light of other provisions making the carrier responsible for the acts of its servants or agents. However, it was suggested that if the fire exception was maintained for traditional reasons, the provision should be adjusted to clarify that the carrier is also responsible for the acts of its servants or agents. In addition, the view was expressed that the existence of the fire exception unfairly placed the burden of proof on the consignee. There was some support for these views, but another view was expressed that the fire exception should be the same as it was in the Hague and Hague-Visby Rules.

127. With respect to the elimination of the exception based on error in navigation, a number of delegations agreed with the position that there was a danger that the elimination of this exception could have the unintended effect outlined in paragraph 89 above. In response to this possibility, some delegations favoured the reinstatement of the exception for error in navigation, while others preferred to bear the potential problem in mind when considering the issue of burden of proof. Additional views were expressed in support of reinstating error in navigation as an exception, for example, that an error might be easy to characterize in hindsight, but that it was often the error of the master, forced to make rapid decisions in bad weather, and that no ship owner would generally interfere with his masters’ decisions in these circumstances. However, the prevailing view was that the deletion of the navigational error exception should be maintained, but also that the impact of that decision should be considered with respect to burdens of proof in discussions to come.

128. The Working Group was reminded that certain of the perils listed in the Hague and Hague-Visby Rules had been placed in a separate chapter 6 in the draft instrument, entitled “Addition provisions relating to carriage by sea [or by other navigable waters]”. The Working Group agreed to leave those exceptions in chapter 6 separate from draft article 14 for future consideration of where best to place them in the draft instrument.

129. The Working Group agreed that the list of “excepted perils” should be included in the draft instrument, and that the substance and content of the exceptions on the list should be inspired from the Hague and Hague-Visby Rules, including article IV.2.q. There appeared to be a slight preference in the Working Group for the list to be characterized as one of presumptions rather than exonerations. Several specific recommendations were made to refine the exceptions

listed, as noted in paragraphs 120 to 126 above, and there was agreement that navigational fault should not be reinstated in the list as an “excepted peril”.

(c) New paragraph 3 of draft article 14

130. Discussion ensued in the Working Group with respect to draft article 14(3) as set out in the second redraft of article 14 (see para. 101 above). Views in the Working Group were divided between the two alternatives presented by the language in square brackets in the opening line of paragraph 3. There was support for the view that the shipper or claimant should only be required to prove the existence of the circumstances in subparagraphs (i), (ii) and (iii), since, it was suggested, it would be difficult enough to prove the events in (i), (ii) or (iii) without having to prove the causal link. A related view was that requiring the shipper to prove the circumstances in subparagraphs (i), (ii) and (iii) was excessively burdensome. Under that view, the mere allegation by the shipper that any of the events in subparagraphs (i), (ii) and (iii) had taken place should be sufficient to establish or restore the liability of the carrier. It was suggested that the word “alleges” should be introduced in square brackets as an alternative to “proves” in the opening words of paragraph 3. The opposing view was also expressed that the shipper or claimant should be required to prove that the circumstances in subparagraphs (i), (ii) and (iii) had caused the loss, damage or delay, since it was suggested that it would not be appreciably more difficult to prove the causal connection in addition to the event itself. It was observed that the new paragraph 3 should be considered in the context of the entire draft article 14. Paragraph 1 of article 14 permitted the claimant to prove the existence of loss, damage or delay without proving its cause. The carrier could explain that it should not be liable by proving a lack of fault or an exception under paragraph 2. If the carrier proved such a lack of fault or an exception, the claimant would have the burden to prove unseaworthiness and causation.

131. Between these two poles, a third view emerged that suggested that it was inappropriate for the loss, damage or delay to be wholly dissociated from the circumstances alleged in the subparagraphs to paragraph 3, and that the shipper or claimant should be required to prove that there was at least some sort of nexus between the alleged unseaworthiness and the damage. It was observed that the differences in opinion on this matter could be rendered less relevant in light of the actual conduct of a claim, since a carrier would often present evidence with respect to seaworthiness and the other matters in subparagraphs (i), (ii) and (iii) early in the conduct of the case in an effort to prove that it was not at fault with respect to the damage. In addition, it was observed that, while the draft instrument might require the claimant to prove the unseaworthiness of the ship, it would not establish a standard of proof. Such a standard of proof would be governed by domestic law and would generally be easy to meet. It was further observed that causation of the damage was a relatively unimportant issue in the conduct of a claim, since even if there were circumstances that might suggest unseaworthiness, the carrier need not guarantee the seaworthiness of the ship, but needed only to prove that it had exercised due diligence in trying to maintain it.

132. Discussion ensued in the Working Group with respect to draft article 14(3) as set out in the second proposed redraft of article 14. The Working Group was of the view that paragraph 3 represented a good basis for the continuation of future work, and that the text should remain with its two alternative approaches for further consideration and consultation prior to making a decision on this matter. The Working Group requested the Secretariat to consider whether a third alternative could be proposed representing the approach that was part way between full proof of causation for the damage and mere allegation of the circumstances in subparagraphs

(i), (ii) or (iii). It was suggested that the notion of “likelihood of causation” by one of the events in subparagraphs (i), (ii) or (iii) might need to be further explored. Wording along the lines of “[that the loss, damage, or delay could have been caused by]” was also suggested in that respect as a possible formulation for the third alternative.

133. As a matter of drafting, it was widely felt that, in the preparation of a revised draft of article 14 for continuation of the discussion at a future session, serious consideration should be given to replacing the word “shipper” by “claimant”. It was suggested that “claimant” could be defined as any person given the right of suit under article 63.

134. The Working Group also took note of a suggestion for restructuring paragraph 3 along the following lines:

“3. The carrier is not liable for loss, damage, or delay resulting from the unseaworthiness of the ship as [alleged] [proved] by the claimant, to the extent that the carrier proves that

“(a) It complied with its obligation to exercise due diligence as required under Article 13(1). [; or

“(b) The loss, damage or delay was not caused by any of the facts mentioned in (i), (ii) and (iii) above.]”.

(d) Provision in draft article 14 dealing with the apportionment of liability in case of concurring causes for the damages

135. The text of draft article 14(3) set forth in the note by the Secretariat was as follows:

“3. If loss, damage or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, the carrier is liable for all the loss, damage, or delay in delivery except to the extent that it proves that a specified part of the loss was caused by an event for which it is not liable.”**

** The text that has been deleted was included as a second alternative in the first draft of the draft instrument. As noted in paragraph 56 of A/CN.9/525, the first alternative received the strongest support in the Working Group and the decision was made to maintain only the first alternative in the draft instrument for the continuation of the discussion at a later stage. However, the Working Group decided to preserve the second alternative as a note or in the comments to the draft text, to permit further consideration of that alternative at a later stage (see A/CN.9/WG.III/WP.32, footnote 79):

[If loss, damage, or delay in delivery is caused in part by an event for which the carrier is not liable and in part by an event for which the carrier is liable, then the carrier is

(a) Liable for the loss, damage, or delay in delivery to the extent that the party seeking to recover for the loss, damage, or delay proves that it was attributable to one or more events for which the carrier is liable; and

(b) Not liable for the loss, damage, or delay in delivery to the extent the carrier proves that it is attributable to one or more events for which the carrier is not liable.

If there is no evidence on which the overall apportionment can be established, then the carrier is liable for one half of the loss, damage, or delay in delivery.]

136. The text of the corresponding provision in the second proposal for a redraft of article 14 was as follows:

“[4. In case of concurring causes that each have caused part of the loss, damage or delay, then the court shall determine the amount for which the carrier is liable in proportion to the extent to which the cause attributable to its fault has contributed to the loss, damage or delay.] [The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis.]”

137. The text of the corresponding provision in the third proposal for a redraft of article 14 was as follows:

“4. In case the fault of the carrier or of a person mentioned in article 14bis has contributed to the loss, damage or delay together with concurring causes for which the carrier is not liable, the amount for which the carrier is liable, without prejudice to its right to limit liability as provided by article 18, shall be determined [by the court] in proportion to the extent to which the loss, damage or delay is attributable to its fault.”

138. A further draft proposal was submitted by one delegation in relation to paragraph 3 of article 14 as follows:

“3. When the carrier establishes that in the circumstances of the case, the loss of or damage to the goods or delay in delivery could be attributed to one or more of the events referred to in paragraph 2, it shall be presumed that it was so caused. The presumption is rebutted if and to the extent that the claimant proves that such loss or damage or delay is caused or contributed to by the fault of a carrier [or of a performing party].”

139. By way of explanation, the Working Group heard that the draft proposal had been taken from article 18(2) of the Convention on the Contract for the International Carriage of Goods by Road, 1956 as amended by the 1978 Protocol (“CMR”) with slight modifications. Under the first sentence, if the carrier could establish that one or more of the listed events occurred during the carriage that could, in the ordinary case, have caused the loss, damage or delay, then the causation between the listed event and the loss would be presumed. It was further explained that the draft provision was intended to decrease the carrier’s burden of proof of causation since, it was suggested, it was often difficult for the carrier to identify the cause of the damage and to establish the causation between the damage and the exonerative events, especially when the cargo was carried by container. It was further explained that, under the second sentence of proposed paragraph 3, the claimant was entitled to rebut the presumption by proving if and to what extent the fault of the carrier caused or contributed to the loss, damage or delay. Although it was proposed that this paragraph would apply even where the carrier’s fault was the only cause of the damage to the goods, it was suggested the proposed paragraph could play a more important role where both the carrier’s fault and the event listed in paragraph 2 jointly contributed to the loss. By way of further explanation, the Working Group heard that the proposed paragraph 3 was intended to be an alternative solution to the concern raised that the elimination of the navigational fault defence may have unintended effects (see A/CN.9/WG.III/WP.34, paragraph 15).

140. The view was expressed that the apportionment of liabilities in situations of concurring causes of the damage should not be dealt with under the draft instrument. Instead, it should be left to courts and arbitral tribunal to be decided upon according to applicable law. The prevailing view, however, was that an attempt should be made to cover the issue of apportionment of liabilities in the draft instrument. It was pointed out that, in cases of concurring causes, it was important to establish as a general rule that each party should prove the extent of causation, in particular in view of the exclusion of the nautical fault from the list of “excepted perils”, it was stated that, where the goods had been damaged at sea, claimants could easily argue that navigational decisions had contributed to the damage (see A/CN.9/WG.III/XII/CRP.1/Add.4, paras. 5-10). The draft instrument should not place the carrier in a situation where the carrier would be liable for the entire loss where its fault had only contributed to a minor proportion of the damage. Accordingly, it was proposed that the issue of apportionment of liability should be discussed on the basis of footnote 79 to the text of draft article 14(3) set forth in the note by the Secretariat (A/CN.9/WG.III/WP.32).

141. That proposal was objected to on the grounds that it had not been favoured by the Working Group at its tenth session (see A/CN.9/525, para. 56). It was observed that a result of the proposed approach might be to transfer on the shipper the insuperable burden of proving the extent of causation in situations where the carrier’s fault had clearly contributed to the damage. In the absence of such proof, the proposed approach offered a 50 per cent liability of the carrier, which was described as unfair to shipping interests. Support was expressed for the text of paragraph (3) of draft article 14 as set forth in the note by the Secretariat.

142. With a view to reconciling the various views that had been expressed, it was suggested that the draft instrument should avoid placing on any party the burden of proving the exact extent of causation. It was also suggested that the draft instrument should provide guidance to courts and arbitral tribunals to avoid certain causes of the damage being neglected, for example through excessive reliance on the doctrine of overriding obligations. The discussion focused on paragraph 4 of the third proposed redraft of article 14. It was suggested that, in discussing the issue of apportionment of liability, it might be useful to bear in mind a distinction between concurring causes and competing causes for the damage. In the case of concurring causes, each event caused part of the damage but none of these events alone was sufficient to cause the entire damage (for example, where the damage was attributable to both weak packaging by the shipper and improper storage by the carrier). In the case of competing damages, the court might have to identify an event or the fault of one party as having caused the entire damage, irrespective of the fault of the other party (for example, where the goods were damaged as a result of artillery fire hitting the vessel, a decision might need to be made as to whether the artillery fire was to be regarded as the only cause of the damage, irrespective of the fault the master of the vessel might have committed by bringing the ship into a war zone). It was pointed out that, in this second situation, the doctrine of “overriding obligations” would often apply. It was suggested that draft article 14 dealt only with the situation where concurring faults were at stake and not with the second situation described as “competing faults”.

143. Various proposals were made for improving the text of the third redraft. A widely accepted proposal was to add in square brackets the last sentence proposed in the second redraft along the lines of “[The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis].” It was widely felt that further discussion could be based on that text. Another

proposal, intended to take into account the situation addressed in paragraph 2(ii) where the damage was not caused by actual fault was to rephrase the paragraph as follows:

“4. In case the fault of the carrier or of a person mentioned in article 14bis [or an event other than the one on which the carrier relied] has contributed to the loss, damage or delay together with concurring causes for which the carrier is not liable, the amount for which the carrier is liable, without prejudice to its right to limit liability as provided by article 18, shall be determined [by the court] in proportion to the extent to which the loss, damage or delay is attributable to such fault [or event].”

The Working Group took note of that suggestion.

144. After discussion, the Secretariat was requested to prepare a revised draft of the provision regarding concurring liabilities under draft article 14, taking into account the above views and suggestions.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Chapter 6: Additional provisions relating to carriage by sea

Draft article 22. Liability of the carrier

92. The Working Group considered the text of draft article 22 as contained in document A/CN.9/WG.III/WP.32.

Placement

93. There was general agreement that the contents of draft article 22 might need to be moved to draft article 14 as a result of the deliberations of the Working Group at its twelfth session.

The fire exception

94. Strong support was expressed for the deletion of a specific fire exception. It was stated that no special treatment of the issue of fire was necessary in modern navigation. It was also pointed out that it would be particularly appropriate to deal with fire through the general rule set forth in draft article 14, since in most instances, the carrier would be better placed to identify the causes of the fire. However, strong support was also expressed for retaining the traditional fire exception to avoid altering the general balance of interests in the draft instrument. It was stated that the elimination of the exception drawn from the error in navigation had already compromised that balance. In that connection, it was suggested that the latter exception should be reinstated in the draft instrument, at least to cover the error in navigation made in the context of mandatory pilotage (see A/CN.9/WG.III/WP.28). That suggestion received little support.

95. As to how the fire exception might be formulated, it was suggested that the reference to the “fault or privity of the carrier” should be replaced by a reference to the “fault or privity of the carrier, its servants or agents”. It was observed that the issue might need to be further discussed in the context of draft article 14.

Salvage of property at sea

96. Doubts were expressed as to whether the salvage or attempted salvage of property at sea should be treated on the same footing as the salvage or attempted salvage of life at sea. Broad support was expressed for the introduction of a test of reasonableness along the lines of “reasonable measures to save or attempt to save property at sea”. It was pointed out that the salvage of property at sea might entail considerable remuneration for the carrier, with no direct or automatic impact on the damaged cargo.

Reasonable attempt to avoid damage to the environment

97. In the context of the discussion regarding the salvage or attempted salvage of property at sea, it was suggested that special mention should be made in the draft instrument of a cause of exoneration that should result from a reasonable attempt to avoid damage to the environment. Broad support was expressed for that suggestion.

Perils of the sea

98. The Working Group was generally in agreement with the substance of the rule on “perils, dangers and accidents of the sea or other navigable waters”.

Conclusions reached by the Working Group on draft article 22

99. After discussion, the Working Group decided that:

- The fire exception would be maintained in the draft instrument and further considered in the context of draft article 14;
- The words “saving or attempting to save property at sea” should be replaced by words along the lines of “reasonable measures to save or attempt to save property at sea”, possibly as a separate subparagraph;
- Words along the lines of “reasonable attempt to avoid damage to the environment” should be introduced in the draft instrument, possibly as a separate subparagraph;
- The Secretariat would be requested to prepare a revised draft merging draft article 22 with draft article 14 as amended at the twelfth session of the Working Group.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]**Draft article 14. Basis of liability****General discussion**

10. The Working Group was reminded that it had most recently considered draft article 14 at its twelfth session (see A/CN.9/544, paras. 85-144), and articles related thereto at its thirteenth session, namely article 22 relating to liability of the carrier with respect to the carriage by sea and article 23 on deviation (see A/CN.9/552, paras. 92-99 and 100-102 respectively).

11. The Working Group heard a short report from the informal consultation group (see A/CN.9/552, para. 167) established for continuation of the discussion between sessions of the Working Group, with a view to accelerating the exchange of views, the formulation of proposals and the emergence of consensus in the preparation of the draft instrument. The

Working Group heard that an exchange of views had taken place within the informal consultation group with respect to draft article 14 in an effort to consider improvements to the drafting of the provision.

Draft paragraph 14(1)

12. The Working Group considered the text of paragraph 1 of draft article 14 as contained in paragraphs 7 and 8 of document A/CN.9/WG.III/WP.36. A proposal was made to maintain the general principle in the draft paragraph that unexplained losses should be the responsibility of the carrier, but suggesting certain improvements to the drafting of the paragraph. It was proposed that the phrase “the nature and amount of the loss and” could be inserted in square brackets between the words “proves” and “that” at the end of the opening phrase of the draft paragraph. In addition, it was suggested that square brackets be placed around the phrase “neither its fault nor the fault of any person mentioned in article 14 bis caused or contributed to the loss, damage or delay” and that the following phrase be inserted as alternative text within square brackets immediately thereafter, “the occurrence that caused or contributed to the loss, damage or delay is not attributable to its fault nor to the fault of any person mentioned in article 14 bis”.

13. There was a suggestion that both the text of draft paragraph 14(1) in A/CN.9/WG.III/WP.36, and the text proposed in the paragraph above were overly complex and should be simplified and clarified. A further alternative text was proposed as follows:

“1. The carrier shall be liable for loss of or damage to the goods as well as for delay in delivery that took place during the period of the carrier’s responsibility as defined in Chapter 3, unless the carrier proves, and in absence of proof to the contrary, that neither its fault or neglect nor the fault or neglect of any person mentioned in article 14 bis caused or contributed to the loss of or damage to the goods or delay in the delivery. The burden of proof of the nature and amount of the loss shall rest upon the claimant.”

14. Some reservations were expressed that the proposed text set out in the paragraph above might not deal effectively and clearly with complex but important matters such as the question of the allocation of the burden of proof in determining liability. The Working Group decided to proceed with its consideration of draft paragraph 14(1) on the basis of the text in A/CN.9/WG.III/WP.36, but to consider proposed changes to that text as they were raised.

“the nature and amount of the loss and”

15. It was suggested that, as presently drafted, paragraph 14(1) could imply that the claimant must prove the physical loss, damage or delay in delivery, but not the amount of the loss resulting therefrom. To address that issue, the inclusion of the phrase, “the nature and amount of its loss”, was suggested as noted in paragraph 12 above. Whilst this proposal received some support, the proposal was withdrawn as it raised questions of measure of damages which were not considered appropriate in the context of the liability regime set out in draft paragraph 14(1).

“claimant”

16. The Working Group confirmed its agreement (see A/CN.9/544, paras. 105 and 133) that the term “claimant” was more appropriate than the term “shipper” to reflect the identity of the party who would be seeking redress against the carrier. Notwithstanding the suggestion

contained in footnote 26 of A/CN.9/WG.III/WP.36 that the Working Group may wish to consider whether a definition of “claimant” should be included in draft article 63, under rights of suit, a proposal was made to include such a definition in draft article 1. Caution was expressed that, as the term “claimant” appeared in other provisions of the draft instrument, for example, in draft articles 19, 65, 68, 75 and 78 of the draft text, the Working Group should ensure that any definition was consistent with the intended meaning of the term when used elsewhere in the draft instrument.

“or contributed to”

17. It was agreed by the Working Group that the square brackets be removed from the term “or contributed to” in both instances in which it appeared in the draft paragraph. It was said that this phrase was necessary to include the case of concurring causes for loss, damage or delay, as considered in draft paragraph 14(4). It was noted that these words might be problematic in some languages and should be reviewed with that in mind.

“and to the extent”

18. It was proposed that the words in square brackets “and to the extent” could be deleted on the basis that they could be in conflict with draft paragraph 4 on concurring causes for loss, damage or delay if the Working Group decided that all matters relating to the determination of the extent to which the carrier was liable in case of concurring causes should be decided by the court in which the claim was brought. However, it was suggested that the words should be retained in order to clarify that it was the carrier who bore the burden of proof in the case of concurring causes. The Working Group agreed to delete the words “and to the extent”, bearing in mind the concern expressed regarding the burden of proof in cases of concurring causes.

Conclusions reached by the Working Group on paragraph 1

19. After discussion, the Working Group agreed to refer to an informal drafting group the following conclusions to be taken into account in preparing a revised text (see paras. 27 to 28 and 31 to 33 below):

- The term “claimant” should be included in paragraph 14(1) but any definition of that term should be consistent with the use of that term in other provisions of the draft instrument;
- The square brackets around the phrase “or contributed to” should be deleted in both instances;
- The phrase “and to the extent” should be deleted.

Draft paragraph 14(2)

20. The Working Group heard that the text of draft paragraph 14(2) as contained in paragraph 7 of document A/CN.9/WG.III/WP.36 was considered to reflect accurately the views of the Working Group with respect to the shifting burden of proof following the claimant’s initial establishment of its claim pursuant to paragraph 14(1). However, it was suggested that the drafting of paragraph 14(2) in document A/CN.9/WG.III/WP.36 was cumbersome and difficult to read. In an effort to preserve the general approach set out in that document, but to remedy the perceived problems, alternative text was proposed as follows:

“2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that the loss, damage or delay was caused by one of the events

enumerated in paragraph 3, then the carrier shall be liable for such loss, damage or delay only if the claimant proves that:

“(a) the event on which the carrier relies under this paragraph was caused by the fault of the carrier or of a person mentioned in article 14 bis [whereupon liability shall be determined in accordance with paragraph 1];

“(b) an event other than those listed in paragraph 3 contributed to the loss, damage or delay, [whereupon liability shall be determined in accordance with paragraph 4]; or

“[(c) the ship was unseaworthy, or improperly manned, equipped or supplied, or the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for the reception, carriage, and preservation of the goods, [whereupon the carrier shall not be liable if it proves that it complied with its obligation to exercise due diligence as required by article 13(1) or that its failure to exercise due diligence did not contribute to the loss, damage or delay]; or]

“[(c) the loss, damage or delay was caused by:

“(i) the unseaworthiness of the ship;

“(ii) the improper manning, equipping, and supplying of the ship; or

“(iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods, “whereupon the carrier shall be liable under paragraph 1 unless it proves that it complied with its obligation to exercise due diligence as required under article 13(1).”

General discussion

21. The Working Group heard that subparagraphs (i) and (ii) of draft paragraph 14(2) in document A/CN.9/WG.III/WP.36 had been redrafted to become subparagraphs 14(2)(a) and (b) of the proposed text, and that draft paragraph 14(3) as set out in document A/CN.9/WG.III/WP.36 had been redrafted to reflect the two alternatives set out in draft subparagraph 14(2)(c). The two alternatives proposed in that subparagraph concerned the burden of proof on the claimant in the event of unseaworthiness, and are further discussed below (see paras. 23 to 25). The Working Group agreed to use the proposed text for subparagraph 14(2) as set out in paragraph 20 above as the basis for further consideration of that draft provision.

Subparagraphs 14(2)(a) and (b)

22. There was general agreement in the Working Group with the proposed text for subparagraphs 14(2)(a) and (b). It was suggested that the text in square brackets at the end of subparagraph 14(2)(a) was unnecessary and should be deleted, particularly in light of the qualification in the opening phrase of draft paragraph 14(2) that the carrier’s proof under this provision was made “alternatively to proving the absence of fault as provided in paragraph 1”. A further suggestion was made that the bracketed text at the end of subparagraph 14(2)(b) should be deleted on the basis that it was unnecessary, and that, in any event, the reference made in that phrase ought to have been to draft paragraph 14(1) for assessment of liability for

the additional event, rather than to paragraph 14(4) regarding concurring causes. Support was expressed in the Working Group for both of these suggestions, while some support was also expressed for the retention of the language at the end of subparagraph 14(2)(b) and the deletion of the square brackets around it. The Working Group agreed to request an informal drafting group to consider the text of subparagraph 14(2)(a) and (b) in light of those suggestions, with a view to preparing a new draft to clarify the text.

Subparagraph 14(2)(c)

The two proposed alternatives

23. The Working Group considered the two alternatives with respect to the burden of proof on the claimant in the event of unseaworthiness set out in the proposed text of subparagraph 14(2)(c). It was observed that the first alternative text of subparagraph 14(2)(c) required the claimant to prove only the unseaworthiness of the ship or the failure of the carrier to properly man, equip and supply the vessel or the unfitness of the holds in order to shift the burden of proof back to the carrier, while the second alternative required the claimant to prove that the loss, damage or delay was actually caused by one of those failings on the part of the carrier. Concerns were raised regarding the burden that would be placed on the claimant in having to prove the causation further to the second alternative approach. Concerns were also raised with respect to the burden that the first alternative would place on the carrier, by requiring it to prove both the seaworthiness of the ship and the cause of the loss. The view was expressed that the first alternative would return the regime to the pre-Hague Rules era, with an overriding obligation of seaworthiness, such that unseaworthiness need not have caused the loss in order for the claim to succeed. Support was expressed in the Working Group for each of the two alternatives set out in subparagraph 14(2)(c).

Possible compromise positions

24. The Working Group heard a proposal that a compromise position between the two alternatives being considered in subparagraph 14(2)(c) could be achieved by reducing the burden on the claimant to prove causation. In this regard, it was suggested that the claimant should be required to prove both the unseaworthiness and that it caused or could reasonably have caused the loss or damage. Support was expressed in the Working Group for the adoption of such a compromise position. Concern was expressed that this compromise position could be seen negatively by domestic courts as an attempt to regulate procedure with respect to how the burden of proof should be evaluated. Concern was also expressed that the adoption of conditional language in this regard could give rise to ambiguities and thus result in increased litigation. Further, the view was expressed that, should this compromise position be adopted, it should be kept in mind when considering the overall balance of rights and liabilities in the draft instrument.

25. A second possible compromise was suggested. It was noted that paragraph 20(4) of the draft instrument required the parties to the claim to give all reasonable facilities to each other for inspection and access to records and documents relevant to the carriage of goods in the context of providing notice of loss, damage or delay. It was suggested that a similar provision could be adopted with respect to the second alternative, in order to assist the claimant who could have practical difficulties in gaining access to the information necessary to prove that unseaworthiness was the cause of the loss or damage. Support was expressed in the Working Group for that position.

Conclusions reached by the Working Group on paragraph 14(2)

26. After discussion, the Working Group decided that an informal drafting group should be requested to prepare a redraft of paragraph 14(2) (see paras. 29 to 33 below), taking into account:

- The desire to clarify the text in subparagraphs 14(2)(a) and (b);
- The goal of seeking a compromise position with respect to subparagraph 14(2)(c), in keeping with those views suggested above in paragraphs 24 and 25.

First proposed redraft of paragraphs 14(1) and (2)

27. An informal drafting group composed of a number of delegations prepared a redraft of draft paragraphs 14(1) and (2), based upon the discussion in the Working Group (see paras. 12 to 26 above).

General discussion of paragraph 14(1)

28. The Working Group heard that paragraph 14(1) had been revised only with respect to its last four lines, in which the text had been clarified and split into two sentences as follows: “took place during the period of the carrier’s responsibility as defined in chapter 3. The carrier is relieved of its liability if it proves that the occurrence that caused or contributed to the loss, damage, or delay is not attributable to its fault or to the fault of any person mentioned in article 14 bis.” Further, the phrase “shall be liable” had been changed to “is liable” to reflect modern usage.

General discussion of paragraph 14(2)

29. The Working Group heard that, with respect to draft subparagraphs 14(2)(a) and (b), the bracketed text at the end of each had been deleted. Draft subparagraph 14(2)(b) was clarified by inserting after the phrase “loss, damage or delay” the following text based on paragraph (1), “unless the carrier proves that this event is not attributable to its fault or to the fault of any person mentioned in article 14 bis”. Further, the informal drafting group had selected the second alternative for subparagraph 14(2)(c) set out in paragraph 20 above as instructed by the Working Group, and, in fulfilment of the goal of seeking a compromise position, the phrase “or was probably” was inserted between the words “was” and “caused”. In addition, the phrase “or contributed to by” was inserted at the end of the opening phrase of the subparagraph before the beginning of subparagraph (c)(i).

30. While general support was expressed for this revised text, some concerns were raised. Some doubts were expressed regarding the impact of the phrase “or contributed to by” in the second line of the chapeau of subparagraph 14(2), since it was thought that if the carrier proved that the loss or damage was merely contributed to by one of the list of excepted perils, it could avoid liability altogether, or at least shift the burden of proof back to the claimant, and it was questioned whether that was consistent with the intended effect of paragraph 14(4). Further, the view was reiterated that the carrier should not be held responsible for unexplained losses, however, the opposite view was also expressed, along with the view that this draft of paragraphs 14(1) and (2) represented a clarification of the existing law that carriers were liable for unexplained losses. Some preference was expressed for the use of the phrase “could have reasonably caused or contributed to” rather than “was probably caused by or contributed to by” in the first line of subparagraph 14(2)(c), since the latter seemed to demand a higher burden of

proof and was thought to potentially be confusing in jurisdictions where the standard of proof was “on the balance of probabilities”. However, the Working Group was reminded that the phrase chosen was intended to be compromise language in order to render acceptable the whole of article 14.

Second proposed redraft of paragraphs 14(1) and (2)

31. Based on the discussion in the Working Group of the first proposed redraft of paragraphs 14(1) and (2) (see paras. 27 to 30 above), an informal drafting group composed of a number of delegations prepared a second redraft. The text of the second redraft of draft paragraphs 14(1) and (2) that was proposed to the Working Group for its consideration was as follows:

“1. The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the claimant proves that

“(a) the loss, damage, or delay; or

“(b) the occurrence that caused or contributed to the loss, damage, or delay took place during the period of the carrier’s responsibility as defined in chapter 3. The carrier is relieved of all or part of its liability if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person mentioned in article 14 bis.

“2. If the carrier, alternatively to proving the absence of fault as provided in paragraph 1, proves that an event listed in paragraph 3 caused or contributed to the loss, damage, or delay, then the carrier is relieved of all or part of its liability except in the following situations:

“(a) if the claimant proves that the fault of the carrier or of a person mentioned in article 14 bis caused or contributed to the event on which the carrier relies, then the carrier is liable for all or part of the loss, damage, or delay.

“(b) if the claimant proves that an event other than those listed in paragraph 3 contributed to the loss, damage, or delay, and the carrier cannot prove that this event is not attributable to its fault or to the fault of any person mentioned in article 14 bis, then the carrier is liable for part of the loss, damage, or delay.

“(c) if the claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by

“(i) the unseaworthiness of the ship;

“(ii) the improper manning, equipping, and supplying of the ship; or

“(iii) the fact that the holds or other parts of the ship in which the goods are carried (including containers, when supplied by the carrier, in or upon which the goods are carried) were not fit and safe for reception, carriage, and preservation of the goods, and the carrier cannot prove that;

“(A) it complied with its obligation to exercise due diligence as required under article 13(1); or

“(B) the loss, damage, or delay was not caused by any of the circumstances mentioned in (i), (ii), and (iii) above,

then the carrier is liable for part or all of the loss, damage, or delay.”

32. Concern was raised that this second proposed redraft of paragraphs 14(1) and (2) would allow the carrier to escape “all or part of its liability” by proving that there was at least one cause, however incidental, of the loss, damage or delay that was not the fault of the carrier, even where the loss, damage or delay in its entirety would not have occurred without the carrier’s fault. In response, there was support for the view that the provisions were to be interpreted as referring to causes that were legally significant, and that national courts could be relied upon to interpret the provisions in that fashion and to apportion liability for those legally significant events accordingly.

Conclusions reached by the Working Group on paragraphs 14(1) and (2)

33. The Working Group agreed that the text of the second proposed redraft of paragraphs 14(1) and (2) as set out in paragraph 31 above was broadly acceptable.

Draft paragraph 14(3)

General discussion

34. The Working Group considered the text of paragraph 2 of draft article 14 as contained in document A/CN.9/WG.III/WP.36. It was proposed that the drafting and readability of article 14 would be improved if the list of excepted perils, previously in draft paragraph 2, were to become a new draft paragraph 14(3). A further alternative was suggested that, in the interest of consistency, the list of excepted perils should be limited to perils which exemplify the lack of fault of the carrier, while other perils, such as the fire exception, should be contained in separate provisions. The Working Group took note of these proposals, and it decided to consider the substance of each of the perils on the basis of the text set out in paragraph 8 of A/CN.9/WG.III/WP.36. The Working Group decided to refer general drafting issues resulting from its consideration of the list of excepted perils to an informal drafting group (see paras. 75 to 80 below). Retention of the list of “excepted perils” and placement of specific perils

35. Throughout the discussion of the list of excepted perils, there were suggestions that some of the perils should be deleted, as being events already covered pursuant to the general liability rule in draft paragraph 14(1). That issue was raised particularly with respect to subparagraphs (a), (b), (g) and the fire exception. However, the Working Group was reminded that it had already decided (see A/CN.9/525, paras. 38 and 39, and A/CN.9/544, paras. 117 and 118) that maintaining the list of excepted perils, particularly in language close to that of the Hague-Visby language, was valuable for the purposes of legal certainty, even if it could be argued that it was logically unnecessary. Alternatively, there was some suggestion that certain of the perils listed might not be consistent with the intention in draft article 14 that the list of perils set out clear situations where the carrier was not at fault. That issue was raised particularly with respect to subparagraphs (a), (i), and the fire exception. The Working Group decided also to refer to an informal drafting group those issues regarding where those perils listed should best be placed in the text.

“(a) [Act of God], war, hostilities, armed conflict, piracy, terrorism, riots and civil commotions”

36. It was suggested that the phrase “Act of God” in subparagraph (a) should be deleted in an effort to further the goal of modernization of transport law, and be consistent with the logic of draft article 14. However, it was observed that due to its traditional importance, it would be useful to retain the Act of God peril, particularly since its deletion could be misinterpreted as having substantive meaning. There was some support for retaining the brackets around “Act of God”, and it was proposed that the phrase should be moved, either with or without brackets, to a separate subparagraph, as, it was suggested, it did not match the logic underlying draft article 14. It was further suggested that alternative wording could be used, for example, “natural phenomena”. However, support was expressed for keeping the phrase “Act of God” and removing the brackets.

37. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The brackets should be removed from around the words “Act of God”;
- The phrase could be placed on its own in a new draft subparagraph.

“(b) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers or people [including interference by or pursuant to legal process]”

38. Some support was expressed for retaining the wording in brackets, but concern was raised that the bracketed text represented a departure from the text of article IV.2.g of the Hague-Visby Rules, “seizure under legal process”, which, it was suggested, should be retained to preserve case law. It was further suggested that the word “detention” could be added to the Hague-Visby wording after “seizure”, if the intention of the bracketed text was to broaden the meaning of the Hague-Visby text beyond arrest. It was noted that the Hague-Visby text was considered by some to be difficult to understand, and that situations might arise when the ship was detained as a result of the fault of the carrier, who should not, therefore, be relieved of responsibility. It was observed that detention could also occur through no fault of the carrier. The suggestion was made that such situations could be avoided by linking the interference to actions of governments or to authorities, however some doubts were raised regarding this approach, as magistrates enforcing claims against the carrier could be considered authorities.

39. It was noted that the Working Group was in general agreement with the principle intended in the subparagraph that the carrier should receive the benefit of an exemption when the arrest or detention was through no fault of its own, but that the exemption should not be available when it resulted from the carrier’s fault.

40. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- There was general agreement with the principle that the carrier should receive the benefit of the excepted peril when the arrest or detention was through no fault of its own, but that the wording needed to be clarified.

“(c) Act or omission of the shipper, the controlling party or the consignee”

41. It was proposed that, in addition to the “shipper”, this subparagraph should include a reference to the persons acting on behalf of the shipper, particularly those set out in article 32

of the draft instrument, in order to ensure that the carrier would not be held liable for acts performed by parties not under its control. It was also suggested that the provision should be coordinated with draft subparagraph (h) (see paras. 57 to 58 below).

42. After discussion, the Working Group decided that:

- The issue of adding parties acting on behalf of the shipper would be left to the consideration of the informal drafting group.

“(d) Strikes, lockouts, stoppages or restraints of labour”

43. While the phrase “restraint of labour” had appeared in article IV.2.j of the Hague-Visby Rules, concerns were expressed regarding its meaning and, in particular, its application to the various forms of strike, which could include strikes arising from the fault of the carrier. It was also stated that while the precise meaning of the phrase was not entirely clear, it was preferable to retain it, since it was clearly broader than strikes and lockouts. It was further proposed that the words “restraints of labour” could be replaced by the more modern labour law term, “labour actions”. However, it was suggested that in order to obtain the benefit of existing case law, the language of the Hague-Visby Rules should be retained unless it had created an ambiguity.

44. The Working Group agreed to retain the text of subparagraph (d) with no changes.

“(e) Wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods”

45. The Working Group agreed that the text of subparagraph (e) reflected established commercial practice and retained it with no changes.

“(f) Insufficiency or defective condition of packing or marking”

46. It was suggested that this subparagraph should be deleted as redundant in light of subparagraph (c) considered above, or, in the alternative, that the words “by the shipper” should be added at the end of subparagraph (f) (see A/CN.9/WG.III/WP.36, footnote 39). In response, it was stated that the text of the Hague-Visby Rules should not be revised to address an issue which did not seem to have posed a problem. It was also observed that the draft instrument made clear that it was the obligation of the shipper to offer the cargo to the carrier in a condition ready for shipping, which entailed appropriate packing and marking. It was suggested that modernization of the text of the convention required acknowledgement of modern shipping practices, including increasing recourse to logistics companies.

47. It was suggested that the subparagraph should be clarified through the addition of the phrase, “except when this is done by or on behalf of the carrier” at the end of the provision.

48. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The phrase, “except when this is done by or on behalf of the carrier”, should be added to the end of the subparagraph.

“(g) Latent defects in the ship not discoverable by due diligence”

49. The question was raised whether the phrase “not discoverable by due diligence” was redundant with respect to a latent defect. Further, some support was expressed for the view that the words “in the ship” represented a departure from the text of article IV.2.p of the Hague-

Visby Rules, and should therefore be deleted to maintain uniformity of interpretation. It was suggested that latent defects for which the carrier should not be held liable could also occur outside the vessel, for example, in machinery such as cranes. The suggestion was also made that the entire subparagraph (g) should be deleted in favour of the application of the general rule of exemption from liability absent fault as set out in paragraph 14(1).

50. The Working Group agreed to retain the current text since alternative drafting proposals failed to gather sufficient support.

“(h) Handling, loading, stowage or unloading of the goods by or on behalf of the shipper, the controlling party or the consignee”

51. Concern was expressed that the expression “on behalf of the shipper” made the provision too broad, and it was suggested that the subparagraph should be limited to situations where the shipper had some actual control over the operation being performed on its behalf. The Working Group was reminded that this subparagraph should be considered in light of draft article 11(2) regarding FIO (free in and out) and FIOS (free in and out, stowed) clauses, where certain of the carrier’s obligations, including stowage, could be performed on behalf of the shipper. It was also noted that draft article 32 and subparagraph (c) (see paras. 41 and 42 above) should be considered in any clarification of subparagraph (g).

52. After discussion, the Working Group agreed to refer to an informal drafting group the decision:

- To delete the words “on behalf of the shipper”;
- To place square brackets around the word “stowage” pending the outcome of deliberations on draft paragraph 11(2).

“(i) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 12 and 13(2) when the goods have become a danger to persons, property or the environment or have been sacrificed”

Relationship to articles 12 and 13(2)

53. It was suggested that consideration of subparagraph (i) regarding dangerous goods should be deferred until after both articles 12 and 13(2) had been discussed and finalized. In that respect, it was suggested that the language used in subparagraph (i) was not entirely aligned with that used in draft articles 12 and 13(2).

Placement of subparagraph (i)

54. It was suggested that subparagraph (i) was of an entirely different nature from the preceding subparagraphs (a) to (h). It was said that those subparagraphs contained presumptions as to the absence of fault on the part of the carrier, whereas subparagraph (i) could be seen as a justification for the carrier’s actions to allow goods to be destroyed and thus did not sit well with provisions setting out a basis for the absence of fault. As well, it was said that while paragraphs (a) to (h) were appropriately placed in article 14 in that they were linked to the burden of proof of fault, subparagraph (i) was an exception to paragraph 14 altogether in that it excluded liability a priori. For that reason it was suggested that the subparagraph could be redrafted so as to expressly provide that it was subject to articles 12 and 13(2). It was also suggested that the subparagraph should be moved from article 14.

General average

55. In response to a suggestion that subparagraph (i) might affect the law on general average, the Working Group was reminded that the question of general average was dealt with in Chapter 17 of the draft instrument and provided that the draft instrument did not prevent the application of provisions in the contract of carriage or national law regarding the adjustment of general average. The Working Group heard that it was not intended to allow the carrier to exercise its discretion to render harmless dangerous goods without being subject to possible liability under article 14. In that respect it was noted that articles 12 and 13(2) were also subject to article 14.

Conclusions reached by the Working Group on draft subparagraph (i)

56. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- The subparagraph should be kept in square brackets to highlight that the content of the provision and its location in the draft instrument would need to be revisited once the content of articles 12 and 13(2) had been settled;
- The subparagraph should not be interpreted as affecting the rules on average;
- The placement of subparagraph (i) must be considered.

“(j) Any other cause arising without the actual fault or privity of the carrier, or without the actual 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.”

57. After discussion, the Working Group decided that this subparagraph should be deleted as redundant, since its substance had been moved to paragraph 14(1) (see paras. 12 to 18 above).

“fire on the ship, unless caused by the fault or privity of the carrier”

58. The Working Group recalled that the inclusion of a specific fire exception in the list of excepted perils had been subject to a discussion most recently at its thirteenth session (A/CN.9/552, paras. 94-95), where a decision was made to retain the exception for further consideration in the context of draft article 14. The text of the exception on which the Working Group based its discussions was as follows: “fire on the ship, unless caused by the fault or privity of the carrier” (see draft article 22, in A/CN.9/WG.III/WP.32, reiterated in para. 9, A/CN.9/WG.III/WP.36, and in para. 11, A/CN.9/WG.III/WP.39). It was noted that the exact placement of this exception was yet to be determined but that, in accordance with a decision taken at the thirteenth session of the Working Group (A/CN.9/552, para. 99), it would be further considered in the context of draft article 14, and that it was possible that it could be included as a subparagraph in the list of “excepted perils”.

59. Three options were proposed in respect of the fire exception:

- Delete the specific exception and deal with the risk of fire through the general rule set forth in draft article 14 on the basis that the carrier was best placed to identify the causes of fire;

- As a fallback position to the first option, retain the fire exception in the list of excepted perils but limit it to “fire on the ship” and delete the remainder of the proposed text;
- Include the proposed text in its entirety and place it outside the list as an exoneration, thereby following more closely the approach taken in the Hague-Visby Rules.

60. Support was expressed in favour of both the deletion and retention of the fire exception for the reasons stated previously in the Working Group (see, generally, A/CN.9/552, paras. 94-95). A further reason in favour of its deletion was said to be that including the exception for ships in a multimodal instrument could produce inequity, and was inappropriate given that in other modes of transport the exception did not apply. Further reasons in support of retention of the full Hague-Visby text of the fire exception were expressed on the basis that it represented a well-established rule both in jurisprudence and in practice.

61. While strong preference was generally expressed in the discussion for either the deletion or retention of the fire exception, several views were expressed that a compromise position could also be acceptable. That compromise position consisted of the fallback position set out in paragraph 59 above.

Conclusions reached by the Working Group on the fire exception

62. After discussion, the Working Group agreed to refer to an informal drafting group the decision that:

- As an acceptable compromise, the fire exception should be retained, possibly as subparagraph (j) of the list of excepted perils in draft article 14, and the text following the phrase “fire on the ship” should be deleted.

Other excepted perils

63. The Working Group considered proposed draft subparagraphs (k), (l), (m) and (n) for the list of excepted perils. The text on which these subparagraphs were based was taken from draft article 22 (see A/CN.9/WG.III/WP.39, para. 11), for reincorporation into draft article 14, following the decision of the Working Group (see A/CN.9/552, paras. 93 and 99).

64. After discussion, the Working Group agreed to refer to an informal drafting group the decision that the following text be taken into account in preparing a revised text of the list of excepted perils in draft article 14:

“(k) Saving or attempting to save life at sea;

“(l) Reasonable measures to save or attempt to save property at sea;

“(m) Reasonable measures to avoid or attempt to avoid damage to the environment;

“(n) Perils, dangers and accidents of the sea or other navigable waters.”

Pilot error

65. It was suggested that, notwithstanding the decision of the Working Group to delete error in navigation as a ground for exception to the carrier’s liability (A/CN.9/525, para. 36), pilot error should be reintroduced to the list of excepted perils by inserting the following new draft subparagraph: “act, neglect or default of the pilot in the navigation of the ship”. Three reasons were given for this proposal: pilot error was not necessarily the pure navigational fault of the carrier or its servants; it was not covered by the general liability rule in draft paragraph 14(1);

and it was not covered by the “perils of the sea” exception. Views for and against this inclusion were expressed similar to those raised in the Working Group during consideration of the issue of pilot error and compulsory pilotage in previous sessions (see A/CN.9/525, para. 43). It was also suggested that pilot error was already covered in the draft instrument: in the case of compulsory pilotage, the carrier could prove absence of fault under draft article 14, while in case of nonobligatory pilotage, the pilot was acting as agent of the carrier and therefore the carrier should bear responsibility for the pilot’s acts. However, some hesitation was expressed whether draft article 14 could be interpreted to cover pilot error in this fashion.

66. After discussion, the Working Group decided that:

- Pilot error would not be reintroduced into the draft instrument as an exception to carrier liability.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Draft paragraph 14(4) “concurring causes”

67. The Working Group proceeded to consider draft paragraph 14(4) as contained in document A/CN.9/WG.III/WP.36, which dealt with the question of concurrent causes of loss, damage or delay. It was recalled that this paragraph had already been the subject of discussion in the Working Group (A/CN.9/525, paras. 46-56 and A/CN.9/544, paras. 135-144).

Scope of paragraph and relationship to remainder of draft article 14

68. The view was expressed that there could be three types of concurring causes, each of which should be subject to an allocation of liability by the court pursuant to paragraph (4):

- Those whereby each event could have caused the entire loss, damage or delay, irrespective of the other causes;
- Those whereby each event caused only a portion of the damage;
- And those whereby each event was insufficient to have independently caused the damage, but the combined result created the loss, damage or delay.

69. The Working Group was reminded of its agreement that the guiding principle of paragraph (4) should be that it not deal with the question of liability as that question was dealt with in paragraphs 14(1) and (2) (A/CN.9/544, para. 142), and that paragraph (4) was intended to be confined to the distribution of loss amongst multiple parties, covering all types of concurring causes. Further, it was recalled that in earlier discussions, the Working Group had agreed in principle that when there were multiple causes for loss, damage or delay, it should be left to the court to allocate liability for the loss based upon causation.

70. A doubt was raised regarding how draft paragraph 14(4) would ever come into operation given that draft paragraph 14(1) appeared to relieve the carrier from liability if it proved an occurrence that contributed to the loss. A minority view was that paragraph 14(4) covered only those situations where each cause was responsible for part of the damage; otherwise, the carrier appeared to be fully liable under paragraph 14(1). The addition of a provision on comparative negligence was suggested. Some concern was also raised regarding how resort would be had to paragraph (4) in cases of unseaworthiness. In clarification, it was

said that paragraph (4) was intended to apply in situations where an event for which the carrier was responsible contributed to the loss, including one of the paragraph 14(3) events or unseaworthiness, and where an event for which the carrier was not responsible also contributed to the loss.

Burden of proof

71. It was suggested that draft paragraph 14(4) was unclear with respect to which party bore the burden of proving the existence and the extent of concurring causes, and that it did not adequately clarify this issue with respect to each of the possible types of concurring causes. A proposal was made to reintroduce the phrase “to the extent” in draft paragraph 14(1) in order to clarify that the carrier should bear this burden. A further concern was raised regarding how the burden of proof would operate with respect to the issue of unseaworthiness.

72. In response, it was suggested that the intention of paragraph (4) was that the burden of proof of concurring causes would be dealt with in every conceivable situation in draft paragraphs 14(1) and (2). In this regard, the burden of proof fell first to the claimant to prove its prima facie case in paragraph 14(1), and pursuant to paragraph 14(2), the burden was on the carrier to prove a cause relieving it of its liability, and on the claimant to prove a concurring cause for which the carrier was liable. At this stage, it was suggested, resort would be had to paragraph (4) to allow the court to determine the allocation of liability based on causation. In the case of unseaworthiness, the view was expressed that the draft article would operate such that where unseaworthiness was proved responsible for part of the loss, resort would be had to paragraph (4) and the carrier would be liable for that portion of the loss attributable to unseaworthiness, but not for that portion of the loss that was not caused by its fault.

“[The court may only apportion liability on an equal basis if it is unable to determine the actual apportionment or if it determines that the actual apportionment is on an equal basis]”

73. It was recalled that when the draft paragraph had been discussed by the Working Group at an earlier session, the bracketed sentence had received support as a basis on which to continue further discussion (see A/CN.9/544, para. 143). It was suggested that, in keeping with the earlier discussions that had taken place in the Working Group regarding its agreement that this paragraph should only concern the distribution of the loss amongst more than one person, the provision should be kept as simple as possible to cover all types of concurring causes and that the courts should be given significant freedom to determine allocation. For that reason, it was suggested that the bracketed sentence in draft paragraph 14(4) was not appropriate, as it could be seen either to encourage courts, as a matter of course, to equally apportion liability, or as unnecessary interference with judicial discretion. An alternative view presented was that the purpose of the final sentence was to encourage courts accurately to apportion liability, and to apply a fifty-fifty apportionment only as a last resort.

Conclusions reached by the Working Group on paragraph (4)

74. After discussion, the Working Group agreed that further drafting (see paras. 75 to 80 below) should take into account the following conclusions:

- The intention of the draft paragraph was to grant courts the responsibility to allocate liability where there existed concurrent causes leading to the loss, damage or delay, some of which the carrier was responsible for and some for which it was not responsible;

- To consider and clarify any existing ambiguity in the intended operation of paragraphs 14(1), (2) and (4);
- The bracketed text at the end of the subparagraph (4) should be deleted.

Proposed redraft of paragraphs 14(3) and (4)

75. An informal drafting group composed of a number of delegations prepared a redraft of draft paragraphs 14(3) and (4), based upon the discussion in the Working Group (see paras. 34 to 74 above). The text of the redraft that was proposed to the Working Group for its consideration was as follows:

“3. The events mentioned in paragraph 2 are:

“(a) Act of God;

“(b) Perils, dangers, and accidents of the sea or other navigable waters;

“(c) War, hostilities, armed conflict, piracy, terrorism, riots, and civil commotions;

“(d) Quarantine restrictions; interference by or impediments created by governments, public authorities, rulers, or people including detention, arrest, or seizure not attributable to the carrier or any person mentioned in article 14 bis;*

“(e) Strikes, lockouts, stoppages, or restraints of labour;

“(f) Fire on the ship;

“(g) Latent defects in the ship not discoverable by due diligence;

“(h) Act or omission of the shipper or any person mentioned in article 32,** the controlling party, or the consignee;

“(i) Handling, loading, [stowage,] or unloading of the goods [actually performed] by the shipper or any person mentioned in article 32,* the controlling party, or the consignee;

“(j) Wastage in bulk or weight or any other loss or damage arising from inherent quality, defect, or vice of the goods;

“(k) Insufficiency or defective condition of packing or marking not performed by [or on behalf of] the carrier;

“(l) Saving or attempting to save life at sea;

“(m) Reasonable measures to save or attempt to save property at sea;

“(n) Reasonable measures to avoid or attempt to avoid damage to the environment;

* Further examination is needed whether the reference to article 14 bis is necessary.

** Further examination is needed whether the reference to article 32 is necessary.

* Further examination is needed whether the reference to article 32 is necessary.

“[(o) Acts of the carrier or a performing party in pursuance of the powers conferred by articles 12 and 13(2) when the goods have become a danger to persons, property, or the environment or have been sacrificed.]

“4. When the carrier is relieved of part of its liability pursuant to the previous paragraphs of this article, then the carrier is liable only for that part of the loss, damage, or delay that is attributable to the event or occurrence for which it is liable under the previous paragraphs, and liability shall be apportioned on the basis established in the previous paragraphs.”

76. The Working Group heard that the informal drafting group had incorporated into this revised text the decisions made by the Working Group with respect to draft paragraph 14(3), as discussed in paragraphs 34 to 66 above. Views were expressed that subparagraph (h) and (i) were repetitive, such that subparagraph (i) could be deleted and its content would be adequately covered by subparagraph (h). However, the view was also expressed that subparagraph (i) referred to physical events which were not necessarily covered by subparagraph (h). The Working Group was reminded that it had agreed to postpone a final decision with respect to subparagraph (i) until the Working Group had further considered draft article 11(2), and it was agreed to add a footnote to subparagraph (i) noting that the final text of subparagraph 3(i) would depend upon the outcome of the discussion of the Working Group on draft article 11(2).

77. It was pointed out that the new language in draft paragraph 14(4) was not meant to be a deviation from the Working Group’s decision to leave the determination of apportionment to the court.

78. The Working Group considered the revised text of draft paragraph 14(4) as set out in paragraph 75 above, and found it acceptable.

79. The Working Group expressed its appreciation to Professor Berlingieri of Italy for his leadership on this issue.

Conclusions reached by the Working Group on paragraphs 14(3) and (4)

80. The Working Group decided that:

- The text of paragraphs 14(3) and (4) was broadly acceptable, with the addition of a footnote to subparagraph 14(3)(i) that its final text would depend upon the outcome of the discussion on draft article 11(2).

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Paragraph 1

64. The Working Group was in agreement that draft paragraph 1 should be approved as drafted.

Paragraph 2

65. The view was expressed that, while there was broad agreement on the text of draft article 17, certain changes should be made to paragraph 2 in order to remedy some perceived shortcomings. In particular, it was thought that the list set out in paragraph 3 of draft article 17 was exhaustive in terms of events that could relieve a carrier of liability, and that paragraph 6

covered the situation where the damage to the goods was caused only partly by the carrier, but that article 2 allowed the carrier to escape liability where two causes of the damage existed, either of which could have caused the entire loss, but only one of which was attributable to the carrier. It was suggested that to remedy this perceived shortcoming, the phrases “all or part of” and “or one of the causes” should be deleted from the text of paragraph 2.

66. While some sympathy was expressed for that position, it was pointed out that similar issues had been raised in the Working Group during its fourteenth session, and that the overwhelming view of the Working Group at that time was that it supported the text as currently drafted. Moreover, it was suggested that the apparent problem articulated would be properly solved through the application of the current text even though it did not precisely take the issue into account. Further, it was indicated that the draft convention had deliberately avoided the discussion of issues of causality, leaving it to national law, and that there was thus insufficient reason to disturb the complex series of compromises represented in the drafting of the current text. A suggestion was made for the insertion of a provision clarifying that causation and related matters, such as comparative negligence, were left to national law.

67. The Working Group was in agreement that draft paragraph 2 should be approved as drafted.

Paragraph 3

68. A number of delegations expressed support for the deletion of paragraph 3 of draft article 17, which was said to provide carriers with an excessively generous list of exonerations, while some other delegations suggested that the deletion of error of navigation from this paragraph during previous sessions of the Working Group should be reviewed, or at least borne in mind by the Working Group in assessing the overall balance of liabilities in the draft convention. The Working Group nevertheless expressed its strong support for the inclusion of paragraph 3 as drafted. In support of this position, a number of delegations cited the delicate balance and consensus that was reached by the Working Group in the negotiation of the entire draft article, and the support during past sessions for the inclusion of paragraph 3 in the draft convention.

Bracketed text in subparagraphs (g), (h), (i) and (k)

69. The Working Group next considered the text in paragraph 3 that remained in square brackets. With respect to subparagraph (h), it was suggested that the square brackets around the phrase “the consignor” should be lifted and the text retained since, although the draft convention did not concern itself with matters of agency, it was thought to be good policy that the carrier should not be held liable for acts of the consignor that caused damage to the goods. With respect to subparagraph (i), it was suggested that the square brackets around the phrase “or a performing party” should be removed and the text retained, and that in the case of subparagraph (k), that the square brackets around the text “or on behalf of” should be deleted and the text retained. While there was some support for the deletion of the text in square brackets as found in these subparagraphs, overall, these inclusions were thought to clarify the text of the various subparagraphs, and the Working Group supported the proposals to include them.

70. In the case of subparagraph (g), it was proposed that both of the variants that appeared in square brackets should be deleted along with the words “in the”, thus leaving the text

substantially as it appeared in article 4(2)(p) of the Hague-Visby Rules. Concern was expressed that choosing the “ship” variant would unduly restrict the previously broader approach in the Hague-Visby Rules that included, for example, cranes, but that the alternative “means of transport” was too broad, even though the draft convention was intended to be a “maritime plus” convention. While some support was expressed for each of these two variants, the prevailing view was that the best approach was to retain the approach taken in the Hague-Visby Rules and delete both variants.

Conclusions reached by the Working Group regarding draft paragraph 3

71. After discussion, the Working Group decided that:

- The text of draft paragraph 3 should be retained in the draft convention as drafted;
- The text in both sets of square brackets in subparagraph (g) should be deleted along with the words “in the”; and
- The text in square brackets in subparagraphs (h), (i) and (k) should be retained and the brackets deleted.

72. A proposal to add the phrase “listed in paragraph 3” after the word “circumstance” in subparagraph (a) was not accepted, and the Working Group was in agreement that draft paragraph 4 should be adopted as drafted.

Paragraph 5

73. A proposal to shift the burden of proof in subparagraph (a) of the draft provision from the claimant to the carrier in order to reduce the burden of proof on the shipper was not accepted by the Working Group. In response to a question regarding the intention of subparagraph (b) of the text, it was clarified that the intended scheme of paragraph 5 was that the cargo claimant would have to prove the probable cause of the loss, damage or delay under subparagraph (a), and that subparagraph (b) provided the carrier with the possibility of counterproof. It was observed that any ambiguity regarding this intention should be rectified. The Working Group was in agreement that draft paragraph 5 should be adopted as drafted, with any necessary clarification as noted above.

Paragraph 6

74. The Working Group was in agreement that draft paragraph 6 should be approved as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 18. Basis of liability

Proposal to revise draft article 18

54. There were several expressions of support for the view that draft article 18 still required some amendment in order to ensure that it preserved an equitable balance between carrier and cargo interests. In particular, the following revisions were proposed:

(a) Paragraph 3(e) of draft article 18 should be deleted, because paragraph 2 of draft article 18 already provided sufficient protection to the carrier, and strikes, lock-outs, stoppages or restraints of labour should not diminish the responsibilities of the carrier;

(b) Paragraph 3(g) of draft article 18 should be deleted, because it was said to be unfair to make the cargo owner liable for any latent defects of the goods;

(c) Paragraph 5 of draft article 18 should be deleted and paragraph 4 should be amended to the effect that the carrier would be liable for all or part of the loss, damage, or delay if the claimant proved that the event set forth is subsequent to a fault of the carrier or a maritime performing party. Such an amendment, it was said would better protect the interests of shippers and remove from them the heavy burden to have to prove the unseaworthiness of the ship whenever the carrier invoked one of the defences mentioned in paragraph 3 of the draft article.

55. Although not all of the above proposals received an equal level of support, some sympathy was expressed for improving the draft article so as to achieve a better balance of interests, in particular with regard to the burden of proof on cargo claimants, who were said to have little means of proving the unseaworthiness of the ship. Instead, it was said, it should be for the carrier to prove that it had complied with draft article 15.

56. The Working Group took note of those views, but did not consider that there was sufficient consensus for reopening the debate on draft article 18. It was widely felt that draft article 18 was one of the most important articles in the draft convention with significant practical implications. In response to the proposal above to revise draft article 18, the Working Group was reminded that draft article 18 was a well-balanced compromise which the Working Group had been able to achieve through serious deliberations during the previous sessions. In addition, concerns were raised that the deletion of subparagraphs 3(e) and (g) would lead to a substantial increase in the carrier's liability, in certain cases even to an absolute liability. It was also noted that caution should be taken when revising a text which had been fully considered and approved by the Working Group, especially because draft article 18 was a central element in the whole package of rights and obligations.

57. It was noted that the term "the consignee" in subparagraph 3(h) of draft article 18 should be deleted, as reference to "the consignee" was unnecessary.

58. The Working Group approved the substance of draft article 18 with the deletion of "the consignee" in subparagraph 3(h) and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 18. Basis of liability

Paragraph 2

67. The Commission heard expressions of strong support for amendments to paragraph 2 of draft article 18, in addition to a request to delete paragraph 3.

Paragraph 3

68. The Commission heard strong expressions of support for the deletion of paragraph 3 and the entire list of circumstances under which the carrier was relieved of liability for loss of or damage to the goods. It was stated that such a system was reminiscent of early stages of liner transportation and was not justified at a time when the shipping industry had made tremendous technological strides, with the appearance of new generations of vessels, container ships and ships specializing in the carriage of hazardous or highly perishable goods. The Hamburg Rules, it was noted, did not retain the list of excepted perils of the Hague-Visby Rules, which meant that for all States that had adopted the Hamburg Rules the draft Convention represented a step backwards. Paragraph 3 of draft article 18, it was said, was likely to adversely affect the legal situation of the party entitled to the cargo and might result, as a normal practical consequence, in higher insurance premiums, which would obviously be reflected in the price of the goods. That snowball effect would ultimately reach the final consumers, with all the obvious implications for their purchasing power and hence for national economies.

69. While giving sympathetic consideration to those arguments, the Commission broadly agreed that the paragraph should not be deleted. The Commission was reminded of the extensive debate that had taken place in the Working Group on the same matter and of the various views that had been expressed. The Commission was aware of the depth of those discussions and of the careful compromise that had been achieved with the current text of draft article 18. That compromise, the Commission felt, would be jeopardized by the proposed deletion of paragraph 3 of the draft article, a provision which in the view of many delegations was an essential piece of an equitable liability regime.

70. Furthermore, it was generally felt that the objections raised to the draft paragraph resulted from a misunderstanding of its practical significance. The liability of carriers was generally based on fault, not on strict liability. The principle that the carrier would be liable for damage to goods if the damage was proved to be the result of the carrier's fault was not, therefore, any novelty introduced by the draft Convention. Paragraph 3 was part of a general system of fault liability and the circumstances listed therein were typically situations where a carrier would not be at fault. Even more importantly, the list in paragraph 3 was not a list of instances of absolute exoneration of liability, but merely a list of circumstances that would reverse the burden of proof and would create a rebuttable presumption that the damage was not caused by the carrier's fault. The shipper still retained the possibility, under paragraphs 4 and 5 of the draft article, to prove that the fault of the carrier caused or contributed to the circumstances invoked by the carrier, or that the damage was or was probably the result of the unseaworthiness of the ship. Even many of those who had originally opposed the list in paragraph 3 in the Working Group were now, as a whole, satisfied of the adequacy of the liability system set forth in draft article 18.

Paragraphs 4, 5 and 6

71. Another criticism that was voiced in respect of draft article 18 concerned the burden of proof, which was said to depart from previous regimes. While it was not questioned that the party having the onus of proof must produce the evidence to support its claim, it was said that it would be more difficult for shippers to discharge their burden of proof under the draft article than under existing law. It was observed that evidence about the causes of a loss of cargo was often difficult to obtain, particularly for the consignee or shipper as they would not have access to all (or any) of the relevant facts. The burden of proof with respect to the actual causes of the loss should normally rest with the carrier, which was in a better position than the shipper to know what happened while the goods were in the carrier's custody. If there was more than one cause of

loss or damage, the carrier should have the onus of proving to what extent a proportion of the loss was due to a particular cause.

72. It was argued that the shipper would have difficulty proving unseaworthiness, improper crewing, equipping or supplying, or that the holds were not fit for the purpose of carrying goods, as required by paragraph 5. The combined effect of paragraphs 4, 5 and 6 was to change the general rule on allocation of liability in a manner that was likely to affect a significant number of cargo claims and disadvantage shippers in cases where there was more than one cause of the loss or damage and a contributing cause was the negligently caused unseaworthiness of the vessel. In such cases, the shipper would bear the onus of proving to what extent unseaworthiness contributed to the loss. It was said that whenever loss or damage had resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under the draft article, which should be amended accordingly. Furthermore, it was proposed that paragraph 6 should be deleted, as it was feared that the concept of proportionate liability introduced therein might create evidentiary hurdles for claimants in litigation.

73. The Commission took note of those concerns. However, there was ample support for retaining paragraphs 4, 5 and 6 of the draft article as they currently appeared. The burden placed on the shipper, it was noted, was not as great as had been stated. In fact, nothing in the draft article required the shipper to submit conclusive proof of unseaworthiness, as the burden of proof would fall back on the carrier as soon as the shipper had showed that the damage was “probably” caused by or contributed to by unseaworthiness. Paragraph 6, too, had been the subject of extensive debate within the Working Group and the current text reflected a compromise that many delegations regarded as an essential piece of the overall balance of draft article 18.

Conclusions concerning the draft article

74. The Commission reverted to a general debate on draft article 18, in particular its paragraph 3, after it had reviewed paragraphs 4-6.

75. The Commission heard strong objections to the decision not to amend the draft article, in particular its paragraph 3 (see paras. 68-70 above). The maintenance of that paragraph, it was stated, would have a number of negative consequences, such as higher insurance premiums, resulting in higher prices of goods and consequently reduced quality of life for the final consumers, which would particularly be felt by the populations of least developed countries, landlocked developing countries and small island developing States. That outcome, it was further stated, would be contrary to a number of fundamental policy goals and principles of the United Nations, as formally adopted by the General Assembly. The Commission was reminded, for instance, of the Millennium Development Goals expressed in General Assembly resolution 60/1 of 16 September 2005, which adopted the 2005 World Summit Outcome. Those goals called for the right to development to be made a reality for everyone. All organs and agencies of the United Nations, it was pointed out, were requested to work towards the linkage between their activities and the Millennium Development Goals in accordance with Assembly resolution 60/1. The Commission was urged not to ignore its role in that process and to bear in mind the negative impact that its decision regarding draft article 18 would have for a number of developing and least developed countries. The concern was expressed that by retaining in the text provisions that unduly favoured carriers to the detriment of shippers, the Commission might diminish the acceptability of the draft Convention in entire regions of the world.

76. The Commission paused to consider those concerns, including suggestions for attempting to redraft the draft article in a manner that might accommodate some of them. The prevailing and strongly held view, however, was that over the years of extensive negotiations the Working Group had eventually achieved a workable balance between the interests of shippers and carriers and that the draft article represented the best compromise that could be arrived at. It was considered that it would be highly unlikely that a better result could be achieved at such a late stage of the negotiations. Moreover, the draft article was part of an overall balance of interests, and any changes in its substance would necessitate adjustments in other parts of the draft Convention, some of which were themselves the subject of delicate and carefully negotiated compromises.

77. While reiterating its sympathy for those who were not entirely satisfied with the draft article, the Commission decided to approve the substance of draft article 18 and to refer it to the drafting group. In doing so, the Commission requested the drafting group to align the reference to containers in subparagraph 5 (a)(iii) with a similar reference in draft article 15, subparagraph (c), deleting the brackets around the relevant phrase.

Carrier's liability for failure to provide information and instructions [Deleted]

Article 18. Carrier's liability for failure to provide information and instructions

The carrier is liable for loss, damage [, delay] or injury caused by a breach of its obligations under article 29, unless [and to the extent] the carrier proves that neither its fault nor the fault of any person referred to in article 19 caused [or contributed to] the loss, damage [, delay] or injury.

[Last version before deletion: A/CN.9/WG.III/WP.81]

[See also paragraphs 124-129, A/CN.9/552 (13th Session of WG III) under article 28 at p. 294]

[See also paragraphs 121-127, A/CN.9/591 (16th Session of WG III) under article 28 at p. 295]

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 18. Carrier's liability for failure to provide information and instructions

General discussion

184. The Working Group next discussed draft article 18, which was closely related to the obligations of the shipper, and, in particular, to draft article 29. The Working Group was reminded that it had last considered draft article 18 at its thirteenth session (see A/CN.9/552, paras. 138 to 148).

185. Wide support was expressed for the deletion of draft article 18, regardless of the disposition of draft article 29. It was indicated that draft article 18 could create confusion regarding whether or not it was intended to create a separate cause of action in addition to draft article 17, as well as with respect to its interaction with draft article 17(4) on concurring causes

of liability. It was further indicated that since a fault-based liability regime was applicable to draft article 29, and that a breach of that obligation that caused loss or damage or delay would be covered by draft article 17 of the draft convention, draft article 18 was considered superfluous.

186. A contrary view was expressed that draft article 18 should be retained to keep the contractual balance between the parties of the contract of carriage. A few delegations expressed their desire to defer the consideration of draft article 18 to a later session of the Working Group pending consultations.

Conclusions reached by the Working Group regarding draft article 18:

187. After discussion, the Working Group decided that:

- Draft article 18 should be placed in square brackets for final disposition at the next session, pending the instructions of a few delegations but debate on the issue should not be reopened.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Retention of draft article 18

185. The view was expressed that, to some extent, the Working Group's decision regarding whether to choose Variant A, B or C of draft article 29 was related to its decision regarding whether or not to retain draft article 18 in the text of the draft convention. However, it was recalled that the Working Group had decided at its last session to delete draft article 18, pending the receipt of instructions by a few delegations (see A/CN.9/591, paras. 184 to 187). Although it was suggested that if the Working Group decided to retain the general provision in Variant C of draft article 29, it might want to consider whether it should retain the more specific articulation of the carrier's liability for failure to provide information and instructions set out in draft article 18, the Working Group decided to delete draft article 18 from the draft convention.

Conclusions reached by the Working Group regarding draft articles 29 and 18:

186. After discussion, the Working Group decided that:

- The Secretariat should be requested to revise the text of draft article 29 based on the approach taken in Variant C in paragraph 14 of A/CN.9/WG.III/WP.67, with certain adjustments to the drafting to take into consideration the concerns expressed in the discussion above; and
- Draft article 18 should be deleted from the text of the draft convention.

Article 18. Liability of the carrier for other persons

The carrier is liable for the breach of its obligations under this Convention caused by the acts or omissions of:

- (a) Any performing party;
- (b) The master or crew of the ship;
- (c) Employees of the carrier or a performing party; or
- (d) Any other person that performs or undertakes to perform any of the carrier's obligations under the contract of carriage, to the extent that the person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]***(d) Paragraph (3)***

166. There was general agreement that, in view of the decision that the contracting carrier should be liable under the draft instrument for all its subcontractors, agents or employees, paragraph (3) should apply to both maritime and non-maritime performing parties, and possibly also to persons that would not fall under the definition of "performing party". The attention of the Working Group was drawn to the fact that the definition of "performing party" (see above, paras. 34 to 42) already encompassed all subcontractors of the performing party.

167. The question of the placement of paragraph (3) was raised. Although support was expressed in favour of maintaining paragraph (3) within draft article 15 in view of the close relationship between the various paragraphs in that draft article, the prevailing view was that a provision dealing with the liability of the carrier did not fit well in an article dealing with the liability of maritime performing parties. It was agreed that paragraph (3) should become a separate article, provisionally numbered draft article 14 bis.

168. Various suggestions were made regarding the substance of paragraph (3). One suggestion was that the contents of paragraph (3) should mirror that of paragraph (4). In that respect, it was pointed out that an express reference to the "employees" of the contracting carrier should be added in subparagraph (b), since the reference to "any other person" was insufficiently clear and a reference to the scope of that person's "employment" was already included in the second sentence of the subparagraph. That suggestion was accepted by the Working Group. As a matter of drafting, it was pointed out that further consideration might need to be given to the possibility of dealing separately with employees (for whom the contracting carrier's liability should be very broad) and with subcontractors (in respect of whom the liability of the contracting carrier might be somewhat narrower).

169. Another suggestion was that the words "who performs or undertakes to perform" should be replaced by the words "who physically performs or undertakes to perform". That suggestion was objected to on the grounds that the contracting carrier should never be allowed to delegate liability, whether he delegated physical or other type of performance.

170. It was stated that the words “Subject to paragraph 5” might be inaccurate since paragraph (3) dealt with actions brought against the carrier, while paragraph (5) dealt with actions brought against any person, other than the carrier. Accordingly, it was suggested that the words “Subject to paragraph 5” should be replaced by “Subject to the liability and limitations of liability available to the carrier”. While support was expressed for that suggestion, the Working Group decided to maintain the reference to paragraph 5, subject to further discussion at a later stage.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 18. Liability of the carrier for other persons

Paragraph 1

75. Noting that paragraph 1(b) of draft article 19 and article 34 related to auxiliary persons to the maritime performing party and to the shipper, respectively, it was proposed that the language used in both the articles should be mirrored in paragraph 1 of draft article 18, which dealt with auxiliary persons to the carrier. It was proposed that paragraph 1(b) be redrafted along the following lines, “any person to which the carrier has entrusted the performance of any of its obligations under the contract of carriage”. It was said that that redraft would provide a simpler formulation that would better clarify that the carrier was not responsible for the acts of a person under its supervision or control if that person had not been entrusted with the performance of the carrier’s obligations. That proposal was not supported.

Conclusions reached by the Working Group regarding paragraph 1

76. The Working Group agreed to retain the text of paragraph 1 as contained in A/CN.9/WG.III/WP.81.

Paragraph 2

77. Some support was expressed for retention of the text set out in paragraph 2, which was currently contained in square brackets. It was said that its retention would promote greater international uniformity. However, strong support was expressed for the deletion of the paragraph for the reason that determination of the scope of employment contracts or agency should be left to national law. In response, it was pointed out that, as drafted, paragraph 2 did not affect national law and that its application even relied on rules of national law. Furthermore, the provision was not concerned with the carrier’s own employees but only with the carrier’s vicarious liability for the acts of other parties. If an employee acted outside his or her employment contract, a carrier would probably not be relieved of liability given that that event would not be covered by the list contained in draft article 17(3). Nevertheless strong support was expressed for the deletion of paragraph 2 in order to leave matters of the scope of employment contracts and agency to national law.

Conclusions reached by the Working Group regarding paragraph 2

78. The Working Group agreed to delete the text of paragraph 2 as contained in A/CN.9/WG.III/WP.81.

Paragraph 3

79. The Working Group proceeded to consider a proposal as contained in A/CN.9/WG.III/WP.85 (see para. 3) to clarify by adding a new paragraph 3 to article 18 that a carrier would not be liable for loss of or damage to the goods to the extent that it was attributable to an act or omission of another shipper. It was noted that the proposal was aimed at addressing the concern expressed at an earlier session that, under the draft convention, carriers might nevertheless be found liable to other shippers with goods on board that vessel for a delay caused by only one shipper (A/CN.9/616, para. 103).

80. Some support was expressed for the inclusion of the proposed text. It was suggested that, notwithstanding the Working Group's support for the exclusion of shipper liability for delay from the draft convention, a shipper could still cause delay and damage to other shippers. Nevertheless, if the Working Group agreed to include the proposed text, its placement and wording should still be considered. The proposed text might fit better in article 17, paragraph 3, which dealt with carrier liability. It was also said that the proposed additional language which referred to "another shipper" was ambiguous and should instead refer to "another shipper under another contract of carriage".

81. The Working Group, however, was of the view that the proposed text was unnecessary as its content was already adequately covered by the liability regime set out in draft article 17.

Conclusions reached by the Working Group regarding proposal to add paragraph 3 of draft article 18

82. The Working Group did not support the proposal to add paragraph 3 of draft article 18 as contained in A/CN.9/WG.III/WP.85.

[See also paragraphs 141-153, A/CN.9/621 (19th Session of WG III) under articles 1(6) and (7) at p. 23]

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 19. Liability of the carrier for other persons

59. The Working Group recalled that at its nineteenth session, it agreed, inter alia, to review the treatment of "agents" in the draft convention, as the definition of "performing party" included agents (see A/CN.9/621, paras. 141, 150 and 153). Consequently, the Working Group approved the substance of draft article 19 with the deletion of "or agent" in subparagraph (c) and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 19. Liability of the carrier for other persons

78. The Commission approved the substance of draft article 19 and referred it to the drafting group.

Article 19. Liability of maritime performing parties

1. A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defences and limits of liability as provided for in this Convention if:

(a) The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

(b) The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship and either* (ii) while the maritime performing party had custody of the goods or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage.

2. If the carrier agrees to assume obligations other than those imposed on the carrier under this Convention, or agrees that the limits of its liability are higher than the limits specified under this Convention, a maritime performing party is not bound by this agreement unless it expressly agrees to accept such obligations or such higher limits.

3. A maritime performing party is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person to which it has entrusted the performance of any of the carrier's obligations under the contract of carriage under the conditions set out in paragraph 1 of this article.

4. Nothing in this Convention imposes liability on the master or crew of the ship or on an employee of the carrier or of a maritime performing party.

*The addition of "and either" and the deletion of the semicolons after "from the ship" and "custody of the goods" are technical corrections notified in Depositary Notification C.N.563.2012.TREATIES-XLD.8 and effected in Depositary Notification C.N.105.2013.TREATIES-XLD.8.

[See also the excerpts under article 4 at p. 66]

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

(f) Paragraph 6.3

63. It was pointed out that paragraph 6.3 recognized that a contracting carrier might not fully or even partly perform the contract of carriage itself. This provision therefore acknowledged and imposed liability on "performing parties", namely those parties that performed, wholly or partly, the contract of carriage. It was further stated that, whereas the contracting carrier was liable throughout the contract of carriage, a performing party had a

more limited liability based on when it had custody of the goods or was actually participating in the performance of an activity contemplated by the contract of carriage. Although a view was expressed that consideration of this paragraph should be deferred until the scope of the draft instrument had been settled, it was agreed that preliminary discussion was useful even if the paragraph would need to be revised once the scope of the draft instrument had been settled. It was widely felt that the paragraph was useful as it recognized the reality of the existence of a performing party and thus protected the shipper and also protected the performing party whose liability was limited according to the criteria set out in subparagraph 6.3.1(a).

64. A concern was expressed that the coverage of performing parties was a novel rule which created a direct right of action as against a party with whom the cargo interests did not have a contractual relationship. It was strongly argued that this innovation should be avoided as it had the potential for serious practical problems. Disagreement was expressed with respect to the statement in paragraph 94 of document A/CN.9/WG.III/WP.21 that a performing party was not liable in tort. In this respect, it was argued that liability of the performing party in tort was a matter of national law to which the present instrument did not extend. Also it was submitted that it was not clear under which conditions liability could be imposed upon the performing party. It was said that even though it appeared that the loss or damage had to be “localized” with the performing party (i.e., the loss or damage had to have occurred when the goods were in the performing party’s custody), it was less than clear how the burden of proof on this point was to be dealt with. It was suggested that one interpretation could require that the performing party prove that the loss or damage occurred at a time when the goods were not in that party’s custody. As well it was suggested that, whilst subparagraph 6.3.4. created joint and several liabilities, it did not indicate how the recourse action as between the parties was to be determined. This was particularly ambiguous given that there was not necessarily a contractual relationship between the parties concerned. For these reasons, it was suggested that paragraph 6.3 and the definition of “performing party” in draft article 1 should be deleted or, in the alternative, that the definition should be clarified so as to ensure that it was limited to “physically” performing parties. Support was expressed for limiting the scope of paragraph 6.3 to “physically” performing parties. In this respect it was suggested that the words “or undertakes to perform” should be deleted from subparagraph 6.3.2(a)(ii). However, strong support was expressed for the retention of paragraph 6.3 on the basis that it was an indispensable provision. It was agreed that paragraph 6.3 should be retained, subject to a revision of the text taking account of the concerns expressed and to considering whether further changes were necessary if the draft instrument ultimately applied on a door-to-door basis.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(c) Treatment of performing parties

251. The Working Group was reminded that the issue of the treatment of performing parties pursuant to the draft instrument had been discussed in general terms by the delegations of the United States and of Italy in the presentation of their proposals regarding scope of application (see above, paras. 220, 226 and 227).

252. One concern raised with respect to the treatment in general of performing parties was the geographic reach of the draft instrument. The example was given of goods being shipped

from Tokyo to Rotterdam via Singapore, and whether the stevedore handling the goods in Singapore was subject to the draft instrument if either Japan or the Netherlands had ratified it but Singapore had not. It was said that a direct cause of action against a performing party in a non-contracting State should not be maintained in the draft instrument.

253. Interest was shown in the proposal by the United States that the draft instrument should provide different treatment for maritime performing parties and for inland performing parties, but the view was expressed that firm positions on the proposal could not be expressed until it was formally presented at a later date. It was stated that, under that proposal, maritime performing parties would be treated pursuant to paragraph 6.3, and thus they would be subject to action under the terms of the draft instrument, receiving all of the benefits of the carrier's defences and limitations. Subparagraphs 6.3.1 and 6.3.3 would have to be modified with respect to inland performing parties, however, so that the draft instrument would not create any additional cause of action against them, nor create any additional Himalaya protection for them, outside of the existing applicable law. The view was expressed that separate treatment of maritime and inland performing parties would be of particular importance if mandatory national law was not included in subparagraph 4.2.1. One concern was raised, however, that the institution of the performing party was created to protect both the shipper and the performing party from potential exposure to unlimited liability pursuant to an action in tort, and that the proposal could create problems in this regard in the multimodal environment, since the performing party could be sued by a claimant on the basis of a different contract. Another concern was raised with respect to whether the operation of this proposal could conflict with the 1991 Convention on the Liability of Operators of Transport Terminals in International Trade.

254. A request was made for clarification with respect to the difference between the performing party and the performing carrier in the Italian proposal. In responding to this question, it was said that the Italian proposal narrowly defined performing party to exclude from it those persons who handled and warehoused the goods, and who were not subject to any inland convention, leaving only those who actually moved or carried the goods as performing parties under the draft instrument. The proposal was said to include a right of suit against performing parties in this narrowed sense, such that the contract that the performing party itself concluded would apply. Some concern was expressed with respect to this narrowed definition of performing party, particularly with the Himalaya protection which, it was thought, should be available to all performing parties. Another concern raised with respect to the narrowed definition of performing party was that it was thought that performing parties should not be defined on the basis of their function, since to do so could give rise to uncertainty over who was covered in the draft instrument, and who should be sued. It was said that another aspect of the Italian proposal was a distinction drawn between maritime performing parties and inland performing parties, such that the draft instrument would apply to maritime performing parties, and the inland performing parties would be subject to the contract that they themselves concluded. It was thought that inland performing parties should have the Himalaya protection granted by the contract concluded by them. The view was expressed that allowing the inland performing party to make use of the protection in its own contract could unduly complicate matters, and might not provide sufficient clarity. Another concern raised with respect to this proposal was that the reference to international conventions and to the national law applicable between the performing carrier and the inland performing party could be understood to include non-mandatory national law, and the terms of that contract could be binding on the shipper who

would like to sue the inland performing party directly. It was said that this would unfairly allow the contracting carrier and the performing carrier to conclude a contract to the detriment of the shipper.

255. Some tentative support was expressed for a combination of the Italian and the United States proposals with respect to the treatment of performing parties. For example, there was general support for the separate treatment of maritime and inland performing parties, but it was thought to be better for the purposes of uniformity if the draft instrument would make specific reference to the rights of suit of inland performing parties. No conclusion was reached with regard to such a combination of proposals.

256. After discussion, it was agreed that the treatment of performing parties under the draft instrument was an important matter that would shape the entire instrument, and could help in the solution of other problems, such as the inclusion of mandatory national law in subparagraph 4.2.1. The anticipation of a more refined written proposal on this issue prevented a clear final or interim decision from being made at this stage. It was thought that the time was not yet ripe for revisions to be made to the draft instrument with respect to its treatment of performing parties.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

C. Consideration of core issues in the draft instrument

1. Scope of application and performing parties

(a) General discussion

20. The Working Group heard statements by the delegation of Italy (made also on behalf of the Netherlands) that, in order to promote a pragmatic approach to the draft instrument and to facilitate the work of the Working Group, its earlier proposal (contained in document A/CN.9/WG.III/WP.25) would be withdrawn to favour the adoption of a limited network system in article 8 of the draft instrument. Italy and the Netherlands remained convinced that a uniform liability regime applicable throughout the door-to-door period of the carriage of goods would be the clearest and simplest solution, but had realized, based upon the debate at the eleventh session of the Working Group, that such a solution would not obtain sufficient support.

21. The Working Group heard that Italy and the Netherlands would support the proposal of the United States with respect to scope of application and performing parties (as it appeared in section I of document A/CN.9/WG.III/WP.34), subject to some minor changes. It was proposed that the first change should be that the provisions of the draft instrument apply from the time the goods are taken over by the carrier to the time of their delivery to the consignee, subject to the limited network exception contained in article 8 of the draft instrument, and that the reference to national law that appeared in square brackets in that draft provision should be deleted. It was suggested that such deletion was necessary to avoid the danger that international law could be superseded by national law. The second change suggested was that in addition to the carrier, the provisions of the draft instrument should also apply to those performing parties that operate in the port areas, which were referred to as “maritime performing parties”, for which a definition would be required. The third suggestion was that the provisions of the draft

instrument should not apply to performing parties that are not maritime performing parties. The fourth suggestion was that all of the provisions of the draft instrument that make reference to performing parties should be reviewed so that in those provisions relating to the liability of the carrier for acts or negligence of performing parties (e.g. draft articles 14(2) and 15(3)) reference should continue to be made to performing parties generally, whether maritime or not, while in those provisions that relate to the obligations and the liability of performing parties, reference should only be made to maritime performing parties. Amongst others, it was suggested that draft articles 15(1) and 15(4) should be revised to create a direct cause of action against maritime performing parties only. Similarly, it was suggested that the “Himalaya” protection of article 15(5) should be extended to maritime performing parties only.

22. By way of general presentation of working paper A/CN.9/WG.III/WP.34, the Working Group heard that the intention of the proposal was to begin shaping the basic structure of the draft instrument now that the Working Group had completed an initial review of possible provisions. It was stated that the working paper was intended to address the likelihood that creating a uniform liability regime would not be possible, and to present an overall package of compromises reached amongst competing interests in the industry. It was felt that the package represented both the highest level of uniformity that was achievable and a significant improvement over the current system.

23. With specific reference to section I of document A/CN.9/WG.III/WP.34 (“Scope of application and performing parties”), the Working Group heard that, in keeping with the overall proposal (which was referred to by its proponents as a “compromise position”), support was given to door-to-door coverage of the draft instrument on a limited network basis as currently set out in the draft instrument. However, it was recommended that the treatment of performing parties be altered so that only maritime performing parties, generally those who would have been covered in a port-to-port instrument, such as stevedores and terminal operators, and ocean carriers would be covered by the draft instrument. Non-maritime performing parties, such as inland truck and railroad carriers or warehouses outside of the port area, would be specifically excluded from the liability regime of the draft instrument. However, non-maritime performing parties would still be considered performing parties under the draft instrument because the contracting carrier would be responsible for their acts or negligence. It was further explained that it was felt that under this proposed regime, reference to “national law” in article 8 of the draft instrument would be inappropriate and unnecessary to protect the current liability regime applicable to inland carriers, and that the liability of inland performing parties would be based on existing law, whether that be a regional unimodal convention or mandatory or non-mandatory domestic law, which may include tort. Automatic “Himalaya clause” protection would extend only to those performing parties who assumed liability under the draft instrument (i.e. to maritime performing parties only), and the ability of inland performing parties to rely on a “Himalaya clause” would be subject to their existing rights to do so under applicable national law. In response to a question, it was acknowledged that this proposal did not solve any existing problems for inland performing parties under current applicable national law, but that inland performing parties would be left in exactly the same position with respect to liability in which they were currently.

24. Strong support was expressed for the general principles and “compromise position” set out in section I of document A/CN.9/WG.III/WP.34. While some potential adjustments were suggested as, for example, with respect to the treatment of maritime performing parties in a

non-Contracting State, it was strongly felt that the approach was the best one possible in the circumstances. Minority views were also expressed that the draft instrument should cover inland carriers and that a uniform liability system should still be considered

25. While there was general support for the creation of different regimes for maritime and non-maritime performing parties, it was proposed that a reference to national law be kept in article 8(b), and it was suggested that this reference could be qualified by referring to national mandatory law that is similar to or based upon existing conventions. It was stated that the proposal in section I of document A/CN.9/WG.III/WP.34 did not solve all problems that a specific reference to national law would solve, since, for example, without a reference to national law in article 8(b), it would not be possible for the owner of goods to sue a contracting carrier on the basis of the national law governing the carriage of goods by road. It was also stated that if inland carriers were left out of the scope of the draft instrument, it could not be assured that claims against inland carriers would be available under the applicable national law, and that this would be detrimental to shippers. It was suggested that shippers could potentially enjoy greater recovery for claims under national law given the generally lower liability limits under maritime conventions, but it was pointed out that this was not necessarily the case, particularly with respect to the “per package” limitation rules contained in maritime conventions, coupled with the amount of container traffic and the incidence of high value/low weight goods. As a further qualification to the reference to national law, it was suggested that only mandatory national regimes that created better protection for owners of goods would prevail over the draft instrument. Some support was expressed for the position that a reference to national law should be maintained in article 8(b), although concern was raised with respect to this proposal in light of the Working Group’s intent to create as uniform a regime as possible under the draft instrument. Further, with respect to the proposed qualifications of the reference to national law, concern was expressed regarding what criteria would be used to decide whether national laws would meet the proposed qualification requirements under article 8(b), and whether this would increase the level of uncertainty in the scope of application.

26. It was suggested that the treatment of performing parties under the draft instrument and the possible reference to national law in article 8(b) were two separate matters that were not necessarily linked. It was suggested that the liability of the contracting carrier was the key aspect of article 8, which in turn had two aspects, that of recourse action under article 8 and that of conflicts with other international conventions. In response, it was suggested that there was a substantial or pragmatic link between article 8 and the treatment of performing parties. It was explained that the proposal in section I of document A/CN.9/WG.III/WP.34 was very clearly dependent on the acceptance of both the exclusion of non-maritime performing parties from the liability regime under the draft instrument, and the deletion of the reference to national law in article 8(b), since the exclusion of inland carriers was intended to render the reference to national law unnecessary.

27. The Working Group was almost unanimous in support of the exclusion of non-maritime performing parties from the liability regime of the draft instrument as set out in section I of A/CN.9/WG.III/WP.34. In addition, there was strong support in favour of the second aspect of that proposal in deleting the reference to national law in article 8(b). One delegation expressed the view that there was no reason to exclude land carriers from the draft instrument. While a provisional decision was made to retain the reference to national law in article 8(b) in square brackets pending a final decision to be made at a future session, it was strongly felt that

deletion of the reference to national law was a necessary component to the overall proposal. The Working Group took note of the fact that the proposal in section I of document A/CN.9/WG.III/WP.34 should be regarded as a single package, including both the exclusion of non-maritime performing parties from the liability regime and the deletion of the reference to national law in article 8(b).

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6. Liability of performing parties (draft article 15)

(a) General discussion

159. The Working Group was reminded of its discussion with respect to the definition of a “maritime performing party” (see above, paras. 23 to 33). The Working Group was generally in agreement with a suggestion that was made to the effect of limiting the scope of draft article 15 to such “maritime performing parties”. The consequences of such a limitation would be that the liability of non-maritime performing parties would be covered by domestic and international law applicable outside the draft instrument. In that context, it was also agreed that adjustment should be made to the title of the draft article to reflect that decision. However, the Working Group generally felt that the general policy regarding the scope of draft article 15 might need to be reviewed in respect of each of the individual paragraphs of the draft article. It was felt that the scope of paragraph (3), in particular, should extend to all performing parties, without limitation to “maritime performing parties” (for continuation of that discussion, see below, para. 166).

160. A concern was expressed that, where the contracting carrier was liable under the draft instrument and a non-maritime performing party would be subject to liabilities under another legal regime, the claimant could seek compensation under the two regimes in addition to one another. It was suggested that a rule on aggregation of claims should also apply to all performing parties. It was stated in response that applicable law outside the draft instrument would typically provide mechanisms through which double compensation could be avoided.

(b) Paragraph (1)

161. The Working Group reaffirmed its understanding that the draft instrument should, in principle, avoid dealing with non-maritime performing parties and that the scope of paragraph (1) should be restricted to maritime performing parties.

162. Broad support was expressed in favour of Variant A. It was suggested that an improvement to the text would result from inserting the words: “if the occurrence that caused the loss, damage or delay took place” before the text of subparagraph (a) in Variant A. That suggestion was found acceptable by the Working Group. A second suggestion was made to add words along the lines of “to the extent that it is established by the claimant” before the other phrase suggested for insertion. It was stated in response that the purpose of paragraph (1) was not to deal specifically with burdens of proof but to place the maritime performing party on an equal footing with the contracting carrier, including the rules applicable to such contracting carrier in respect of burdens of proof. The second suggestion was not adopted by the Working Group.

(c) Paragraph (2)

163. The Working Group generally agreed with the substance of the paragraph. It was also agreed that the scope of paragraph (2) should be restricted to maritime performing parties. In response to a proposal that the word “higher” should be replaced by the word “different” to allow the parties to agree to a lower limit of liability, it was pointed out that the contracting carrier should not be allowed to contract with the shipper to the detriment of the performing party (or of any other third party). It was acknowledged that the liability of the performing party could be reduced by agreement but not as a result of a contract to which it was not a party. The proposal was withdrawn by its proponents.

164. Another proposal was made to replace the words “unless the performing party expressly agrees to accept such responsibilities or such limits” by wording along the lines of “unless the performing party has knowledge of such responsibilities or such limits”. That proposal was objected to on the grounds that a contract should not bind a third party unless that third party had at least accepted to be bound. Simple knowledge of a contract by a third party should not result in that third party being bound.

165. Yet another proposal was made to limit the reference to draft article 18. It was stated that, while the reference to paragraphs (1), (3) and (4) of draft article 18 was acceptable, paragraph (2) of draft article 18 should not be referred to since the performing party was not liable in case of non-localized damage. The Working Group took note of the suggestion and decided that it might need to be further discussed after a decision had been made regarding the inclusion of paragraph (2) of draft article 18 in the draft instrument.

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(e) Paragraph (4)

171. Consistent with a suggestion made in the context of the discussion of paragraph (3), it was suggested that the situation of employees under paragraph (4) might be differentiated from that of subcontractors. For example, it was stated that the notion that performance was “delegated” might be appropriate for a subcontractor but seemed too narrow to address the situation of an employee, which might be better covered by wording along the lines of “a performing party shall be responsible for the acts and omissions of its employees, provided they acted within the scope of their employment”. Another example given was that the text of paragraph (4) should avoid suggesting that a subcontractor could delegate “any” of the obligations of the carrier, since the subcontractor could only delegate those obligations of the carrier the subcontractor had undertaken.

172. The Working Group reaffirmed its earlier decision that the structure of paragraph (4) should mirror that of paragraph (3). In that connection, a question was raised as to whether the scope of paragraph (4) should be extended to cover both maritime and non-maritime performing parties. After discussion, it was recalled that the provision that would replace paragraph (3) as a separate article should establish the liability of the contracting carrier also in respect of subcontractors and employees of its subcontractors. That provision was intended to establish a general liability of the contracting carrier for all conceivable agents or subcontractors the contracting carrier might rely upon. However, since paragraph (4) dealt with employees and subcontractors from the perspective of the maritime performing party and not from that of the contracting carrier, there was no need to extend the scope of paragraph (4) to

non-maritime performing parties. While the Working Group was generally in agreement with the difference in scope between paragraphs (3) and (4), the recurring view was expressed that the maritime subcontractor dealt with under paragraph (4) should still be responsible for all of its subcontractors, whether maritime or non-maritime. The view was also reiterated that paragraph (4) should mirror the general rule in paragraph (3) since in both provisions, the contracting carrier and the maritime performing party were placed in parallel situations vis-à-vis their maritime and non-maritime subcontractors. It was pointed out that those views were not in conflict with the general policy that the non-maritime performing party, as such, should not be regulated under the draft instrument. The Working Group took note of those views for continuation of the discussion at a future session.

(f) Paragraph (5)

173. It was suggested that the reference to paragraph (3) should be deleted to avoid any interpretation extending the protection of “Himalaya clauses” to nonmaritime performing parties. While the Working Group generally approved the intended result of that suggestion, it was observed that the deletion of the reference to the persons mentioned in paragraph (3) would deprive employees and agents of the carrier of the benefit of “Himalaya clauses”. A revised suggestion was that paragraph (5) might need to list expressly those persons mentioned in paragraph (3) to which the benefit of such clauses should extend. In the context of that discussion, the view was expressed that since, historically, “Himalaya clauses” had been introduced for the protection of employees, the scope of paragraph (5) should be restricted to such employees of the carrier, to the exclusion of subcontractors of the carrier. The view was also expressed that the benefit of “Himalaya clauses” should only extend to those parties who were liable under the draft instrument. An alternative suggestion was made for a restriction of the scope of paragraph (5) to employees of the contracting carrier or of a maritime performing party, if they proved that they had acted within the scope of their employment.

174. In response to those suggestions, it was pointed out that a clear departure from the interpretation of the Hague and Hague-Visby Rules might adversely affect the acceptability of the draft instrument. It was also pointed out that the definition of “performing party” covered only those persons that “physically” handled the goods. Therefore, pilots, cargo inspectors and other persons that might assist the carrier would not be protected by “Himalaya clauses”. As to the formulation of the draft instrument, it was suggested that the protection created by paragraph (5) should be extended at least to “employees or agents of the contracting carrier or of a maritime performing party”. An alternative suggestion was that wording should be introduced to extend such protection to all the parties involved in the maritime operations, including independent subcontractors.

175. After discussion, the Working Group agreed that, as an alternative to the existing text of paragraph (5), the words “employees or agents of the contracting carrier or of a maritime performing party” should be inserted in square brackets for continuation of the discussion at a future session. The Secretariat was requested to examine the possibility of introducing a further variant limiting the scope of paragraph (5) to the maritime sphere.

176. As a matter of drafting, it was suggested that the words “Any action” might lend themselves to misinterpretation and should be replaced by the words “Any action under this instrument”. The Working Group took note of that suggestion.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]**Draft article 20. Liability of maritime performing parties**

141. It was recalled that the insertion of a new paragraph 20(5), as contained in A/CN.9/WG.III/WP.61, paragraph 44, had been suggested. It was indicated that the draft provision aimed at resolving certain difficulties relating to the interaction between draft article 8, on the general scope of application of the draft convention, and draft article 20, on the liability of maritime performing parties. In particular, the insertion of the draft provision was aimed at avoiding the application of the draft convention to those maritime performing parties that performed their duties completely in non-contracting States.

142. In response to a query, it was explained that the phrases “initially received” and “finally delivered” in draft paragraph 20(5) were in line with text adopted in draft article 77 (see A/CN.9/591, para. 41), and that the references were intended as clarifications to avoid the application of the draft convention to maritime performing parties that carried the goods from a non-contracting State to another non-contracting State but a trans-shipment occurred at a port of a contracting State during the voyage.

143. In response to another query, it was further explained that draft paragraph 20(5) made reference to “place” where the goods were received or delivered rather than “port” because a reference to “port” could result in leaving a gap in the scope of application during the maritime performing party’s custody of the goods in situations where the maritime performing party received or delivered the goods outside of the port area at an inland location.

144. It was suggested that the text of the draft convention should be considered with a view to identifying other references to maritime performing parties, and ascertaining whether draft paragraph 20(5) should only exclude the application of draft article 20, or whether it should refer to the entire draft convention.

Conclusions reached by the Working Group regarding draft article 20(5):

145. After discussion, the Working Group decided that:

- The text of draft paragraph 20(5) contained in A/CN.9/WG.III/WP.61, paragraph 44, should be inserted in the draft convention; and that
- The Secretariat was requested to consider other references to the maritime performing party in the draft convention in order to ensure the appropriateness of the reference to the non-application of “this article”.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 19. Liability of maritime performing parties**

83. It was clarified that the language in the bracketed text in paragraph 1 of draft article 19 was intended to ensure that maritime performing parties would not be covered by the draft convention if they did not perform any of their activities in a Contracting State. Whilst there was some support for the deletion of the bracketed text, there was strong support for the retention of the language. In that respect, it was pointed out that the exclusion of maritime performing parties did not mean that carriers would not be liable for the acts of these

performing parties. Rather, it meant that the shipper or consignee would not have a direct cause of action against the maritime performing party under the draft convention, and that such maritime performing party would not automatically enjoy the same exoneration and limits on liability that applied to the carrier under the draft convention.

Conclusions reached by the Working Group regarding paragraph 1

84. The Working Group agreed to retain the text of paragraph 1 of draft article 19 as contained in A/CN.9/WG.III/WP.81 and delete the brackets.

Paragraph 2

85. The Working Group proceeded to consider paragraph 2 of draft article 19 as set out in A/CN.9/WG.III/WP.81. The Working Group took the view that, in light of the decision taken to delete paragraph 2 of draft article 18, paragraph 2 of draft article 19 should also be deleted.

Conclusions reached by the Working Group regarding paragraph 2

86. The Working Group decided that the text in paragraph 2 of draft article 19 as found in A/CN.9/WG.III/WP.81 should be deleted.

Paragraph 3

87. Given the broad formulation of the definition of maritime performing party, a proposal was made to delete paragraph 3 for the reason that it would not be fair to the consignee to allow a carrier to enforce the limitation of liability with respect to additional obligations or to higher liability limits that it agreed to, but to refuse to bind the maritime performing party to those same limits absent express agreement. However, support was expressed for retention of that paragraph. It was said that if the contractual carrier agreed to increase liability beyond that provided for in the draft convention, it would be illogical to impose such liability on the maritime performing party who might not even be a party to that agreement.

Conclusions reached by the Working Group regarding paragraph 3

88. The Working Group was in agreement that the text in paragraph 3 of draft article 19 as found in A/CN.9/WG.III/WP.81 should be retained, subject to any changes to cross-references that might be necessary once the text of the draft convention was finalized.

Paragraph 4

General comments and placement

89. Support was expressed for the general policy behind paragraph 4, which was to afford employees, agents and sub-contractors of the carrier and maritime performing parties the full protection of the rights, defences and limits of liability available to the carrier under the draft convention for any breach of its contractual obligations or duties in the event that an action under the draft convention was made directly against it, a protection which was often sought through the insertion of so-called “Himalaya” clauses in transport documents. It was agreed that the term “defences and limits of liability” should be interpreted broadly, as had been agreed by the Working Group in connection with draft article 4.

90. A concern was expressed that it was not clear whether or not employees of the carrier were dealt with anywhere else than paragraph 4 in the draft convention. For example, subparagraph 1(b) of draft article 18, which referred to persons that performed the carrier’s

obligation, did not appear to encompass the carrier's employees. It was suggested that a Himalaya clause should be extended to apply to any person who assisted the carrier in performing its duties. To that end, a proposal was made to expand paragraph 4 so as to encompass the full category of parties that performed the carrier's obligations under the draft convention, including its employees and agents. A suggestion was made that the master and crew of the ship should also be covered as well as independent contractors. A view was expressed that the existing definitions of performing party and maritime performing party were broad enough to include these persons. Given the different possible interpretations, it was agreed that these definitions should be clarified. In that respect, it was stated that, in the situation where crew members were not employees of the carrier but rather employees of the ship owner or of a crew company should also be taken into account.

91. It was proposed that, as paragraph 4 dealt with matters different from exemptions for maritime performing parties, it might be more appropriately located following article 4 in Chapter 1 of the draft convention which dealt with general provisions. Some support was expressed for that suggestion.

Bracketed text

92. The Working Group proceeded to consider the three alternative bracketed texts.

93. Some support was expressed for the retention of the first bracketed text. However, it was suggested that if the first bracketed text, which referred only to maritime performing parties, were retained, then paragraph 4 could be deleted as it was already covered by paragraph 1 of draft article 19.

94. Strong support was expressed for retaining the second bracketed text. In that respect, it was noted that article 4 bis (2) of the Hague-Visby Rules extended the protection of a Himalaya clause to servants or agents of the carrier, as such protection was not always valid in all jurisdictions.

95. Some support was expressed for the third bracketed text for the reason that it was said to better reflect that the draft convention applied to multimodal rather than traditional port-to-port transportation. It was suggested that the words "or subparagraph 1(a) of this article," could also be deleted. However, concern was expressed that the third bracketed text appeared to bring agents and servants of inland carriers within the scope of Himalaya protection which would not be consistent with the Working Group's decision to exclude inland carriers from the scope of the draft convention.

"if [it proves that] it acted within the scope of its contract, employment or agency"

96. Although some support was expressed for its retention, there was a consensus to delete the entire phrase "if [it proves that] it acted within the scope of its contract, employment or agency".

Conclusions reached by the Working Group regarding paragraph 4

97. The Working Group was in agreement that:

- The second bracketed text in paragraph 4 of draft article 19 as found in A/CN.9/WG.III/WP.81 be retained without the brackets;

- Paragraph 4 and the definitions of “performing party” and “maritime performing party” be reconsidered and possibly redrafted to specify who precisely was covered by the Himalaya protection clause and consideration be given as to whether the crew, master, independent contractors and employees of the carrier were also covered;
- The final part of paragraph 4, “if [it proves that] it acted within the scope of its contract, employment or agency” be deleted in accordance with the decision to delete paragraph 2 of article 18 and leave matters relating to the scope of employment contracts and agency to national law (see paras. 77 to 78 above); and
- That the location of paragraph 4 be reconsidered, taking account of the suggestions of the Working Group.

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Revised text of draft articles 1(6) and 1(7) (“performing party” and “maritime performing party”); and draft articles 4, 18 and 19

141. In accordance with its earlier decision to reconsider the reformulated definitions of “performing party” and “maritime performing party” as originally contained in paragraphs 6 and 7, respectively, of draft article 1 (see above, para. 138), the Working Group continued its deliberations on the following revised text of those provisions, as well as consequential changes to draft articles 4, 18 and 19:

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“Article 19. Liability of maritime performing parties

“1. A maritime performing party that initially received the goods for carriage in a Contracting State, or finally delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State if the occurrence that caused the loss, damage or delay took place during the period between the arrival of the goods at the port of loading of a ship and their departure from the port of discharge from a ship, when it has custody of the goods or at any other time to the extent that it is participating in the performance of any of the activities contemplated by the contract of carriage:

“(a) Is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier’s defences and limits of liability as provided for in this Convention, and

“(b) Is liable for the breach of its obligations pursuant to this Convention caused by the acts and omissions of any person to which it has entrusted the performance of any of the carrier’s obligations under the contract of carriage. ...”

142. It was explained that the three guiding principles agreed upon by the Working Group with respect to the reformulation of the definitions of “performing party” and “maritime performing party” (see above, para. 131) had been followed in redrafting the text. In the revised text, “Performing party” was defined narrowly, such that subparagraph (a) detailed the inclusive list, and subparagraph (b) detailed the excluded persons, which was thought to solve the potential problem of the employee of the maritime performing party being held liable pursuant to the draft convention for the actions of its employer. In addition, it was indicated that the list of persons included in the vicarious liability provision of draft article 18 was

expanded to specifically include the persons who, the Working Group had decided, should receive such protection. Further, automatic protection was specifically included for the broader category of persons, as agreed by the Working Group, and protection pursuant to draft article 4 was expanded, including small additional changes such as the inclusion of arbitral proceedings in the text of the provision. Certain technical adjustments were also made to draft article 19(1), such as moving a portion of subparagraph 1(a) into the chapeau. Finally, it was explained that the last sentence of the definition of “maritime performing party” was intended to exclude specifically from the definition those inland carriers who carried the goods only into or out of the port, as decided by the Working Group.

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151. In response to a question regarding the treatment of employees and agents under draft article 19(1)(b), it was noted that the phrase “any person to which it has entrusted the performance” was intended to include such persons. However, it was agreed that should any doubt persist in that regard, the master and crew of the ship, employee and agent should be included in the text of draft article 19(1)(b). A preference was expressed for such a clarification in the text, but a further observation was made that that inclusion should be very specific so as to ensure that it referred to the master and crew of the ship that performed the ocean transport leg for which the maritime performing party was responsible.

152. A question was also raised regarding the inclusion of independent contractors in the Himalaya protection. It was indicated that “subcontractors” were included in the definition of the “performing party” and thus were included under Himalaya protection by virtue of the inclusion of the “performing party”, but it was suggested that if that reference were unclear, consideration could be given to the addition of “independent contractors”.

Conclusions reached by the Working Group regarding the revised text

153. After discussion, the Working Group decided that:

- It was satisfied that the revised text corresponded to its earlier decisions;
- Some drafting suggestions as set out in the paragraphs above should be considered by the Secretariat, including examination of the list of persons excluded from “performing party”; the treatment of “agents” in draft article 1(6), 4(2) and 18; and appropriate wording to include inland waterways in the closing sentence of draft article 1(7);
- The revised text was otherwise generally acceptable to the Working Group.

[See also paragraphs 141, and 143-150, A/CN.9/621 (19th Session of WG III) under articles 1(6) and (7) at p. 23]

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 20. Liability of maritime performing parties**

60. A question was raised with regard to paragraph 4 of draft article 20 whether liability would be imposed on the “master or crew of the ship”. The Working Group recalled that the draft convention had previously defined “maritime performing party” to include employees and that paragraph 4 of draft article 20 was drafted in order to exempt employees from liability. It was pointed out that if the intent of the draft convention was to exempt individual masters or crew from liability as can be implied from subparagraph (b) of draft article 19, a separate exemption for those parties should be provided accordingly in paragraph 4 of draft article 20. After discussion, the Working Group approved the substance of draft article 20 with the inclusion of reference to “master or crew of the ship” in paragraph 4 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 20. Liability of maritime performing parties; and draft article 1, paragraphs 6 (“performing party”) and 7 (“maritime performing party”)**

79. It was noted that draft article 20 made the maritime performing party subject to the same liabilities imposed on the carrier. According to the definition in draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. The combined effect of those provisions was said to be inappropriate, as seaworthy packing could also be performed inland. Furthermore, cargo companies located in seaports were more and more frequently performing services that did not fall under the obligations of the carrier. Furthermore, there might be doubts as to whether a road or rail carrier that brought goods into the port area would qualify as a maritime performing party for its entire journey or whether it would be a mere performing party until it reached the port area and would become a maritime performing party upon entering the port area. As it was in practice difficult to establish the boundaries of port areas, the practical application of those provisions would be problematic. In view of those problems, it was suggested that the draft Convention should allow for declarations whereby Contracting States could limit the scope of the Convention to carriage by sea only.

80. In response, it was noted that in accordance with draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. That qualification was consistent with a policy decision taken by the Working Group that road carriers should generally not be equated with maritime performing parties. Therefore, a road carrier that brought goods from outside the port area into the port area would not be regarded as a maritime performing party, as the road carrier had not performed its obligations exclusively in the port area. Furthermore, it was noted that it had become common for local authorities to define the extent of their port areas, which would in most cases provide a clear basis for the application of the draft article. The Working

Group, it was further noted, did not consider that there was any practical need for providing a uniform definition of “port area”.

81. The Commission approved the substance of draft article 20 and of the definitions contained in draft article 1, paragraphs 6 and 7, and referred them to the drafting group.

Article 20. Joint and several liability

1. If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention.
2. Without prejudice to article 61, the aggregate liability of all such persons shall not exceed the overall limits of liability under this Convention.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

(g) Paragraph (6)

177. Concerns were expressed with respect to the translation of the legal notion of “joint and several liability” in a number of official languages. It was pointed out that, for example, in French and Spanish, the phrases “responsabilité solidaire” and “responsabilidad solidaria” respectively, should be used. The Working Group requested the Secretariat to ensure that the notion was used consistently in all official languages. A suggestion was made to introduce a definition of “joint and several liability” in the draft instrument. However, it was generally felt that such a definition might be superfluous to the extent that corresponding concepts existed in the various legal systems. It was further suggested that the provisions of paragraph 6 should not prevent parties that are liable from resorting to recourse actions.

178. Regarding the substance of paragraph (6), a question was raised as to how the reference to “the limits provided for in articles 16, 24 and 18” would interplay with the operation of the international conventions referred to in draft article 8 that might be applicable before or after the sea leg of the carriage. In response, it was pointed out that, in relation to maritime performing parties, draft article 8 would not apply. Furthermore, while draft article 8 might apply in relation to non-maritime performing parties, there seemed to be no example of a single situation where a claimant would have an option to sue a contracting carrier or a non-maritime performing party to whom article 8 might be applicable. It was stated that concurring actions were only conceivable in actions against the contracting carrier or against a maritime performing party, both of whom would be covered by maritime limitations.

179. A concern was expressed with respect to the operation of limits of liability. In a situation where two parties were liable but the limit of liability did not apply in respect of only one of those parties, the theory of joint and several liability would apply up to the limit in respect of one party but the other party should be liable beyond the limit. In order to clarify that paragraph 6 should only deal with maritime performing parties and in response to that concern, a suggestion was made to simplify the text of paragraph (6) along the following lines: “The contracting carrier and the maritime performing party are jointly and severally liable.” It was suggested that the issue should be further discussed in the context of paragraph (7).

180. After discussion, the Working Group agreed that the scope of paragraph (6) should be limited to maritime performing parties.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Paragraph 6

11. The Working Group considered the text of paragraph 6 of draft article 15 as contained in document A/CN.9/WG.III/WP.36 (previously, paragraph 7 of draft article 15 as contained in document A/CN.9/WG.III/WP.32).

Joint and several liability

12. Questions were raised regarding the relationship between paragraph 6 and paragraph 5 (which expressed the principle that, where more than one maritime performing party was liable, such liability was joint and several). With respect to paragraph 5, the view was expressed that the common law concept of “joint and several liability” might not be interpreted as strictly equivalent to such civil law concepts as “responsabilité solidaire” or “responsabilidad solidaria” which, in turn, differed from such notions as “responsabilité conjointe” or “responsabilidad mancomunada”. It was widely felt that further elaboration might be necessary to make it clear in all languages that, where several parties were held liable under paragraph 5, each party was individually responsible for compensating the total loss, subject to any statutory limit applicable and also subject to the recourse action that party might exercise against other liable parties.

Aggregate liability

13. There was general agreement with the principle expressed in paragraph 6 that, where all of the defendants to a claim were entitled to benefit from the limited liability provisions of the draft instrument, a claimant should be precluded from claiming from the contracting carrier and/or the maritime performing parties an aggregate amount greater than the total limits of liability provided for in the draft instrument.

Set-off—exclusion of non-maritime performing parties

14. The issue of the set-off of damages amongst defendants to a claim was discussed, and several possible scenarios envisaged. Concerns were raised as to how the principle of aggregate liability would operate in cases of interplay between various liability regimes, which might result in the combination in one claim of defendants who could claim the aggregate limitation on liability and defendants who could not. For example, where both maritime and non-maritime performing parties were liable and the non-maritime parties were subject to higher limits of liability under applicable law, the effect of paragraph 6 should not be to create a lower limit of liability for such non-maritime parties. However, where compensation would be paid under another liability regime because the claimant had sought compensation in a claim directly against a non-maritime performing party and thereafter claimed against the contracting carrier, the compensation payable by the non-maritime performing party should be set off against the amount claimed from the carrier. Another example was envisaged where the limit of liability was broken in respect of one of the defendants for reasons of wilful misconduct but that limit should still be available to other defendants. With a view to alleviating some of these concerns,

the Working Group generally agreed that paragraph 6 should apply to both the contracting carrier and maritime performing parties but that it should clarify that it was not intended to apply to non-maritime performing parties.

15. Regarding the possible formulation of paragraph 6, it was suggested that the words “all such persons” should be replaced by a reference to the contractual carrier and to maritime performing parties. Alternatively, it was suggested that paragraph 6 should read along the following lines: “Without prejudice to article 19, the aggregate liability of all such persons shall, as far as the liability of the contracting carrier and any maritime performing party, not exceed the overall limits of liability under this instrument”. A suggestion was also made that the issue of set-off should be left to applicable domestic law. A further suggestion was that, in preparing a revised draft of paragraph 6, the text of article 10 of the Hamburg Rules might be of assistance.

Placement of paragraphs 5 and 6

16. It was suggested that paragraphs 5 and 6 should be merged and that, since they should apply to both contracting carriers and maritime performing parties, they should be moved out of article 15, possibly into the provision dealing with limitation of liability.

Conclusions reached by the Working Group on paragraph 6

17. After discussion, the Working Group decided that:

- Appropriate clarification should be introduced in the draft provision to reflect the consensus reached regarding the meaning of “joint and several liability”;
- The general principle on aggregate claims expressed in paragraph 6 was appropriate;
- Paragraphs 5 and 6 should apply to both contracting carriers and maritime performing parties;
- Paragraphs 5 and 6 should be moved out of draft article 15 into a provision of their own;
- Further discussion would be needed regarding the feasibility of preparing a uniform rule on the issue of set-off, in the absence of which the issue might need to be left to applicable domestic law;
- The Secretariat should prepare a revised draft taking into account various possible solutions for the issue of set-off, based on the views and suggestions mentioned above.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 20. Joint and several liability and set-off

Paragraph 1

98. The Working Group proceeded to consider paragraph 1 of draft article 20 as set out in A/CN.9/WG.III/WP.81 noting that it contained bracketed text which was intended to clarify what was meant by the term “joint and several liability”. Support was expressed for retention of the bracketed text for those jurisdictions where joint and several liability was not well-recognized in order to assist in a harmonized interpretation of those terms. However, opposition was expressed to retaining the text in square brackets, since it was noted that a number of

international conventions also used these terms but did not include definitions. Concerns were expressed that the inclusion of such definitions might thus have adverse interpretative consequences. It was also suggested that the definitions were overly simplistic and might not sufficiently capture the subtle differences in the use of the terms in different jurisdictions.

99. A suggestion was made to delete the references to articles 25, 62 and 63 given that these limits would apply regardless of whether or not they were listed. That proposal did not receive sufficient support.

Conclusions reached by the Working Group regarding paragraph 1

100. The Working Group agreed to the deletion of the bracketed text in paragraph 1.

Paragraph 2

101. It was agreed that the phrase “all such persons” was intended to cover all parties that were jointly or severally liable. It was questioned how paragraph 2 would operate in situations where a carrier had contracted out of the provisions of the draft convention, and had increased its liability limit. In response, it was suggested that the overall limit of liability referred to in this provision was intended to include a voluntary increase in the limitation on the carrier’s liability, which would then become the amount referred to in draft paragraph 2.

Conclusions reached by the Working Group regarding paragraph 2

102. The Working Group agreed to retain the text of paragraph 2.

Paragraph 3

103. The Working Group proceeded to consider draft paragraph 3 as set out in A/CN.9/WG.III/WP.81. The Working Group was reminded that the aim of paragraphs 1 and 2 was that the overall limits of liability should not be circumvented by a claimant suing more than one party. Paragraph 3 was included to avoid the possibility that might arise in some jurisdictions that a court might find that a claimant who successfully sued a non-maritime performing party should not have the amount awarded set off against a claim made under the draft convention. It was suggested that paragraph 3, as drafted, was capable of two interpretations: either it operated to set off the amount recovered from suing outside of the draft convention against the total amount of the damage, or it operated to set off the amount recovered from the limitation on liability in the draft convention. There was support for the view that the first interpretation was acceptable, and would, in fact, be the conclusion reached in most jurisdictions, but that the second interpretation was not acceptable. It was clarified that the second interpretation had been the one sought in the original proposal for the inclusion of this paragraph in the draft convention.

104. Support was expressed for the deletion of paragraph 3 as being both unclear in its effect, and for the reason that it might introduce procedural difficulties such as determining who bore the onus of proving whether or not an action had been successfully brought against the non-maritime performing party.

Conclusions reached by the Working Group regarding paragraph 3

105. The Working Group agreed to delete the text of paragraph 3.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 21. Joint and several liability**

63. The Working Group approved the substance of draft article 21 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 21. Joint and several liability**

82. The Commission approved the substance of draft article 21 and referred it to the drafting group.

Article 21. Delay

Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time agreed.

[For the discussion of shippers' liability for delay, see paragraphs 199-207,**A/CN.9/594 (17th Session of WG III) under article 30 at p. 313]****[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]****(g) Paragraph 6.4**

65. The Working Group heard the view that whilst a provision on delay was a novel one at least if compared with the text of the Hague and Hague-Visby Rules, it was however dealt with in the Hamburg Rules and in a number of transport law instruments of a contractual nature, such as the UNCTAD/ICC Rules and the FIATA bill of lading. It was suggested that it would be appropriate to deal with this matter in the draft instrument. Although it was recognised that time was not as crucial in maritime carriage as in other forms of carriage, it was recognised that, once time was agreed upon in the maritime context, any breach should be regulated in the interests of harmonisation rather than left to national law as was done under the Hague and Hague-Visby Rules. In support of the inclusion of a provision on delay it was said that time was becoming more important particularly in respect of short sea trade. A contrary view was that time was not as important as other factors in the maritime context, and that delay should not be a ground for breach of contract as envisaged in paragraph 6.4.

66. The prevailing view was that a provision on delay should be included in the draft instrument. Regarding the substance of the paragraph, it was observed that the provision included two limbs, the first recognising that delay was a matter left for the parties to agree upon, the second (in bracketed text), which provided a default rule in the absence of such an

agreement. It was stated that the first limb of the provision provided clarity in that it allowed parties to raise limitation amounts, a choice that could also be reflected in the amount of freight. Support was expressed for the first limb of subparagraph 6.4.1 and for broad recognition that the matter of delay and duration of a transport was a commercial matter that could be the subject of agreements between the parties. Some support was expressed for the view that the question of how to deal with delay should be left exclusively to the parties. On that basis, it was suggested that the second limb of subparagraph 6.4.1 should be deleted.

67. Additional opposition was expressed to the second limb of subparagraph 6.4.1, which recognized the discretion of courts to find delay if delivery did not occur within the time that it would be reasonable to expect of a diligent carrier and allowed for evidence to be brought taking account of normal trade and communications expectations. It was stated that the second limb was too vague in its reference to reasonableness for determining whether there had been delay and also that it did not serve a useful purpose in modern transport. It was also argued that, given that the error in navigation defence had been omitted from the draft instrument (see above, para. 36), a general provision on delay as set out in the second limb of paragraph 6.4 would impose too heavy a burden on the carrier. It was stated in response that, where the delay was caused by matters outside the control of the carrier, such as thick ice or storms, the carrier still had the protection offered by subparagraph 6.1.1. The prevailing view in the Working Group was that a provision along the lines of the second limb of subparagraph 6.4.1 should be retained, since the omission of such a provision would result in too rigid a formulation of the rule on delay. In that respect, it was pointed out that almost all international conventions concerning transport law included rules on liability for delay. A widely shared view was that the present wording was balanced because the reference to “reasonable” expectations of a diligent carrier provided shippers with an adequate level of protection. However, it was suggested that the term “reasonable” might require further explanations and that the second limb of the subparagraph should be re-examined once the scope of the draft instrument had been settled.

68. It was observed that one aspect not covered by paragraph 6.4, but dealt with in a number of other conventions, was the legal fiction that, after a certain period of time, delayed goods could be treated as lost goods. Some support was expressed for inclusion of a provision establishing such a fiction in the draft instrument. Strong opposition was expressed to the inclusion of such a clause, particularly in respect of developing countries where the choice of carriers was often non-existent. After discussion, during which strong concerns were raised about the inclusion of this provision, it was agreed that this was a topic worthy of further consideration taking account of industry needs and practices.

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70. After discussion, the Working Group agreed that the text of paragraph 6.4. would remain as currently drafted for continuation of the discussion at a later stage.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]**Draft article 16. Delay**

18. The Working Group considered the text of draft article 16 as contained in document A/CN.9/WG.III/WP.32.

General discussion

19. Doubts were expressed as to whether the issue of delay in delivery should be addressed at all in the draft instrument. In support of deletion of draft article 16, the view was expressed that the issue was purely commercial in nature and should thus be left for interested parties to deal with in the context of their contractual arrangements. It was explained that, consistent with that view, the issue of delay in delivery was not dealt with in the Hague Rules. Examples were given of situations where a regulation placing too much emphasis on delay in delivery might disregard certain established usages and contractual practices, or even result in compromising the safety of maritime transport. The prevailing view, however, was that the issue of delay in delivery required regulatory treatment and, consistent with other existing liability regimes, including a maritime regime such as the Hamburg Rules, could appropriately be dealt with in the draft instrument.

Paragraph 1***Delay where the parties have expressly agreed upon the time for delivery***

20. There was general support for the notion that the carrier might be liable for breach of its obligation to deliver within a time it had expressly agreed upon. As a matter of drafting, it was suggested that the words “the time expressly agreed upon” used in article 5(2) of the Hamburg Rules was more accurate than the current formulation of the draft provision.

Delay where the parties have not expressly agreed upon the time for delivery

21. The discussion focused on whether, in such a case, the carrier should be held liable for delivery after “the time it would be reasonable to expect of a diligent carrier”. The reference to “reasonable time” was objected to on the grounds that it was too subjective, imprecise, open to extensive interpretation by local courts and thus likely increase disharmony in international jurisprudence. In the same line of thought, it was stated that creating an obligation for the carrier to deliver the goods within “reasonable time” would further upset the balance of obligations between carriers and shippers, a balance that was already altered to the detriment of carriers by the deletion of the navigational error exception (see A/CN.9/544, para. 127). In response, it was pointed out that, while paragraph 1 might establish an obligation for the carrier, it should be borne in mind that paragraph 2 provided considerable relief by limiting the carrier’s liability for consequential damages in case of delayed delivery.

22. The prevailing view was that a default rule along the lines of the bracketed text at the end of paragraph 1 was necessary to reflect the general principle that delivery should occur without undue delay. It was pointed out that the reference to “the characteristics of the transport” or “the circumstances of the voyage” provided ample safeguards for established commercial practices that were said to tolerate a degree of imprecision in the application of that principle. It was explained that the default rule was also necessary to avoid exempting the carrier from liability in situations where a time for delivery was implied, although not expressly agreed upon by the parties. It was also pointed out that, should the default rule contained in

paragraph 1 be deleted, the issue would need to be covered by domestic law, a solution that would unnecessarily derogate from the general objective to promote uniform law.

23. With respect to the circumstances listed at the end of paragraph 1, a suggestion was made that “the characteristics of the goods” should be added. Another suggestion was that the end of the paragraph should be simplified to read along the lines of article 5(2) of the Hamburg Rules, which only referred to “the circumstances of the case”. Yet another suggestion was that, in any event, the reference to “the terms of the contract” should be maintained as essential. With respect to consistency in terminology, a question was raised regarding the expression “place of destination”. It was also suggested that the draft instrument should be checked to avoid unnecessary distinctions between “place” and “location” of delivery, and dispel ambiguity as to whether such location referred to the contractual place of delivery or the actual place of delivery. As a matter of drafting, it was suggested that the words “in the absence of such agreement” should be deleted as superfluous.

Conclusions reached by the Working Group on paragraph 1

24. After discussion, the Working Group decided that:

- The draft instrument should reflect the principle that the carrier should be liable for delay in delivery and that such liability should be based on the fault of the carrier;
- The default rule at the end of the paragraph would be retained without square brackets;
- The Working Group took note of the suggestions reflected above with respect to the detailed formulation of paragraph 1, and it was understood that the precise wording might need to be further discussed at a future session, based on a revised draft to be prepared by the Secretariat.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Liability for delay in delivery of the goods

177. The Working Group was reminded that its most recent consideration of liability for delay in the delivery of goods pursuant to the draft convention had taken place in the context of shipper’s liability for delay, which had been last considered at its eighteenth session (see A/CN.9/616, paras. 83 to 113). It was also recalled that two proposals with respect to liability for delay had been submitted to the Working Group for consideration: a proposal on delay prepared in light of the consideration of the topic during its eighteenth session (A/CN.9/WG.III/WP.85) and a proposal on carrier and shipper delay (A/CN.9/WG.III/WP.91). The Working Group proceeded to consider the various provisions concerning delay as contained in A/CN.9/WG.III/WP.81.

General introduction

178. The Working Group was reminded that it had considered the topic of liability for delay in the delivery of goods during a number of its sessions, and that the topic was one of particular sensitivity on the part of both shippers and carriers. Given the thoroughness of previous discussions on the topic, it was thought that a complete review of the issues involved and the carrier and shipper interests at stake was unnecessary, and discussion proceeded to various

proposals that had been placed before the Working Group. It was explained that the proposal contained in A/CN.9/WG.III/WP.85 was a written version of what had been proposed orally during the eighteenth session of the Working Group (A/CN.9/616, paras. 101-113), which, it was recalled, had been an attempt by the Working Group to retain in the draft convention liability for delay on the part of both the carrier and the shipper, and to find an appropriate limitation level for shipper's liability for delay. In light of that, the proposal was said to be a compromise that contained three elements: a clarification of draft article 18 that the carrier was not liable for any loss or damage to the extent that it was attributable to other shippers; the limitation of shipper's liability for pure economic loss arising from delay to an amount that was in square brackets in the text; and a general rule on causation to be placed in draft article 22.

179. The Working Group was reminded that its deliberations on damages for delay were concerned with pure economic loss resulting from delay, since physical damage to the goods resulting from delay would be covered by the draft convention under its provisions on liability for loss of or damage to the goods. Further, it was indicated that research undertaken on the topic had found very few reported cases, and no successful cases, in jurisdictions that allowed for the recovery of damages for delay. While some doubt was expressed regarding the reason for so few cases on the topic, a view was expressed that the findings suggested that there was no commercial need for delay provisions, and it was said that, in any event, they should be non-mandatory. More specific arguments were put forward in support of the view that liability for delay should be non-mandatory, as set out in A/CN.9/WG.III/WP.91. Although it was said that the deletion of liability for delay on the part of both the shipper and the carrier was the best option in light of commercial reality and the apparent difficulty in finding an acceptable way to limit the liability of the shipper for damages due to delay, an alternative proposal set out in A/CN.9/WG.III/WP.91 was to make shipper's and carrier's liability for delay nonmandatory, or subject to freedom of contract. However, concerns were raised that this approach would simply result in carriers inserting standard language in the transport document exempting them from liability for any damages due to delay.

Discussion

180. The Working Group was informed that the working hypothesis for a compromise on the issue of delay that had been proposed during its eighteenth session, and that was embodied in A/CN.9/WG.III/WP.85, had not met with sufficient support in further formal and informal consultations, and that it was in danger of failing. In light of that possibility, a number of other proposals were made regarding how best to deal with the issue of liability for delay in the draft convention. Those proposals could be summarized as follows:

(a) All reference to liability for delay on the part of the shipper and on the part of the carrier should be deleted from the text of the draft convention, thus leaving the determination of such matters to national law;

(b) A more elaborate proposal consisted of three elements. First, the shipper's liability for delay should be deleted due to failure to find a suitable means to limit that liability. Secondly, the text of draft article 21 on delay should be limited to the opening phrase ("Delay in delivery occurs when the goods are not delivered at the place of destination provided for in the contract of carriage within the time expressly agreed") and the rest of the draft article should be deleted. Thirdly, draft article 63 should be made mandatory by deletion of the phrase in square brackets "unless otherwise agreed";

(c) The limitation of liability for economic loss caused by delay should be made subject to freedom of contract by retaining the text in square brackets in draft article 63 and removing the brackets;

(d) Liability for delay should be made non-mandatory, or subject to freedom of contract, in regard to both the carrier and the shipper;

(e) The text with respect to the recoverability of damages as proposed during the eighteenth session of the Working Group (see para. 107, A/CN.9/616) should be reintroduced in addition to the proposal set out in A/CN.9/WG.III/WP.85;

(f) Shipper's liability for delay should be excluded from the draft convention, and carrier liability for delay should only be maintained in the case where the shipper made clear to the carrier its interest in timely delivery;

(g) Liability for delay should be mandatory on the part of the carrier, but more flexible with respect to shippers;

(h) The treatment of both the carrier and the shipper should be identical with respect to liability for damages for delay;

(i) A provision should be included that made clear that compensation for economic loss that was not connected to any physical damage should be excluded from the draft convention in the case of both the shipper and the carrier;

(j) Liability for delay should be mandatory on the part of both the shipper and the carrier; and

(k) The same approach to delay should be taken as was adopted in the Hamburg Rules, including the limitation level of two and one half times the freight payable for the goods delayed.

181. The Working Group heard a number of views on which of the proposals set out in the previous paragraph were preferred, and which could be considered as second and third choices. In the course of that discussion, while no clear consensus for any one of the approaches set out above initially emerged in the Working Group, a number of strongly held positions were enunciated and received support in the Working Group. These may be summarized as:

(a) There appeared to be general agreement that the compromise articulated in A/CN.9/WG.III/WP.85 would not achieve acceptance in the Working Group;

(b) There was strong support for the retention of liability on the part of the carrier for damages arising due to delay;

(c) There was support for the view that liability for delay on the part of the carrier should be mandatory; and

(d) There was a high degree of flexibility regarding the necessity of including liability on the part of shippers for damages due to delay, particularly given information provided to the Working Group on the difficulty and expense involved for shippers insuring for pure economic loss.

182. In light of the strong views expressed, the Working Group sought to reach a compromise on the issue by focussing on the first two alternative approaches set out in paragraph 180 above. It was stated that one of the advantages of deleting liability for delay for

both the shipper and the carrier from the draft convention was to give greater flexibility to jurisdictions that had specific rules on carrier delay. In addition, the view was expressed that it was better to have no rule on liability for delay in the draft convention than to formulate one that was inadequate or detrimental to the operation of mandatory domestic law. The countervailing view was that the three-pronged proposal would allow for at least a certain level of harmonization with respect to the rules on delay, rather than leaving the entire matter to domestic law. Furthermore, a compromise solution that limited the notion of delay to a failure to deliver the goods within the agreed delivery period would fit well with a commercial approach that had been advocated to the problem of liability for delay.

183. While a general preference appeared to emerge in favour of the three-pronged proposal described in paragraph 180(b) above, the Working Group heard conflicting views on the desirability of deleting the clause in draft article 21 that referred to the time within which it would be reasonable to expect that a diligent carrier would deliver the goods, having regard to the terms of the contract, the customs, practices and usages of the trade, and the circumstances of the journey. There was strong support for retaining those words, which were said to be the core of the draft article and to offer an important safeguard to protect shippers from unreasonable delay by carriers. Shippers, it was stated, should not only be entitled to damages for delay when carriers failed to deliver by an expressly agreed date. Shippers deserved the same protection when they relied on advertisements and line schedules published by carriers. However, there was also strong support for deleting the words in question, which were said to express a vague concept of difficult application that was likely to increase the risk of litigation.

184. At that stage, the Working Group was invited to consider an amended version of the three-pronged approach set out in paragraph 180(b) above. The Working Group was reminded that the first option for several delegations was to have mandatory rules on carrier delay in the draft convention, failing which they would prefer the deletion of all references to liability for delay from the text of the draft convention, thus leaving the determination of such matters to domestic law. The proponents of that solution were however prepared to accept the three-pronged approach set out in paragraph 180(b) above, subject to the deletion of the word “expressly” from the description of delay enunciated in draft article 21. Such an adjustment, it was said, would render the deletion of the latter half of the draft provision less problematic for many in the Working Group, and reduce the burden of proof on cargo claimants regarding agreement on the time of delivery. Others were of the view, however, that deletion of the word “expressly” would not substantively alter the provision. In the spirit of compromise, the Working Group welcomed that proposal and supported the three-pronged approach as amended by it.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 22. Delay

Proposal to reconsider the issue of delay

64. The Working Group was reminded that it had last considered the issue of liability for delay in the delivery of the goods at its 19th session (see A/CN.9/621, paras. 177-184). At that time, and in light of previous discussions in the Working Group regarding liability for delay in

delivery (see A/CN.9/616, paras. 101-113), a number of proposals were presented and considered with a view to coming to an agreement regarding the treatment of delay in the draft convention (see A/CN.9/621, para. 180). The compromise agreed upon by the Working Group following those discussions at its 19th session was reflected in the text of the draft convention in draft articles 22 and 63, and in the deletion of the shipper's liability for delay in the draft convention. However, it was suggested that that compromise had been made hastily, that there did not seem to be a common understanding of its effects, and that it was thought to have produced the undesirable result of requiring the carrier to agree to be liable for delay in delivery by way of the text in draft article 22 that delay occurred when the goods were not delivered within the time agreed in the contract of carriage. Since the legal regime in a number of jurisdictions already set out mandatory liability on the part of the carrier for delay, whether by way of the Hamburg Rules or through national law, it was suggested that now subscribing to a regime such as that of the draft convention where there was no mandatory liability for delay on the part of the carrier would place those States in a politically untenable situation. Further, it was suggested that where draft article 27 allowed the operation of unimodal regimes that provided for mandatory liability of the carrier for delay, such as the Convention on the Contract for the International Carriage of Goods by Road, 1956 ("CMR") or the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 ("CIM-COTIF"), it would be illogical to have such mandatory liability only for certain portions of the transport. As such, it was suggested that, since past experience had shown that it was not possible to reach consensus on how to deal with the issue of delay in the draft convention, the best option would be to simply delete draft articles 22 and 63, as well as all other references to delay in the draft convention, and to leave the matter entirely to applicable law. There was some sympathy expressed for the concerns raised, and the proposal met with some support.

65. However, the Working Group was generally of the view that, after the lengthy and numerous discussions that had taken place in previous sessions with respect to the treatment of delay pursuant to the draft convention, the compromise reached as reflected in the text was genuine and that it formed part of the delicate balance of rights and obligations in the text as a whole. The proposal to delete draft articles 22 and 63, as well as all other references to delay, was not accepted by the Working Group, nor was the suggestion that resort could be had to a "reasonableness" approach in terms of the time required for delivery, such as had been deleted pursuant to the compromise made at the 19th session, as reflected in footnote 49 of A/CN.9/WG.III/WP.101.

66. Some concerns were raised in the Working Group regarding the interpretation of draft article 22. Specifically, there seemed to be some confusion regarding whether express or implied agreement with respect to the time for delivery was required for the operation of the provision. However, it was noted that the requirement for "express" agreement had been deleted as part of the compromise agreed to at the 19th session of the Working Group (see A/CN.9/616, paras. 184), and that the phrase "unless otherwise agreed" with respect to the limitation on the amount of compensation for loss or damage due to delay in draft article 63 had also been deleted as part of that compromise (see A/CN.9/616, paras. 180(b) and 184). A number of delegations agreed with the view that draft article 18 set out the carrier's general obligation in respect of delay, that that obligation could not be contracted out of pursuant to draft article 82, that the date of delivery was not a required element of the contract particulars,

that the carrier's agreement to deliver by a certain date might be inferred from the communications exchanged by the parties, including the carrier's public schedule of arrivals and departures, and that draft article 22 only determined when delay had occurred. The Working Group declined to take a definitive position regarding that, or any other, interpretation of the draft provisions on delay.

Conclusions reached by the Working Group regarding draft article 22

67. The Working Group approved the substance of draft article 22 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 22. Delay

83. The view was expressed that the draft article was unsatisfactory, as it did not limit the amount recoverable for delay in delivery, leaving the issue entirely to freedom of contract. Another criticism was that it was unclear whether under the draft article damage caused by the delay would also be recoverable in case of implied delivery deadlines or periods. It was proposed, therefore, that the draft article should be deleted and that the matter of liability for delay should be left for applicable national law.

84. In response, it was noted that, as currently worded, the draft article did not require an express agreement on a delivery time or period, neither did it allow the carrier to exclude its liability for delay.

85. The Commission approved the substance of draft article 22 and referred it to the drafting group.

Article 22. Calculation of compensation

1. Subject to article 59, the compensation payable by the carrier for loss of or damage to the goods is calculated by reference to the value of such goods at the place and time of delivery established in accordance with article 43.
2. The value of the goods is fixed according to the commodity exchange price or, if there is no such price, according to their market price or, if there is no commodity exchange price or market price, by reference to the normal value of the goods of the same kind and quality at the place of delivery.
3. In case of loss of or damage to the goods, the carrier is not liable for payment of any compensation beyond what is provided for in paragraphs 1 and 2 of this article except when the carrier and the shipper have agreed to calculate compensation in a different manner within the limits of chapter 16.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]**(e) Paragraph 6.2**

57. It was recalled that paragraph 6.2 defined the scope and amount of compensation that was payable and that delay was dealt with separately under paragraph 6.4. It was also recalled that the provision had been drafted with the intention of clarifying that damages were to be calculated on the “arrived value” being the value of the goods at the place of delivery. It was pointed out that this approach was a well-recognized method for calculating compensation and was used in the marine insurance context. In response, it was stated that, at least in one jurisdiction, compensation was calculated based on the value of the goods at the place where the carrier received the goods and that some jurisdictions also had mandatory regulations including the refunding of freight and costs incurred during the course of carriage as part of the compensation payable. It was suggested that these differences should be taken into account particularly if the draft instrument was to apply on a door-to-door basis. It was generally agreed that, if the draft instrument applied on a door-to-door basis, it would be necessary to determine whether or not customs and related costs should be included within the compensation that was payable. It was stated that, in some jurisdictions, customs related costs were not generally included in the valuation of goods. The Working Group agreed, notwithstanding the different approaches to the time at which a valuation of goods should be made, that a provision standardizing the calculation of compensation was important to include in the draft instrument.

58. A question was raised whether paragraph 6.2 was intended to exclude all losses which could not be ascertained in the normal valuation of goods as set out in paragraph 6.2 such as, for example, consequential losses. It was suggested that whether or not consequential damages should be included in the compensation payable should depend on what was the intention of the parties. In response, it was explained that the intention of the CMI in preparing the draft was to replicate the Hague-Visby Rules.

59. A further concern raised was that, whilst paragraph 6.2 appeared to set an absolute limit on the amount of damages recoverable, it did not include the qualification set forth in the Hague-Visby Rules that allowed the shipper to declare the value of the goods in the bill of lading. There was support for the view that the calculation of compensation should take account of the intention of the parties as expressed in the contract of carriage.

60. It was observed that paragraph 6.2 was dealt with separately from the limits of liability as set out in draft paragraph 6.7, whereas article 4.5 of the Hague-Visby Rules dealt with both these issues together. It was stated that there was no specific reason for this separation and a future draft could consider combining paragraphs 6.2 with paragraph 6.7. In this respect a concern was raised as to the interaction between paragraphs 6.2 and 6.7, particularly given that the intention of the latter paragraph appeared to be to restrict compensation and exclude consequential damages.

61. A suggestion was made that paragraph 6.2 should contain a cross-reference to draft article 4 which dealt with the period of responsibility including the place of delivery. It was stated that the method for calculating compensation might need to be reviewed if the draft instrument applied on a door-to-door basis.

62. A suggestion was made that consideration should be given to revising paragraph 6.2 to cover loss or damage other than to the goods, a situation which could arise particularly if the

instrument applied on a door-to-door basis. A suggestion was also made that, with a view to achieving drafting equilibrium, mirroring provisions for calculation of damages should be drafted with respect to shipper's liability. The Working Group agreed that paragraph 6.2 might be revised to take account of the specific concerns raised, particularly if the draft instrument applied on a door-to-door basis.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 17. Calculation of compensation

32. The Working Group considered the text of draft article 17 as contained in document A/CN.9/WG.III/WP.32.

Paragraph 1

General discussion

33. There was broad support in the Working Group for the contents of paragraph 1. However, some drafting concerns were expressed. There was support for the suggestion that the draft instrument should use consistent terminology such that “the place and time of delivery according to the contract of carriage” in paragraph 1 should be consistent with the text used in draft article 7, and a preference was expressed for the phrasing used in draft article 7. A further suggestion was made that, in light of the discussion in the Working Group regarding draft article 16, it might be advisable to consider a separate article on the calculation of damages due to delay.

Conclusions reached by the Working Group on paragraph 1

34. After discussion, the Working Group approved the substance of paragraph 1, subject to redrafting by the Secretariat to improve consistency with draft article 7.

Paragraph 2

Conclusions reached by the Working Group on paragraph 2

35. After discussion, the Working Group approved the substance of paragraph 2.

Paragraph 3

General discussion

36. It was explained that this paragraph was intended to clarify the Hague-Visby Rules, which were unclear as to whether or not claimants were entitled to consequential damages. The paragraph was intended to allow the parties to the contract of carriage to compensate for consequential damages when they made clear their intention to do so pursuant to draft article 88. Some concerns were expressed regarding the treatment of consequential damages and the apparent support of this paragraph for the one-sided mandatory nature of the draft instrument as currently stated in draft article 88, wherein a carrier or a performing party may agree to increase its responsibilities and its obligations.

Conclusions reached by the Working Group on paragraph 3

37. After discussion, the Working Group approved the substance of paragraph 3.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 22. Calculation of compensation**

106. The Working Group was reminded that its most recent consideration of draft article 22 on the calculation of compensation was at its thirteenth session (see A/CN.9/552, paras. 32 to 37). The Working Group proceeded to consider draft article 22 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1

107. Bearing in mind that the reference in draft paragraph 1 to draft article 11 might have to be revisited should any adjustments be made to the text of draft article 11, the Working Group was in agreement that draft paragraph 1 should be approved as drafted.

Paragraph 2

108. A suggestion was made that the order of factors to be used in determining the value of goods under draft paragraph 2 should be altered so that the market value would be taken into account before the commodity exchange price. However, that view received insufficient support and draft paragraph 2 was approved as drafted.

Paragraph 3

109. The Working Group was in agreement that draft paragraph 3 should be approved as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 23. Calculation of compensation**

68. The Working Group approved the substance of draft article 23 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 23. Calculation of compensation**

86. There was no support for a proposal to mention a determination of value of the goods by the competent courts in cases where there were no similar goods. It was felt that courts generally would assess the compensation according to the local rules and that the draft Convention should not venture into offering concrete rules for exceptional situations.

87. The Commission approved the substance of draft article 23 and referred it to the drafting group.

Article 23. Notice in case of loss, damage or delay

1. The carrier is presumed, in absence of proof to the contrary, to have delivered the goods according to their description in the contract particulars unless notice of loss of or damage to the goods, indicating the general nature of such loss or damage, was given to the carrier or the performing party that delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within seven working days at the place of delivery after the delivery of the goods.
2. Failure to provide the notice referred to in this article to the carrier or the performing party shall not affect the right to claim compensation for loss of or damage to the goods under this Convention, nor shall it affect the allocation of the burden of proof set out in article 17.
3. The notice referred to in this article is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the person to which they have been delivered and the carrier or the maritime performing party against which liability is being asserted.
4. No compensation in respect of delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.
5. When the notice referred to in this article is given to the performing party that delivered the goods, it has the same effect as if that notice was given to the carrier, and notice given to the carrier has the same effect as a notice given to a maritime performing party.
6. In the case of any actual or apprehended loss or damage, the parties to the dispute shall give all reasonable facilities to each other for inspecting and tallying the goods and shall provide access to records and documents relevant to the carriage of the goods.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

(l) Paragraph 6.9

93. The Working Group observed that this provision was of practical importance recognising that a claim for damages in a liability case necessarily started with proof that damage had occurred whilst the goods were in the custody of the carrier. Evidence showing that the cargo had been delivered in a damaged condition would thus be required otherwise the carrier enjoyed a presumption of proper delivery. The article provided that this evidence could be given by the consignee providing a notice of such loss or damage, or by joint inspection of the goods by the consignee and the carrier or performing party against whom the claim was made. Without this notice or joint inspection, there was a presumption that the carrier delivered the goods according to their description in the contract. A point was made that under the present formulation, the presumption would not operate if there was proof to the contrary, even if no notice had been given. It was further observed that the three-day period within which

notice was to be provided was intended to assist all parties providing them with early notice of damage. It was also observed that a short notice period retained the greatest evidentiary value for the claimant, while exceeding the notice period would not time-bar the claim but would make its proof more difficult. In response, it was suggested that the view that a relatively short notice period added to the evidentiary strength was a matter of fact to be decided by a court or tribunal. A concern was also expressed that the words “unless notice of loss or damage” did not sufficiently make it clear that the failure to give notice would not constitute a time bar as it did in the pre-Hague Rules era. It was pointed out that the operation of the presumption depended on clear requirements as to the form and content of the notice of loss, damage or delay. It was stated that some refinement of the form and content of that notice should thus be considered. It was pointed out that the presumption was not a precondition to proof of damage during carriage, however it did provide an incentive to the consignee to give notice in a timely fashion.

94. A question was raised whether or not the notice should be in writing. Support was expressed for this, although it was noted that this could introduce an overly formalistic requirement and that a prudent cargo owner would send a written notice, otherwise it would be up to the cargo owner to prove that it had given notice or that there was constructive notice. It was suggested that, in principle and as a matter of good faith, unless given at the time of delivery, notice should be in writing. It was suggested that account should be taken of electronic communications in reworking this provision. In this respect, it was noted that draft article 2.3 provided that notices might be made using electronic communications. It was agreed that the Secretariat should take account of the broad support for written notice when preparing the revised draft of this text.

95. As well, given the different time periods that applied in different modes of transport, it was considered appropriate that compliance with the time period applicable to the last leg of the transport should suffice in determining whether timely notice had been given. It was noted that the time within which notice should be given differed in various instruments ranging from three, six, and seven to as much as fifteen days. Deep concern was expressed regarding a possible three-day time limit on the basis that in some countries geographical realities would make the period impossible to meet. In response to that concern, it was noted that the consignee would negotiate the place of delivery in the contract and could take into account concerns such as geographical distance and notice periods. This point was also made in response to the suggestion that the length of the time period should depend upon whether or not the goods were containerized. It was noted in response that it was impossible for the parties to choose door-to-door transport with respect to certain cargo or certain destinations. It was also suggested that the use of the term “working days” could result in uncertainty due to differing national holidays and that it would be helpful to specify “working days at the place of delivery” or “consecutive days”. Strong support was expressed for the view that a three-day period was too short. However, there was no consensus as to the time period that should apply and a suggestion was made that a reference to a “reasonable time” could be appropriate. It was decided that the reference to “three working” should be placed in square brackets, together with other possible alternatives, in the revised text.

96. It was suggested that the reference to “joint inspection” in subparagraph 6.9.1 was too imprecise and did not cover the situation where a carrier refused to participate in such an inspection. In addition, it was suggested that the phrase “concurrent inspection” or “inspection contradictoire” might be more appropriate in a civil law context. Whilst it was agreed that this

point was essentially a drafting matter, it was agreed that the matter should be considered in a future draft.

97. In subparagraph 6.9.1 it was suggested that the phrase “or in connection” was redundant and that it should be made clear that it was the consignee that was required to give the notice under this provision. Another drafting suggestion was that consideration should be given to expanding the scope of subparagraph 6.9.1 to allow for notice to be given to the employee or agent of the carrier or performing party. The Working Group observed that the draft instrument had been drafted to avoid encroaching on agency law. It was suggested that it should be clarified whether the term “delivery” referred to actual delivery or should be given the meaning set out in draft article 4.1.3. It was said that the term “delivery” in draft article 6.9.1 was the contractual point of the delivery but it was questioned why the draft instrument departed from the approach taken in the Hague and Hague Visby Rules which referred to removal of goods. In response, it was stated that the approach taken in the draft instrument was of paramount importance in order to avoid the situation where the consignee would dictate the date of removal, putting the matter beyond the control of the carrier. A question was raised as to how to cover the situation where goods were required under law to be left with an authority upon whom the consignee could not rely to provide the required notice.

98. In respect of subparagraph 6.9.2, the issue was raised whether notice of damages for delay could be given prior to delivery to the consignee. In addition, the issue was raised whether exceeding the twenty-one day notice period would result in a loss of a right to claim damages for delay and how that provision interacted with provision on time for suit in draft article 14. In this regard it was noted that only notice had to be given within twenty-one days and that the consignee had a year from the date of delivery within which to institute judicial or arbitral proceedings under draft article 14. However, it was suggested that the twenty-one day period for giving notice to the person against whom liability was being asserted would be a difficult burden for the consignee.

99. It was clarified that the performing party under subparagraph 6.9.3 could only refer to the person who actually delivered the goods and could not include the warehouse unless it delivered the goods.

100. Support was expressed for subparagraph 6.9.4 on the basis that it contained notions of good faith and cooperation between the parties. It was however suggested that the reference to providing access to “all reasonable facilities for inspecting and tallying the goods” should also include reference to providing access to records and documents relevant to the carriage of the goods. This was said to be particularly important with respect to the transport of temperature-sensitive goods where temperature records might be only in electronic form, accessible only by the carrier, and could be quickly overwritten. There was strong support for this proposal.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 20. Notice of loss, damage or delay

63. The Working Group considered the text of draft article 20 as contained in document A/CN.9/WG.III/WP.32.

Paragraph 1***Purpose of paragraph 1***

64. The usefulness of the presumption created in paragraph 1 was widely acknowledged. It was noted that similar provisions had been a feature of maritime law since the presumption first appeared in article III.6 of the Hague Rules, and that its operation since had not created major difficulties. The Working Group heard that its inclusion in the Hague Rules was intended to remedy the situation where failure to provide notice of the loss within the prescribed time limit resulted in a total bar to a claim for that loss. The Hague Rules intended to make it clear that failure to provide such a notice resulted only in the claimant losing the benefit of the presumption that the damage to the cargo had occurred during the period of responsibility of the carrier, and prior to its delivery to the consignee. Further, the Working Group heard the following example regarding the operation of such a provision: the carrier delivered the goods to the consignee's agent, who then took them to the consignee, who failed to inspect them and to provide notice of damage to the carrier within the prescribed time limit. The result would be that the consignee would then lose the benefit of the presumption, and would be required to prove that the damage to the goods occurred before delivery to the consignee's agent. It was observed that the presumption operated to the benefit of both the consignee, who received the benefit of the presumption and who was also protected from being subjected to very short notice periods that could be imposed in a contract of carriage, and the carrier, who received notice of damage in a timely fashion and could thus begin gathering evidence while it was still available.

65. However, the need for paragraph 1 was questioned given the apparent lack of legal consequences for failure to provide the required notice. Since the issuance of the notice, or the failure to provide such a notice, did not affect the respective burdens of proof of the carrier and of the claimant set out in the general liability regime in draft article 14, the question arose of whether paragraph 1 was necessary at all. In light of the Working Group's agreement on the general usefulness of the presumption created by paragraph 1, it was decided to attempt to improve the wording of paragraph 1 to clarify its operation and the consequences entailed by failure to provide the notice. It was also suggested that the attempted redraft should clarify the distinction between providing notice of the existence of damage or loss, which was the intent of paragraph 1, and providing proof of the damage or loss, which would only become necessary later to substantiate the claim.

66. With a view to reflecting some of the above views and suggestions, the following redrafted text of paragraph 1 was proposed to the Working Group:

“1. Notice of loss of or damage to [or in connection with] the goods, indicating the general nature of such loss or damage, shall be given [by or on behalf of the consignee] to the carrier or the performing party who delivered the goods before or at the time of the delivery, or, if the loss or damage is not apparent, within [three working days] [a reasonable time] [___working days at the place of delivery] [___consecutive days] after the delivery of the goods. [A court [may] [shall] consider the failure to give such notice in deciding whether the claimant has carried its burden of proof under article 14(1).] Such a notice is not required in respect of loss or damage that is ascertained in a joint inspection of the goods by the consignee and the carrier or the performing party against whom liability is being asserted.”

67. The redrafted text was welcomed by some as an improvement in that it deleted the presumption in the original version of paragraph 1, and reminded parties that failure to provide notice could make it more difficult to prove their case. It was observed that the bracketed text could also prevent courts from imposing some other sanction for failure to provide notice. There was also continuing support for the original text of paragraph 1, particularly in light of the fact that the text is well known, that it exists in several other transport regimes, and that it is thus familiar to judges in many jurisdictions. One reservation raised with respect to the redrafted text was regarding the clarity of the bracketed sentence, and also the reluctance to appear to be advising courts on how evidence should be assessed. In addition, there was some support for the deletion of paragraph 1 altogether.

Time for giving notice

68. The Working Group was generally of the view that if paragraph 1 was to be maintained, “a reasonable time” was an inappropriate time period in which to notify the carrier or the performing party of concealed damage, since it did not provide clear guidance to commercial parties. It was noted that the Hague and Hague-Visby Rules required that this notice be provided within three days. Various time periods were suggested, including 3, 7, 10 and 15 days. The suggestion was also made that, in any event, in the interests of fairness, the time chosen should refer to a certain number of working days rather than consecutive days, particularly if a brief notice period was chosen.

69. A question was raised as to whether the notice period should refer to “the place of delivery” or to “the place of final delivery”. A suggestion was made that the text should read “___ working days at the place of actual delivery”. The view was expressed that there could be practical difficulties with expiry of the notice period if it was a short period that expired before a road carrier, who picked up the cargo at the dock, delivered it to the consignee, particularly since such a road carrier was unlikely to agree to act as the consignee’s agent, and unlikely to unpack the goods in order to discover concealed damage. However, it was noted that this difficulty would only arise when the contract of carriage was on a port-to-port basis, rather than on a door-to-door basis, since the provision was intended to allocate the risk of any ambiguity about where the damage occurred. It was suggested that in a port-to-port contract of carriage, the consignee should bear the risk once its agent had control of the goods, but it was observed that since most contracts were now door-to-door, this issue would arise much less frequently. There was support for this reasoning, and it was observed that this was the reason why caution had been advised with respect to the inclusion in the draft instrument of mixed contracts of carriage and forwarding in draft article 9 of the draft instrument.

70. A further question was raised regarding the functioning of paragraph 1 in a number of ports where delivery must be made by the carrier to state-controlled parties, such as customs authorities, where neither the carrier nor the consignee could control the amount of time that might pass before such cargo would actually be delivered to the consignee. The suggestion was made that the notice period in paragraph 1 should thus begin to run only at the time that the consignee physically received the cargo.

71. The prevailing view was that seven days was an appropriate notice period.

Form of the notice

72. Concern was expressed that the form in which the notice must be provided was not specified in paragraph 1. While it was noted that parties would, in most cases, send written notice for evidentiary purposes regardless of a requirement to do so, a preference was expressed in the Working Group that it be made explicit that notice should be either in writing, as specified in article 19(1) of the Hamburg Rules and in article III.6 of the Hague Rules, or that it may be made by electronic means. It was observed that draft article 5, which had not yet been considered by the Working Group, established that notice should be given in written or electronic form under the draft instrument.

Parties who must send and receive the notice

73. Concern was raised with respect to the phrase in square brackets that notice must be given “[by or on behalf of the consignee]”. It was observed that this requirement, if accepted by the Working Group, might unnecessarily restrict the category of parties who could provide notice of loss or damage. In addition, it was suggested that the parties to whom notice could be provided should be expanded from “the carrier or the performing party” to include the agents of the carrier or performing party. There was some support for these suggestions.

74. It was observed that notice under paragraph 1 must be given to the carrier or the performing party, but that the network system in the draft instrument envisaged that rules other than those set forth in the draft instrument could apply for the notice of loss, damage or delay with respect to the land leg of a particular contract of carriage. It was proposed that it would thus be appropriate to include in draft article 20 a rule as follows: “The form and time limit prescribed for the notice of damage shall be deemed to have been observed as well if the corresponding provisions which would be applicable to a contract of carriage covering the last leg of the carriage have been complied with.” There was some support in favour of that proposal. In opposition, it was stated that the issue of notice periods in inland transport conventions was linked to their liability systems and ought not be taken out of that context. Since paragraph 1 had limited legal consequences, it should not be unnecessarily complicated. In addition, it was noted that a seven-day notice period, if finally retained, would be helpful in avoiding confusion, since it would be similar to the notice period required in certain road transport instruments such as CMR.

Conclusions reached by the Working Group on paragraph 1

75. After discussion, the Working Group decided that:

- The original text and the proposed redraft of paragraph 1 should be placed in square brackets for future discussion;
- The words “a reasonable time” should be deleted from the original version of paragraph 1;
- Seven days was an appropriate notice period and should be inserted into the original version of paragraph 1, with the words “seven consecutive days” and “seven working days” appearing as alternatives in square brackets.

Paragraph 2***Differences between paragraphs 1 and 2***

76. Concerns were expressed with respect to the difference in treatment accorded to failure to give notice under paragraph 1 and under paragraph 2. It was suggested that barring a claim for loss due to delay on the grounds of failure to give notice within 21 days was particularly harsh in light of the fact that the carrier would already benefit from the low limitation on damages for delay of one times the freight payable pursuant to paragraph 16(2). It was also suggested that the draft convention already contained provisions on the time for suit, and that it would be unreasonable to bar a claim in the circumstances set out in paragraph 2. It was noted in response that the approach in paragraph 1 was intended to deal with notice of non-apparent loss, which was discoverable upon examination of the goods, and which was in all parties' interest to be made in as short a delay as possible. However, in the situation covered by paragraph 2, all parties would know quickly of the delay, but the missing information was with respect to the consequential damages claimed as a result of the loss for delay. It was suggested that the longer notice period was reasonable in order to determine the existence of consequential damages, which could be difficult to ascertain, and to provide notice of them. In addition, it was noted that CMR accorded the same treatment for failure to notice of loss due to delay within the specified time limit.

“such loss”

77. It was suggested that the notice required should be notice of the delay rather than notice of the loss. However, it was noted that the fact of the delay would be known by the parties very quickly, and that the important factor for the carrier was to have some certainty regarding the legal consequences of the delay and the economic loss resulting therefrom for which it could be liable. It was suggested that it would be difficult for the claimant to ascertain the extent of its consequential loss due to delay, but it was noted that the notice required was notice of the loss rather than the details of the claim. A proposal was made to delete the word “such” from this phrase in order to clarify the contents of the notice, or to make specific reference to paragraph 16(2) to clarify that reference was being made to economic loss. It was suggested that simply using the word “loss” would be insufficient to indicate that reference was being made to loss occasioned by delay. Support was expressed for substituting the phrase “loss due to delay” for the phrase “such loss”.

“the person against whom liability is being asserted”

78. It was noted that paragraph 1 provided for notice to the carrier or to the performing party, while paragraph 2 required notice to “the person against whom liability is being asserted”. It was suggested that this language was intended to encourage the claimant to decide at an early stage who to sue, keeping in mind that multiple parties could be notified, in order to provide certainty to the potential defendants to the claim. However, there was support for the view that this language could unfairly limit the claimant in pursuing a claim, since it was not clear whether it would be possible to sue a party to whom notice was not provided. There was support for the suggestion that the word “carrier” should be substituted for the phrase “the person against whom liability is being asserted”.

Time period

79. It was noted that the Hamburg Rules provided in article 19(5) a 60-day notice period for notice of loss resulting from delay. It was suggested that 21 days was a suitable period of time in which to require notice in order to both provide certainty for the carrier and allow an assessment of the extent of its potential liability. It was also noted that the 21 day time period in paragraph 2 was identical to the time period provided in the CMR for notice of loss due to delay.

“delivery”

80. It was suggested that it should be made clear in paragraph 2 that the “delivery” should be delivery pursuant to the contract.

Conclusions reached by the Working Group on paragraph 2

81. After discussion, the Working Group decided that:

- The phrase “the person against whom liability is being asserted” should be replaced by the words “the carrier”;
- The phrase “loss due to delay” should be substituted for the phrase “such loss”, taking care that there is consistency in the translation of the word “loss” in all language versions.

Paragraph 3***Drafting correction***

82. It was agreed that the phrase in paragraph 3 “in this chapter” should be revised to “in this article”.

“notice given to a performing party”

83. There was support for the suggestion that the second reference to “performing party” in the closing phrase of this paragraph should instead make reference to “maritime performing party” in order to take into account the agreement of the Working Group to limit the application of the draft instrument to maritime performing parties. It was thought that to do otherwise would impose upon performing parties the burden of receiving notice under the draft instrument. In response, the suggestion was made that it was clear that the paragraph was referring only to notice under the draft instrument, and not under some other transport convention. It was noted that if the change were made to maritime performing parties, the phrase should read “a” or “any” maritime performing party, and that the phrase “that delivered the goods” would likely no longer be necessary.

Conclusions reached by the Working Group on paragraph 3

84. After discussion, the Working Group decided that the Secretariat should prepare a revised draft of this paragraph, taking into consideration whether the change should be made to “maritime performing party” in the closing phrase of the paragraph, and whether further language adjustments should be made in that regard.

Paragraph 4***General discussion***

85. It was suggested that paragraph 4 should be deleted and that arrangements for access and inspection should be left to cooperation between the parties or to national law. However, it was noted that this provision served an important purpose and was drawn from the Hague and Hague-Visby Rules, and support was expressed for maintaining the paragraph.

“[for][must provide]”

86. It was suggested that the word “[for]” should be deleted and the phrase “[must provide]” should be maintained, without square brackets.

Conclusions reached by the Working Group on paragraph 4

87. After discussion, the Working Group decided that paragraph 4 would be maintained, with the word “[for]” deleted and the phrase “must provide” maintained, without square brackets.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 23. Notice of loss, damage or delay**

110. The Working Group was reminded that its most recent consideration of draft article 23 on notice of loss, damage or delay was at its thirteenth session (see A/CN.9/552, paras. 63 to 87). The Working Group proceeded to consider draft article 23 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1***Legal effect of draft paragraph 1***

111. Concern similar to that expressed during the thirteenth session of the Working Group (see A/CN.9/552, para. 65) was reiterated regarding the operation of draft paragraph 1. There was support for the view that paragraph 1 was unnecessary since the issuance of the notice to the carrier or the performing party, or the failure to provide such a notice, did not affect the respective burdens of proof of the carrier and of the claimant as set out in the general liability regime in draft article 17. Moreover, it was noted that in some jurisdictions, the provision on which this draft article was based, article 3(6) of the Hague Rules, had caused confusion and had led some courts to conclude that failure to provide such a notice resulted in the loss of the right to claim for loss or damage pursuant to the instrument. As such, the Working Group was urged to delete draft paragraph 1, and, failing that, to make it clear that failure to provide the notice under the draft provision was not intended to have a special legal effect.

112. In response, it was noted that the draft paragraph was not intended to attach a specific legal effect to the failure to provide notice. Nevertheless, the draft provision was intended to have the positive practical effect of requiring notice of the loss or damage as early as possible to the carrier, so as to enable the carrier to conduct an inspection of the goods, assuming there had been no joint inspection. While there was no agreement in the Working Group to reverse its earlier decision to retain the draft paragraph, there was agreement that draft paragraph 1 was

not intended to affect the rights of cargo interests to make claims under the draft convention, and that it was in particular not intended to affect the liability regime and burdens of proof set out in draft article 17.

Time period

113. There was some support in the Working Group for the selection of a notice period of three working days from the alternatives appearing in the draft text in square brackets, particularly in light of the purpose of the draft paragraph to encourage that inspections of the damaged goods should take place as early as possible. However, the Working Group expressed a preference that a notice period of seven working days at the place of delivery should be chosen from among the alternatives presented.

Conclusions reached by the Working Group regarding draft paragraph 1

114. After discussion, the Working Group decided that:

- The text of draft paragraph 1 should be retained in the draft convention as drafted;
- The text in square brackets “seven working days at the place of delivery” should be retained and the brackets removed, and all other alternative time periods in square brackets should be deleted; and
- It should be made clear that draft paragraph 1 was not intended to have any evidentiary effect nor was it intended to conflict with or affect the liability regime and burdens of proof set out in draft article 17 in any way.

Paragraph 2

115. It was agreed that the discussion of this paragraph would be postponed until the broader consideration by the Working Group of shipper and carrier delay.

Paragraph 3

116. It was observed that the phrase “same effect” in draft paragraph 3 referred to the notice referred to in draft paragraph 1, which was thought in that context to have no special legal effect (see above, para. 112). The Working Group was in agreement that draft paragraph 3 should be approved as drafted.

Paragraph 4

117. The Working Group agreed that draft paragraph 4 should be adopted as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 24. Notice of loss, damage or delay

Paragraph 4

69. Although the Working Group was generally of the view that draft article 24 was acceptable, a drafting issue was raised with respect to the reference in paragraph 4 to “articles 22 and 63”. It was observed that compensation for loss due to delay was not actually payable pursuant to those provisions, but rather that it was payable pursuant to draft article 18, and that reference to draft articles 22 and 63 could create ambiguity. The Working Group agreed with a

suggestion that paragraph 4 should be made more accurate in that respect, and a proposal to simply delete the reference to articles 22 and 63 received considerable support. However, it was pointed out that care had to be taken in the reformulation of the remainder of the paragraph, such that it did not require that the notice contain the specific amount of the loss claimed, which would be difficult to quantify, but rather provided notice that loss resulting from the delay had occurred. While a precise formulation was not agreed upon, the Working Group agreed that the drafting group should consider text for paragraph 4 along the following lines: “No compensation [due to] [arising from] [resulting from] delay is payable unless notice of loss due to delay was given to the carrier within twenty-one consecutive days of delivery of the goods.”

Title of draft article 24

70. It was observed that the drafting group should consider whether the title of draft article 24 was appropriate, given the agreement in the Working Group that the notice should concern the loss due to the delay, and not the delay itself. There was some support for that suggestion.

Conclusions reached by the Working Group regarding draft article 24

71. Subject to the following adjustments, the Working Group approved the substance of draft article 24 and referred it to the drafting group:

- the title of the draft provision should be considered with a view to adjusting it to reflect that the notice should be of the loss rather than of the delay; and
- the text of paragraph 4 should be amended along the lines noted in the final sentence of paragraph 69 above.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 24. Notice in case of loss, damage or delay

88. The Commission approved the substance of draft article 24 and referred it to the drafting group.

CHAPTER 6.

ADDITIONAL PROVISIONS RELATING TO PARTICULAR STAGES OF CARRIAGE

Article 24. Deviation

When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

(h) Paragraph 6.5

71. It was explained that paragraph 6.5 on deviation had been included in the draft instrument with a view to modernizing this area of maritime law. In traditional maritime law, deviation amounted to a breach of contract, further to which the carrier could lose all the benefits it would normally derive from the governing legal regime. Paragraph 6.5 was intended to reflect a policy under which deviations could be justified where they were made in order to attempt to save lives or property at sea, or where the deviation was otherwise reasonable. Paragraph 6.5(b) was intended to harmonize the rules regarding deviation in those countries where national law held that deviation amounted to a breach of contract, and to subject those domestic provisions to a reading within the provisions of the draft instrument. It was recalled that, in addition, the draft instrument in paragraph 6.8 contained provisions regarding loss of the right to limit liability and fundamental breach of contract.

72. There was strong support for the inclusion of a provision on deviation in the draft instrument. It was pointed out that a deviation by the carrier in order to save property at sea differed from a deviation to save life, and that the carrier should thus be subject to liability for delay when deviating to salvage property, particularly where such a deviation to salvage property was agreed for a price. However, it was also noted that it was often difficult to distinguish between situations involving deviations to save life and those made to salvage property. It was suggested that the draft article could include language to the effect that, when goods are salvaged as a result of the deviation, compensation received as a result of the salvage could be used as compensation for loss caused by the resulting delay. As a matter of drafting, although paragraph 6.5 was being considered in general terms only, translation might need to be reviewed to ensure that “deviation” should be translated as “desvio” in Spanish, and as “déroutement” in French.

73. It was suggested that the phrase “authorized by the shipper or a deviation” should be inserted after the phrase “...in delivery caused by a deviation” in subparagraph 6.5(a). In addition, concern was raised over the meaning of the phrase “or by any other reasonable deviation” at the end of subparagraph 6.5(a). It was recommended that this phrase should be clarified or deleted, since there was no uniform interpretation of the term “reasonable deviation” in all countries. However, it was also stated that it could be difficult to foresee the

precise circumstances of each deviation, and that precise language could unduly limit the provision. It was stated that there were often extensive clauses on changes in the route of the ship found in bills of lading, and issue was raised whether it would be consequently possible for contracting parties to define in their contracts what they intended to be a “reasonable deviation”. Clarification was given that the concept of “reasonable deviation” was a concept in general law that had existed for some time, without giving rise to many problems of interpretation and that deviation was meant to be a departure from the contractual agreement, rather than an agreed term. The Working Group also heard that deviation to save life and property at sea was an international public law principle with respect to assisting when another vessel was in peril, and was not intended to cover the situation where one’s own vessel was in danger.

74. It was suggested that subparagraph 6.5(b) was unnecessary as a result of the international law of treaties, and that it should be deleted. However, subparagraph 6.5(b) received broad support, and was generally welcomed as confirmation of the primacy of international law in the face of national law on this topic.

75. The Working Group decided to retain paragraph 6.5 in its entirety, and the Secretariat was requested to take the above suggestions, views and concerns into consideration when preparing a future draft of this provision.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 23. Deviation

100. The Working Group considered the text of draft article 23 as contained in document A/CN.9/WG.III/WP.32.

General discussion

101. Doubts were expressed regarding the usefulness of draft article 23 in many legal systems. However, it was explained that under existing case law in certain countries, a provision along the lines of draft article 23 was necessary to avoid deviation being treated as a major breach of the carrier’s obligations. That explanation met with the general approval of the Working Group. With a view to providing a more complete treatment of the issue of deviation, the attention of the Working Group was drawn to a proposal for a revision of draft article 23 contained in document A/CN.9/WG.III/WP.34, paragraph 38. In particular, that proposal was intended to clarify that the only deviation for which the carrier could be held liable was an “unreasonable” deviation and that this concept would relate only to the routing of an ocean-going vessel (operated by the carrier or a performing party). While support was expressed with respect to both the current text of draft article 23 and the proposed revision, the view was expressed that further consultations were necessary before a formulation of the provision on deviation could be agreed upon.

Conclusions reached by the Working Group on draft article 23

102. After discussion, the Working Group decided that the current text of draft article 23, together with the alternative text proposed in document A/CN.9/WG.III/WP.34, paragraph 38

would be placed in square brackets in the draft instrument for continuation of the discussion at a future session.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 24. Deviation during sea carriage

118. The Working Group was reminded that its most recent consideration of draft article 24 on deviation during sea carriage was at its thirteenth session (see A/CN.9/552, paras. 100 to 102). The Working Group proceeded to consider draft article 24 as contained in A/CN.9/WG.III/WP.81.

119. The Working Group agreed that draft article 24 should be approved as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

72. It was suggested that the title of the provision would better reflect its placement in chapter 6 if the phrase “during sea carriage” were deleted. Subject to that adjustment, the Working Group approved the substance of draft article 25 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 25. Deviation

89. The Commission approved the substance of draft article 25 and referred it to the drafting group.

Article 25. Deck cargo on ships

1. Goods may be carried on the deck of a ship only if:
 - (a) Such carriage is required by law;
 - (b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or
 - (c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.
2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.
3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.
4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.
5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]**(i) Paragraph 6.6**

76. The Working Group heard that paragraph 6.6 had been included in the draft instrument in order to cover the situation of cargo placed on deck, and thus being exposed to greater risks and hazards than it would have faced had it been placed below deck. It was also noted that in some jurisdictions, placing cargo on the deck without prior agreement could amount to a fundamental breach of contract or a quasi-deviation. Further, some types of cargo could only be reasonably transported on deck, and with respect to other types of cargo, transportation on deck had become the norm. In response to a question regarding the meaning of goods being carried “on” containers, it was explained that the provision was intended to reflect the possible use of a flat container, as defined paragraph 1.4 in the definitions chapter of the draft instrument .

77. It was noted that subparagraph 6.6.1 provided three situations when goods could be carried on deck: when it was required by public law, administrative law, or regulation; when the goods were carried in or on containers on decks that were specially fitted to carry such containers; or when it was in accordance with the contract of carriage or with the customs,

usages and practices of the trade. It was explained that subparagraph 6.6.2 provided that where the goods were carried on deck in accordance with subparagraph 6.6.1, the carrier would not be held liable for any loss, damage or delay specifically related to the enhanced risk of carrying the good on deck. In addition, it was clarified that subparagraph 6.6.3 indicated that placing the cargo on deck might be not just in the interest of carriers, but also in the interest of parties to a sales contract, in which case it should be stated clearly in the documentation applying to the contract. It was also noted that subparagraph 6.6.4 set out the consequences for loss or damage incurred in deck cargo.

78. It was explained that approximately 65% of the container-carrying capacity of a vessel was usually on or above its deck, such that for operational reasons it was important for container carriers to have the operational flexibility to decide where to carry the containers. However, in this respect it was stated that in the absence of instructions, the decision whether to carry cargo on or below deck was not a matter entirely in the discretion of the carrier, given other obligations such as the obligation to exercise proper care in respect of the cargo under subparagraph 5.2.1.

79. Paragraph 6.6 received strong support for its structure and content. This provision was welcomed as an appropriate apportionment of liability in conformity with the freedom of contract regime, with the caveat that certain terms needed clarification, and that, as currently drafted, the draft article was too lengthy and complex. A question was raised whether in the case of vessels specially fitted for containers outlined in subparagraph 6.6.1(ii), there could not in some situations be an agreement between the shipper and the carrier regarding whether carriage was to be on or below deck. It was explained that the existence of specially-fitted vessels was not novel, and that the principle enshrined in subparagraph 6.6.1(ii) was intended to allow for carrier flexibility in choosing whether to carry cargo above or below deck. Concerns were raised with respect to alterations to the burden of proof regime that could be caused by subparagraph 6.6.2, since the carrier would have to prove either exoneration under subparagraph 6.6.1, or that the damage was not exclusively the consequence of their carriage on deck. In response, it was explained that pursuant to subparagraph 6.6.2, if the cargo was unjustifiably carried on deck, the carrier was responsible for any loss attributable to deck carriage, regardless of whether or not the carrier was at fault for the actual damage – in other words, strict liability was imposed. A suggestion was made that reference to “failing this” in the second sentence of subparagraph 6.6.3 required that the shipper had to prove that the goods had been shipped in accordance with subparagraph 6.6.1(iii). Further clarity was sought on where the burden of proof lay in the operation of subparagraph 6.6.3. In response, it was noted that the burden of proof in subparagraph 6.6.3 was not with respect to the damage, but rather with respect to compliance with the contract for deck carriage. In addition, it was suggested that the phrase “exclusively the consequence of their carriage on deck” in the final sentence of subparagraph 6.6.2 was imprecise, because damage or loss rarely has only one cause. A possible remedy for this could be use of the word “solely”, taken from article 9.3 in the Hamburg Rules, or alternatively, to place the word “exclusively” in square brackets. The question was raised whether reference should also be made to containers in subparagraph 6.6.4. It was suggested that the limits of liability in the draft instrument should be mandatory and subject to no exception, however, the point was made that subparagraph 6.6.4 allowed for the limit on liability to be broken only when there was an intentional breach of contract regarding where to carry the cargo.

80. The Working Group decided to retain the structure and content of paragraph 6.6 for continuation of the discussion at a later stage.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 24. Deck cargo

103. The Working Group considered the text of draft article 24 as contained in document A/CN.9/WG.III/WP.32.

Paragraph 1

“(b) ... containers on decks that are specially fitted to carry such containers”

104. It was suggested that subparagraph (b) specify that the containers for carriage on deck should be “closed containers” or “containers fitted to carry cargo on deck” since the definition of container in draft article 1(s) was very broad. It was pointed out in response that various types of semi-closed containers were used for on-deck carriage. A question was raised whether subparagraph (b) was necessary at all, since it would appear to be subsumed by the reference in subparagraph (c) to carriage on deck in compliance “with the customs, usages, and practices of the trade”. It was suggested, however, that the two separate categories in subparagraphs (b) and (c) were necessary to reflect various industry practices that might entail different legal consequences.

“(c) ... in accordance with the contract of carriage”

105. Questions were raised concerning the agreement necessary to approve carriage on deck in the contract of carriage, specifically whether mention of it in the bill of lading was sufficient, or whether express agreement was necessary. It was suggested that this question could be more easily answered after the Working Group had had its discussion on freedom of contract issues.

Conclusions reached by the Working Group on paragraph 1

106. After discussion, the Working Group decided that:

- In subparagraph (b), the word “containers” should be replaced by the phrase “containers fitted to carry cargo on deck”, to be placed between square brackets for continuation of the discussion;
- Square brackets should be inserted around the phrase “in cases not covered by paragraphs (a) or (b) of this article” in subparagraph (c);
- Square brackets should be inserted around the phrase “in accordance with the contract of carriage” in subparagraph (c).

Paragraph 2

General discussion

107. There was general agreement with the principle of the rule enunciated in paragraph 2. It was also agreed that the opening phrase of paragraph 2 should read “... in accordance with paragraphs 1(a) or (c)”, rather than “... in accordance with paragraphs 1(a) and (c)”. Interaction with draft article 14 on burden of proof and concurrent causation

108. Questions were raised concerning the interaction of paragraph 2 with draft article 14 (A/CN.9/WG.III/WP.36). It was noted that paragraph 2 derogated from draft article 14 and placed the burden of proof of the damage on the carrier. Despite this derogation, it was stated that the liability of the carrier for loss, damage or delay “that are exclusively the consequence” of the carriage of the goods on deck, might raise a difficult question in connection with the rule on concurrent causation in draft article 14(4).

Conclusions reached by the Working Group on paragraph 2

109. After discussion, the Working Group decided that:

- The text of paragraph 2 would be corrected by replacing the word “and” with the word “or” in its opening phrase;
- Paragraph 2 would be discussed in greater detail in conjunction with draft article 14(4).

Paragraph 3

General remarks

110. While the thrust of paragraph 3 was generally acceptable, a widely shared view was that the issue of third party rights should be further discussed in the context of chapter 11 (right of control) and chapter 12 (transfer of rights). It was observed that the pending discussion on freedom of contract would also have a bearing on the issue of third party rights. A suggestion was made that paragraph 3 should also apply to the situation where a third party has relied on a non-negotiable transport document or electronic record, since the issue should be the reliance on the document or record rather than its legal contents.

Conclusions reached by the Working Group on paragraph 3

111. After discussion, the Working Group decided that it would reopen discussion of paragraph 3 generally, and of whether it should be expanded to cover third-party reliance on non-negotiable transport documents and electronic records after it had discussed the broader issues of third-party rights and freedom of contract under the draft instrument.

Paragraph 4

“if the carrier and shipper expressly have agreed”

112. A question was raised as to why express agreement between the shipper and the carrier to carry the goods below deck was necessary to break the liability limit for damage caused by on-deck carriage, when the general approach was that the goods should be carried below deck except in the situations outlined in paragraph 1. It was stated in response that only the breach of an express agreement to carry containers below deck should result in loss of the right to limit liability of the carrier under paragraph 4 for incurring the damage specifically intended to be avoided.

“that exclusively resulted from their carriage on deck”

113. It was suggested that when the carrier carried the goods above deck contrary to an express agreement to carry the goods below deck, any damage caused by the deck carriage was the result of a reckless act under draft article 19, and the carrier should thus lose the right to limit its liability. It was proposed that, therefore, the phrase “that exclusively resulted from their carriage on deck” should be deleted. There was support for that proposal.

114. However, several delegations expressed the view that the reckless or intentional behaviour dealt with under draft article 19 differed markedly from the situation covered in paragraph 4 in terms of the intent to cause loss or damage to the goods. An example was given that loss of an entire ship should not result in the loss by the carrier of its limitation regarding carriage on deck, since there was no causal connection between the improper deck carriage and the loss of the cargo. There was some support for the suggestion that paragraph 4 be retained in its current form.

115. A third proposal was made to delete only the word “exclusively”. It was thought that this might broaden somewhat the potential liability of the carrier, thus recognizing the serious nature of the carrier’s failure to respect the express agreement to carry the goods below deck. Some support was also expressed for that proposal.

Deletion of paragraph 4

116. A fourth proposal was made to delete paragraph 4 in its entirety, particularly if draft article 19 could be said to cover the circumstances dealt with in paragraph 4. This proposal met with somewhat less support than the other three proposals with respect to this paragraph.

Conclusions reached by the Working Group on paragraph 4

117. After discussion, the Working Group decided that:

- The word “expressly” should be retained in square brackets;
- Square brackets should be placed around the phrase “that exclusively resulted from their carriage on deck”;
- Square brackets should also be placed around the word “exclusively”;
- Square brackets should be placed around paragraph 4 in its entirety;
- The discussion of paragraph 4 would need to be reopened at a future session and its relationship with draft article 19 should be further studied.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 25. Deck cargo on ships

120. The Working Group was reminded that its most recent consideration of draft article 25 on deck cargo on ships was at its thirteenth session (see A/CN.9/552, paras. 103 to 117). The Working Group proceeded to consider draft article 25 as contained in A/CN.9/WG.III/WP.81. A general remark was made questioning whether chapter 7 was the appropriate placement for draft article 25.

Paragraphs 1, 2, 3 and 4

121. The Working Group agreed that draft paragraphs 1, 2, 3 and 4 should be approved as drafted.

Paragraph 5

122. It was noted that draft paragraph 5 appeared in the text in square brackets, and that the provision also contained four sets of square brackets in the text itself.

Text of the entire paragraph and placement

123. The view was expressed that draft paragraph 5 should be deleted in its entirety, and that in all cases under the draft convention, resort should be had to draft article 64 in the cases of loss of or damage to goods improperly carried as deck cargo. It was clarified, however, that the intention of draft paragraph 5 was not to lower the general threshold for the loss of the benefit of the limitation on liability in draft article 64, which should be kept as the general rule under the draft convention. It was appropriate, however, to treat a breach by the carrier to its express promise to carry goods under deck as a case warranting a special sanction.

124. There was broad agreement in the Working Group that the square brackets around the draft paragraph should be lifted and the text of the paragraph retained. A proposal was made that the draft paragraph should be moved to become a new subparagraph of draft article 24 but was not taken up. However, there was agreement to the drafting suggestion that the phrase “not entitled to limit its liability” in draft paragraph 5 should be adjusted to be consistent with the phrase used in draft article 64 “not entitled to the benefit of the limitation of liability”.

“[expressly]”, “[that solely][to the extent that such damage] resulted from their carriage on deck”

125. The Working Group next considered the text that appeared in square brackets in the draft provision. While there were some views expressed to the contrary, the Working Group agreed to retain the word “expressly” and to delete the square brackets surrounding it; to delete the phrase “that solely”, including square brackets surrounding it; to retain the phrase “to the extent that such damage” and to delete the square brackets surrounding it; and to retain the phrase “resulted from their carriage on deck” and delete the square brackets surrounding the entire final phrase. It was felt that the requirement of an express agreement to trigger the loss of the benefit of the liability limits was important so as to make foreseeable for the carrier its exposure to that sanction. Furthermore, the phrase “to the extent that such damage” was to be preferred over the words “that solely”, since it was in keeping with the general approach to causation in the draft convention.

Conclusions reached by the Working Group regarding draft paragraph 5

126. After discussion, the Working Group decided that:

- The text of draft paragraph 5 should be retained in the draft convention as drafted and the square brackets around it deleted;
- The phrase “not entitled to limit its liability” in draft paragraph 5 should be adjusted to be consistent with the phrase used in draft article 64 “not entitled to the benefit of the limitation of liability”; and
- The draft paragraph should reflect the text chosen by the Working Group from the alternatives presented, as set out in paragraph 125 above.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 26. Deck cargo on ships*****Proposal for expanding the definition of “containers”***

73. The Working Group was reminded that a proposal had been made regarding a suggested improvement to be made to the definition of “container” currently in draft article 1(26) (see A/CN.9/WG.III/WP.102), and that it would seem logical to discuss that proposal in connection with draft article 26. It was explained that the proposal was to adjust the definition of “container” in the draft convention by adding to it the term “road cargo vehicle”, and that that change would primarily have an effect on draft articles 26(1) and (2) and 62(3). It was noted that road cargo vehicles were often carried overseas in large numbers, usually on specialized trailer carrying vessels that were designed to carry both such vehicles and containers either on or below deck. It was explained that the current text of the draft convention treated road cargo vehicles pursuant to draft article 26(1)(c), rather than grouping them with containers pursuant to draft article 26(1)(b), such that the carrier might not be liable for damage to the goods in road cargo vehicles due to the special risk of carrying them on deck as part of the category in paragraph (c). It was suggested that road cargo vehicles should instead be treated in the same fashion as containers, such that the normal liability rules would apply to them regardless of whether they were carried on or below deck.

74. By way of further explanation, it was noted that adjusting the definition of “container” so as to include road cargo vehicles would ensure that it would not be possible to consider a road cargo vehicle as one unit pursuant to draft article 62(3), but that, as in the case of containers, each package in the road cargo vehicle could be enumerated for the purposes of the per package limitation on liability. It was noted that that particular problem had been raised by the International Road Transport Union (IRU) (see A/CN.9/WG.III/WP.90) as being of particular concern. Further, it was suggested that adjusting the definition of “container” as proposed could have the additional benefit of treating containers and road cargo vehicles in an equitable fashion.

75. An additional proposal was made to extend the definition of “container” to include not only “road cargo vehicles”, but to include “railroad cars” as well. While it was noted that railroad cars were seldom carried on deck, it was suggested that the inclusion of that term in the definition of “container” could have certain advantages, for example, in respect of the shipper’s obligation to properly and carefully stow, lash and secure the contents of containers pursuant to draft article 28.

76. Broad support was expressed for both proposals, as they entailed practical benefits, reflected the current practice and were especially reasonable from the viewpoint of the industry. It was observed that the proposal did not cause any change in the conflict of conventions provision of the draft convention and that there would be in particular no conflict with the CMR. It was further noted that if the proposals were to be approved, the drafting group should review the entire draft convention on the use of the terms “container” and “trailer”.

77. However, some concerns were raised with regard to extending the definition of “containers”. From the viewpoint of carriers, it was said, the expanded definition might result in an increase of the carrier’s level of liability, thus upsetting the balance currently reflected in the draft convention.

78. From the viewpoint of shippers, the concern was expressed that an expanded definition of “containers” might have undesirable implications on draft article 62 on limitation of liability especially with regard to sea transport of a road cargo vehicle. For example, if the bill of lading did not include the enumeration of the goods on the vehicle, the vehicle and its contents would be regarded as a single package and thus all the owners of the goods on the truck would lose the per package limitation. This danger would also be a matter of concern for road haulers. It was pointed out that the CMR provided for a higher weight limitation of liability than currently contemplated in the draft convention. Thus, in case of cargo loss or damage during a sea journey while the goods were loaded on a truck, the road carrier might be liable to compensate cargo owners at an amount higher than it could recover from the sea carrier. Another concern was the possible implication that the inclusion of road vehicles in the definition of containers might have for loss or damage to a road cargo vehicle which was transported by sea without any goods loaded on it. For those reasons, rather than amending the definition of “containers” it was suggested that it would be preferable to take an article-by-article approach and add the words “road cargo vehicles” and “railroad cars” whenever the context so required.

79. In response to those concerns, it was stated that goods in “road cargo vehicles” would need to be enumerated to benefit from the per package limitation and that that was already the practice, especially under the CMR. As regards damage to the vehicle itself, it was pointed out that the definition of “goods” as provided in paragraph 24 of draft article 1 addressed that issue as it included containers not supplied with cargo. Furthermore, from a practical point of view, it was noted that an amendment in the definition of containers had the advantage of avoiding the need for adding the expressions “road cargo vehicles” and “railroad cars” every time the term “container” was used (draft articles 1(25), 1(26), 15(c), 18(5)(a), 26(1)(b), 28(3), 42(3), 42(4), 42(4)(a)(i), 42(4)(b)(i), 42(4)(b)(ii), 43(c)(ii), 51(2)(b), 62(3)).

80. In view of the concerns that had been raised, and noting the relationship between some of the arguments and the notion of “package” in draft article 62, paragraph 3, the Working Group agreed that it should postpone its deliberations on the matter until it had examined that other provision.

Fitness for carriage on deck

81. It was pointed out that, regardless of whether or not the definition of “container” in the draft convention was to include “road cargo vehicles” and “railroad cars”, they would in any event need to be fit for carriage on deck and this should be reflected in paragraph 1(b) of draft article 26. There was general agreement in the Working Group that the carrier should only be allowed to carry on deck road cargo vehicles and railroad cars that were fit for such carriage and that the ship’s deck should be specially fitted to carry them.

Conclusions reached by the Working Group regarding draft article 26

82. The Working Group approved the substance of draft article 26, subject to inclusion of reference to “road cargo vehicles” and “railroad cars” in subparagraph 1(b). The Working Group agreed to revert to the proposed amendment to the definition of containers after it had examined draft article 62, paragraph 3.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 26. Deck cargo on ships; and draft article 1, paragraphs 24 (“goods”), 25 (“ship”) and 26 (“container”)

90. There was not sufficient support for a proposal to supplement the definition of the word “goods” with a reference to road and railroad cargo vehicles, as it was considered that the proposed addition would require amendments in other provisions of the draft Convention, such as draft article 61, paragraph 2, that mentioned goods, containers or road and railroad cargo vehicles.

91. The Commission approved the substance of draft article 26 and of the definitions contained in draft article 1, paragraphs 24, 25 and 26, and referred them to the drafting group. The Commission requested the drafting group to ensure consistency throughout the draft Convention in references to “customs, usages and practices of the trade”.

Article 26. Carriage preceding or subsequent to sea carriage

When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier’s period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international instrument that, at the time of such loss, damage or event or circumstance causing delay:

(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier’s activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;

(b) Specifically provide for the carrier’s liability, limitation of liability, or time for suit; and

(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.

[For deliberations on door-to-door scope of application of the Convention, see

General Discussion, Chapter 2, at p. 71]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(b) Relationship of the draft instrument with other transport conventions and with domestic legislation***

245. The Working Group next considered the issue of the relationship of the draft instrument with other conventions and with domestic legislation. Discussion ensued in an effort to clarify views regarding the relationship between the draft instrument and multimodal and unimodal instruments, and with applicable national law.

246. The Working Group was reminded that subparagraph 4.2.1 was intended to accommodate the continued application of the normally applicable inland conventions for the carriage of goods. The view was expressed that with respect to pure unimodal conventions, with no multimodal aspects, no conflict with the draft instrument would arise, and that, as a consequence, subparagraph 4.2.1 was unnecessary. A widely supported view was expressed that the limited network principle in subparagraph 4.2.1 of the draft instrument was effective in ensuring that there was no overlap with unimodal conventions or any future regional multimodal convention. Another view was expressed, however, that subparagraph 4.2.1 did not solve the issue of conflict of conventions, since it gave preference only to specific provisions of applicable unimodal conventions. The Working Group was reminded that certain States would find it impossible to be signatory to more than one multimodal convention, and that if the draft instrument was a multimodal instrument, ratification of it could preclude some States from ratifying broader multimodal conventions. A further concern was raised that if the draft instrument was multimodal, parties to other instruments that have multimodal aspects, such as the Montreal Convention and COTIF, might have to denounce those conventions in favour of the draft instrument.

247. It was also suggested that paragraph 3.1 should be clarified with respect to the situation where, for example, goods on a truck were not unloaded onto the vessel during a multimodal carriage of goods, such that the draft instrument and CMR would compete in terms of applicable law. A further suggestion was made that the network system in subparagraph 4.2.1 should be abandoned in favour of a uniform approach, and that, in its stead, a conflict of conventions provision could be inserted into article 16 of the draft instrument. It was also suggested that such a provision should be added to article 16, in any event, if it was decided that subparagraph 4.2.1 should be deleted.

248. Concern was raised with respect to how the draft instrument would deal with future regional transport conventions. The view was expressed that the terms of such future conventions might also prevail over those of the draft instrument pursuant to subparagraph 4.2.1, and thus that such future conventions represented at least as great a threat to uniformity as the inclusion of mandatory national law. The suggestion was made that since the limited network principle was intended as a practical approach to gain as much support for the draft instrument as possible, the problem of future conventions could be solved by limiting the operation of subparagraph 4.2.1 to existing international conventions.

249. It was reiterated that there was an important relationship between national law and the draft instrument, since the current version of the draft instrument would automatically supersede national law pursuant to subparagraph 4.2.1, yet the provisions of international conventions would stand. The suggestion was again made that the draft instrument should

include mandatory national law in the exception to its scope of application set out in subparagraph 4.2.1, and reference was again made to option 2 of the Canadian proposal (see above, paras. 221 and 235). In response, the view was expressed that subparagraph 4.2.1 should not be so amended in order to apply mandatory national law, since it could mean, in some cases, that the limit on liability in the national law would be lower than that set out in the draft instrument, and this would mean not only that performing parties would be protected in terms of the lower liability limits, but that contracting carriers could claim the same liability limit. It was explained that the change suggested with respect to the treatment of performing parties under the draft instrument was intended to take into account the concern with respect to national law, but at the same time to allow cargo interests to proceed directly against performing parties under whatever law would apply in the absence of the draft instrument. The point was made that option 2 of the Canadian proposal was not intended to allow the application of national law to the contracting carrier, but that the possibility of this unintended consequence would have to be assessed. Interest was voiced in pursuing further discussions based on both the Italian proposal (see above paras. 220 and 236) and the United States suggestion (see above paras. 226 and 227), one of which the Working Group might potentially adopt in the future to deal with concerns respecting the preservation of mandatory national law.

250. After discussion, the Working Group agreed provisionally to retain the text of subparagraph 4.2.1 as a means of resolving possible conflicts between the draft instrument and other conventions already in force. The Secretariat was instructed to prepare a conflict of convention provision for possible insertion into article 16 of the draft instrument, and to prepare language considering as an option the Swedish proposal to clarify paragraph 3.1. The exchange of views regarding the relationship between the draft instrument and national law was inconclusive, and the decision was made to consider this issue further in light of anticipated future proposals. Given the level of support with respect to the issue of national law, however, the Working Group requested the Secretariat to insert a reference to national law in square brackets into the text of subparagraph 4.2.1 for further reflection in the future.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

25. While there was general support for the creation of different regimes for maritime and non-maritime performing parties, it was proposed that a reference to national law be kept in article 8(b), and it was suggested that this reference could be qualified by referring to national mandatory law that is similar to or based upon existing conventions. It was stated that the proposal in section I of document A/CN.9/WG.III/WP.34 did not solve all problems that a specific reference to national law would solve, since, for example, without a reference to national law in article 8(b), it would not be possible for the owner of goods to sue a contracting A/CN.9/544 carrier on the basis of the national law governing the carriage of goods by road. It was also stated that if inland carriers were left out of the scope of the draft instrument, it could not be assured that claims against inland carriers would be available under the applicable national law, and that this would be detrimental to shippers. It was suggested that shippers could potentially enjoy greater recovery for claims under national law given the generally lower liability limits under maritime conventions, but it was pointed out that this was not necessarily the case, particularly with respect to the “per package” limitation rules contained in maritime conventions, coupled with the amount of container traffic and the incidence of high

value/low weight goods. As a further qualification to the reference to national law, it was suggested that only mandatory national regimes that created better protection for owners of goods would prevail over the draft instrument. Some support was expressed for the position that a reference to national law should be maintained in article 8(b), although concern was raised with respect to this proposal in light of the Working Group's intent to create as uniform a regime as possible under the draft instrument. Further, with respect to the proposed qualifications of the reference to national law, concern was expressed regarding what criteria would be used to decide whether national laws would meet the proposed qualification requirements under article 8(b), and whether this would increase the level of uncertainty in the scope of application.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

General discussion and draft article 27

216. It was recalled that the Working Group had previously considered the issue of the relationship of the draft convention with other conventions at its eleventh session (see A/CN.9/526, paras. 191-202), and that the Working Group had instructed the Secretariat to prepare conflict of convention provisions for possible insertion into draft chapter 19 during its discussion of draft article 27, also at its 11th session (see A/CN.9/526, paras. 245-250, particularly paras. 247 and 250). Those provisions were currently found in the text at articles 89 and 90. It was also recalled that a note by the Secretariat had been prepared on the relationship of the draft convention with other conventions (A/CN.9/WG.III/WP.78), and that it was intended to be read along with a previous note on the sphere of application of the draft convention that had been prepared by the Secretariat (A/CN.9/WG.III/WP.29). The consideration by the Working Group of draft articles 27, 89 and 90 was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56.

217. The Working Group heard a presentation from the International Road Union (IRU) that highlighted certain concerns of the IRU regarding the interaction of the draft convention with the CMR. According to the IRU, the draft convention created a competing legal regime to the CMR for the carriage of goods by road. While recognizing that draft article 27 of the draft convention attempted to harmonize the operation of the two conventions, the IRU contended that the combined operation of draft articles 27, 89 and 90 of the draft convention would require a Contracting Party of the CMR that wanted to accede to the draft convention to be in conflict with the provisions of the CMR. The view of the IRU was that the draft convention would operate contrary to the terms of article 41(1)(b) of the Vienna Convention on the Law of Treaties, with respect to the modification of a treaty, and of article 1(5) of the CMR, which prohibited Contracting Parties of the CMR from making any special agreements amongst themselves to vary the provisions of the CMR. It was argued by the IRU that any Contracting Party of the CMR would be in conflict with those provisions by ratifying the draft convention, since it was alleged that the door-to-door sphere of application of the draft convention necessarily entailed that the obligations of those Contracting Parties under the CMR would be varied or violated. Of further concern to the IRU was the operation of draft article 27 of the draft convention, that, in the case of localized loss or damage to the goods, allowed for the operation of mandatory provisions of other conventions that specifically provided for the carrier's liability, limitation of liability or time for suit, which was said to be contrary to the

mandatory nature of the whole of the CMR, pursuant to its own provisions (see CMR, article 41).

218. In response to those remarks, it was pointed out that some of the comments of the IRU were based on tentative provisions in the draft convention that were still subject to consideration by the Working Group. It was also observed that the membership of the Contracting Parties of the CMR did not coincide with the membership of the United Nations, and that it was for the Contracting Parties of the CMR to assess the extent of their treaty obligations under public international law. Finally, it was also emphasized that the type of contract of carriage contemplated for coverage by the draft convention was clearly of a different type than that covered by the CMR.

219. The Working Group proceeded to consider the alleged conflicts between the draft convention and other international conventions on the carriage of goods. As a preliminary matter intended to alleviate any perceived concerns with the relationship of the draft convention with other conventions, it was proposed that the text of draft article 89 be modified by replacing the phrase, “and that applies mandatorily to contract of carriage of goods primarily by a mode of transport other than carriage by sea” with the phrase, “to the extent that it applies mandatorily to the contract of carriage in question and cannot be overridden by this Convention.” It was explained that this proposed change was intended to ensure that other transport conventions were applied only and to the extent that such application was truly necessary and when the draft convention could not be said to apply. The Working Group took note of that suggestion.

220. It was observed that the draft convention and the CMR each had its particular and discrete sphere of application, based on the type of contract of carriage contemplated for inclusion. It was indicated that the draft convention concerned the “maritime plus” contract of carriage with additional inland carriage, while the CMR concerned contracts for the carriage of goods exclusively by road. It was further observed that the operation of draft article 27 intended to respect and preserve the provisions of the existing conventions for inland carriage of goods relating to liability matters, and that the performing inland carrier would always be subject to its own unimodal inland liability regime, while the overall contracting carrier would be subject to the regime under the draft convention. The Working Group was encouraged to avoid placing too much emphasis on the possible conflict of conventions.

221. The focus of the problem of conflict of conventions was said to be the definition of the contract of carriage in various conventions. For example, it was said that the definition of “contract of carriage” in the draft convention was quite broad, and could include a fairly short sea leg and very long inland carriage. Further, the combined transport provisions of other conventions, such as article 2 of the CMR and article 38 of the Montreal Convention, apply those conventions to the entire carriage in certain cases, regardless of the fact that other modes of transport were involved. This appeared to set up a direct conflict of conventions with the draft convention, but the view was expressed that draft article 27 was the most appropriate mechanism through which to deal with such conflicts, subject to any necessary drafting adjustments.

222. It was suggested that a conflict of conventions arose in the case of transport conventions primarily when the provisions on scope allowed for an overlap in the types of contracts of carriage covered by the convention. In particular, the concern was said to be particularly

problematic only when the scope provisions of unimodal transport conventions were read very generously. The view was expressed that the scope provisions of the draft convention were quite modest and precise compared with those of other conventions, and that further precision of the scope of the draft convention had been achieved by allowing for actions against only the contracting carrier and the maritime performing party, leaving inland carriers subject to their unimodal inland regimes. It was acknowledged that, in spite of these mechanisms, there could still exist cases where there was a conflict between the regimes applicable to the overarching umbrella contract of carriage and the unimodal contract of carriage, and that draft article 27 was intended to allow for coordination in those cases by having the draft convention give way to mandatory provisions in present or future conventions but only regarding carrier's liability, limitation of liability or time for suit. The reason for maintaining the priority of the draft convention with respect to all other issues was said to be a matter of utmost concern to the certainty of trade, in that treatment of the documentary aspects of the multimodal shipment had to stay constant and subject to the rules of the draft convention. Otherwise, it was suggested that instability would be created by, for example, having a negotiable transport document suddenly being transformed into a non-negotiable one under the CMR for the land leg of the transport. Similar arguments were said to exist for the preservation of the right to instruct with respect to the goods, and the right of control, in that, unlike under certain unimodal conventions, the shipper could under the provisions of the draft convention prevent a consignee that had not paid for the goods from nonetheless collecting them at the end of the transport.

223. Although there was general satisfaction with the approach to other conventions taken in draft article 27, and although there was general agreement that the Working Group had agreed on adopting a limited network approach in the draft convention (see A/CN.9/526, paras. 219-239), some concerns were raised regarding whether the scope of draft article 27 was broad enough to provide a complete remedy for the conflict of conventions. In particular, since draft article 27 referred only to mandatory provisions, the view was expressed that conflicts could also arise in the case of non-mandatory provisions, such as with respect to notice of damage provisions, and that draft article 27 did not provide a sufficient answer for those situations. As such, it was said that the provisions of the draft convention could be said to overlap with the unimodal transport conventions. A possible solution for the problem regarding non-mandatory provisions was said to be the addition of a provision that parties were deemed to opt out of non-mandatory provisions of other conventions to the extent that they were in conflict with provisions of the draft convention.

224. Another, related problem was said to exist in the wording of draft article 27(1)(b)(i) itself, which referred to conventions which according to their terms “appl[ied] to all or any of the carrier’s activities” under the contract of carriage. It was pointed out that, given the differing scopes of application of the various unimodal transport conventions, their provisions might never apply “according to their terms” and draft article 27 might never operate, thus establishing a uniform system rather than a limited network system. It was suggested that the phrase “according to their terms apply to all or any of the carrier’s activities under the contract of carriage during that period” should be deleted and replaced with text along the following lines: “would have applied if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of transport where the loss or damage occurred”. It was said in further support of a limited network system that it would operate in order to create the preferable situation in which the contracting carrier would be sued by the cargo claimant rather than the performing carrier.

225. The view was expressed by some that draft article 27, perhaps with some drafting adjustments to take into account the specific problems of overlap with conventions such as the Montreal Convention, was sufficient to ensure a solution to any potential conflict of conventions. In light of this, it was said by some that the additional provisions in draft article 89 and 90 were unnecessary, and in fact complicated the clear and predictable approach to the problem provided for in draft article 27. In support of this view, it was said that draft article 89 allowed too much discretion for a decision regarding which convention to apply to be made, and preference was expressed for the more certain approach presented in draft article 27. Further, it was said that using draft article 89 as a solution to the conflict of conventions problem would not provide for as precise and uniform an interpretation as could be found by relying on draft article 27. However, others that supported draft article 27 saw a possible continuing role for draft articles 89 and 90, in order to deal with situations such as the direct and unavoidable conflict between the provisions of the draft convention and the operation of the provisions of other conventions, such as articles 18(4) and 38 of the Montreal Convention. Further, it was thought that the position of draft articles 89 and 90 in the chapter on “Other conventions” was more appropriate for a conflict of conventions provision, and that inclusion of such provisions could provide added security of interpretation should such conflicts arise.

“[national law]”

226. Several delegations expressed the view that the phrase “national law” should be deleted from the chapeau of draft article 27(1)(b). In support of this view, it was said the deletion of the terms would promote uniformity of interpretation and legal certainty. It was further suggested that the added complexity and expense in a cargo claim of having to determine the applicable provisions of national law argued against retention of that phrase. However, a considerable number of delegations also expressed a desire to retain the text in square brackets, pending further consideration of that phrase. In support of that proposal, the view was expressed that in some situations where the last leg of the carriage was by road and was purely domestic, leaving out the phrase could result in a markedly different regime being applied to that road leg than might be applied under domestic law. It was thought that further consideration should be given to such a possible scenario, or whether such concerns could be accommodated by means of another approach in the draft text.

An additional drafting concern

227. Questions were raised whether it was necessary in draft article 27(1)(b)(iii) to make reference to “private contracts”, or whether the word “private” could be deleted from the text.

Conclusions reached by the Working Group regarding draft article 27:

228. After discussion, the Working Group decided that:

- The scheme of draft article 27 should be maintained with some possible drafting improvements;
- The brackets around the text of paragraph 1 should be removed and the text retained;
- The Secretariat was requested to consider alternative drafting for aspects such as the phrase “according to their terms apply”;
- To maintain the square brackets around paragraphs 2 and 3; and

- The phrase “[or national law]” in the chapeau of draft article 27(1)(b) should be retained pending further consideration.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 26. Carriage preceding or subsequent to sea carriage

185. The Working Group was reminded that draft article 26 had been last considered at its eighteenth session (see A/CN.9/616, paras. 216 to 228). The Working Group proceeded to consider draft article 26 on carriage preceding or subsequent to sea carriage as contained in A/CN.9/WG.III/WP.81.

186. In respect of draft article 26 generally, the Working Group was reminded that a proposal had been made suggesting a consolidated text for draft articles 26, 64(2) and the former draft article 89 as it appeared in A/CN.9/WG.III/WP.56 (see A/CN.9/WG.III/WP.89). It was suggested that the close connection between those draft provisions in terms of regulating the relationship of the draft convention with other conventions made it desirable to consolidate them into a single provision that would be clearer and more reader-friendly. The Working Group, however, preferred to continue treating those provisions separately and did not take up that proposal.

Paragraph 1

“[or national law]”

187. Some support was expressed for a retention of the bracketed text “or national law” in draft paragraph 1. In that respect, it was said that the contract of carriage under a “maritime plus” regime such as that envisaged pursuant to the draft convention, might contain a very long inland leg and a comparatively short sea leg. In that context, it was said that a reference to national law in draft article 26 was necessary in some jurisdictions to preserve mandatory national law that applied in respect of the inland transport. In further support of maintaining the references to national law in draft paragraph 1, it was suggested that with that reference nonmaritime performing parties would have greater certainty that they did not fall within the liability regime of the draft convention. Further, in response to suggestions that the inclusion of the reference to mandatory national law strayed too far from the draft convention’s goal of uniformity, it was pointed out that the inclusion of “international instruments” in paragraph 1 already provided for the possible inclusion of regional international agreements, which could simply consist of an exchange of notes between two States.

188. However, strong support was shown for the deletion of the phrase “or national law” as currently found in square brackets in draft paragraph 1. Although there was sympathy for those who sought a solution for the problems outlined in the previous paragraph, it was said that the retention of references to national law represent a major departure from the balance that had already been achieved on the network approach as contained in draft article 26, paragraph 1. It was further said that there had been an understanding that in formulating a basis for the network system, it had not been possible to reach complete uniformity due to the need to accommodate in certain limited situations the operation of other unimodal conventions such as the Convention on the Contract for the International Carriage of Goods by Road (CMR) and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (CIM-

COTIF). However, it was said that the expansion of those narrow exceptions to include all mandatory national law would undermine the usefulness of

the entire provision and would greatly detract from the uniformity and predictability of the draft convention as a whole. In addition, it was suggested that the inclusion of a reference to national law in article 26, paragraph 1 could render it impossible to use draft article 4 (“the Himalaya clause”) to protect performing parties. Another problem with the inclusion of a reference to national law was said to be that it would create uncertainty for both shippers and carriers in terms of determining which liability regime would govern their activities.

The compromise proposal

189. In light of the support within the Working Group in favour of both retaining and of deleting the phrase “or national law” in paragraph 1, a compromise proposal was suggested. The proposal was to allow Contracting States that wished to apply their mandatory national law to inland cases of loss of or damage to the goods to do so by means of declarations made in accordance with draft article 94. It was envisaged that Contracting States should be required to identify specifically the national law that would apply in those cases. The effect of such a declaration would be to allow the courts of that State to apply national law to cases of localized inland damage in that State. However, courts of other States than the State making the declaration would not be bound by that declaration, and would apply the text of the draft convention according to its terms, and without regard to mandatory national law. Furthermore, it was clarified that courts of the State making the declaration would only be able to apply their substantive national law with respect to damage occurring within that State, and that the declaration would not provide a basis for any purported extraterritorial effect of the national law in cases of inland loss or damage outside of that State.

190. While strong preferences were expressed in the Working Group for both retaining and deleting the references to national law, broad support was expressed for the compromise proposal. While the inclusion of national law in draft article 26, even if by way of declaration rather than in the text itself, was said to detract from the uniformity of the draft convention, it was noted that at least the specification of only certain national laws by specific countries making declarations to that effect would allow for greater uniformity and predictability than including reference in the text to the national law of all Contracting States. Further, such an approach allowed for the accommodation of the needs of certain States who had mandatory national provisions regarding their inland carriage. The Working Group was reminded that such an approach had been advocated in A/CN.9/WG.III/WP.23. In light of the technical nature of formulating the appropriate approach to the declaration technique, the Working Group agreed not to consider specific proposals to that effect at the present stage and requested the Secretariat to offer draft language in due course. The Working Group took note of the view that if the declaration approach were adopted by the Working Group as a compromise solution, part of the compromise should be the deletion of the phrase “or national law” in draft article 62(2) on non-localized damage, if draft article 62(2), which was in square brackets, were retained in the text.

Variant A or B

191. While support was expressed in the Working Group for the retention of Variant A of subparagraph 1(a), a stronger preference was expressed for Variant B as being clearer and more likely to be interpreted accurately. It was further said that the text of Variant B was preferable in that it ensured that the operation of the draft convention would take place independently of

the scope provisions of other transport conventions. Variant A, it was suggested, was less desirable, since it was drafted as primarily a conflict of conventions provision that relied upon the interpretation of the scope provisions of other transport conventions.

Conclusions reached by the Working Group regarding paragraph 1

192. The Working Group was in agreement that:

- All references to the phrase “[or national law]” should be deleted from paragraph 1;
- The Secretariat should draft a declaration provision allowing a Contracting State to include in draft article 26(1) its mandatory national law provided that: (1) the State specifically identified in a declaration to that effect made pursuant to draft article 94; (2) the national law of the State making the declaration applied to the loss or damage in question; and (3) the damage occurred in the territory of the State that made the declaration; and
- Variant B of draft subparagraph 1(a) should be taken up and Variant A deleted.

Paragraph 2

193. It was observed that draft paragraph 2 of article 26 referred to draft article 62(2), and it was suggested that discussion of draft article 26(2) should be deferred until the Working Group had considered draft article 62(2). That suggestion was approved by the Working Group in light of the relationship between draft article 26 on localized damage to the goods and draft article 62(2) on non-localized damage to the goods. However, it was also suggested that draft article 62(2) could not be considered until a decision regarding the limitation level in draft article 62(1) had been made was not taken up in light of the link regarding the scope of the draft convention shared by draft articles 26 and 62(2).

[* * *]

Paragraph 3 of draft article 26

201. The Working Group next considered the text of paragraph 3 of draft article 26 as found in A/CN.9/WG.III/WP.81. It was observed that draft paragraph 3 was intended to clarify that no deviation could be made from draft article 26 except by choice of law, and that notwithstanding paragraph 1 of draft article 26, the normal liability rules of the draft convention would continue to apply. While there was some doubt regarding the necessity of including a provision such as paragraph 3, support was expressed for the additional clarity that it lent the application of the general liability rules in the draft convention.

“maritime performing party”

202. A question was raised regarding whether it was necessary to refer to the maritime performing party in the text of draft paragraph 3, since the focus of draft article 26 was on the contract of carriage, and should thus perhaps be limited to a reference to the carrier. Some doubt was expressed regarding this view, however, and it was agreed that the concern regarding the inclusion of the maritime performing party would be noted.

Conclusions reached by the Working Group regarding paragraph 3

203. The Working Group agreed that:

- The square brackets around the text of draft paragraph 3 should be deleted and the text of the provision retained; and
- The Secretariat examine the need for referring to the maritime performing party in the draft paragraph and make proposals to the Working Group in due course.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 27. Carriage preceding or subsequent to sea carriage

83. Some concern was raised that draft article 27 did not provide for a declaration provision whereby a contracting State might declare that it would apply mandatory provisions of its domestic law in essentially the same circumstances under which a contracting State could apply an international instrument in accordance with paragraph 1 of draft article 27. In response, the Working Group was reminded that at its nineteenth session it had requested the inclusion of such a draft article (see A/CN.9/621, paras. 125-126) and that, at its twentieth session, it had decided, as part of its provisional decision pending further consideration of the compromise proposal on the level of the limitation of the carrier's liability, to reverse that decision (see A/CN.9/642, paras. 163 and 166), which is why the text before the Working Group did not contain any such provision.

84. A question was raised whether the use of the different terms "international instruments" in draft article 27 and "international convention" in draft article 85 was intentional. It was clarified that the differentiation was intentional, because not all relevant international instruments in this context were regarded as international conventions, for example, a regulation issued by a regional economic integration organization.

85. With regard to paragraph 3 of draft article 27, it was suggested that the paragraph should be deleted entirely, in light of the Working Group's decision at its nineteenth session to choose the Variant B approach with regard to limits of liability (see A/CN.9/621, para. 191). The Working Group was reminded that draft paragraph 3 had been added for greater clarity regarding the applicability of inland transport conventions when the only approach in subparagraph 1(a) of the text was the conflict of laws approach set out in Variant A. It was pointed out that, since the draft article currently reflected a different approach, namely the "hypothetical contract" approach, draft paragraph 3 had become superfluous and might even interfere with the operation of subparagraph 1(a).

86. In response, there was some support for retaining paragraph 3 as it had been part of a compromise arrived at after extensive debate. The Working Group was invited to consider carefully possible implications of deleting draft paragraph 3, in particular in connection with draft article 62, paragraph 2, before making final decision on the matter.

Conclusions reached by the Working Group regarding draft article 27

87. After discussion, the Working Group approved the substance of draft article 27 and referred it to the drafting group. The Working Group agreed to postpone a decision on paragraph 3 of draft article 27 until it had further deliberated on matters relating to limits of liability in paragraph 2 of draft article 62 (see below, para. 204).

[* * *]

Draft article 27. Carriage preceding or subsequent to sea carriage (*continued*)

204. Following its decision to delete paragraph 2 of draft article 62, the Working Group agreed to delete paragraph 2 of draft article 27. In addition, the Working Group agreed to delete paragraph 3 of draft article 27.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 27. Carriage preceding or subsequent to sea carriage**

92. It was recalled by the Commission that, in addition to referring to other international instruments, previous versions of draft article 27 of the draft Convention had also contained a bracketed reference to “national law”. It was further recalled that at the nineteenth and twentieth sessions of the Working Group, that reference had been deleted as part of a compromise proposal concerning several issues, including the level of the limitation of the carrier’s liability (see A/CN.9/621, paras. 189-192 and A/CN.9/642, paras. 163 and 166).

93. A proposal was made in the Commission to reinstate the reference to “national law” in draft article 27, or to include a provision in the draft Convention allowing a Contracting State to make a declaration including its mandatory national law in draft article 27. In support of that proposal, it was observed that some States had very specific national rules to deal with particular geographical areas, such as deserts, and would like to preserve those special rules once the draft Convention came into force. Further, it was suggested that as the current text of draft article 27 provided a solution in the case of possible conflicts with regional unimodal transport conventions, other States that were not parties to such conventions should have their national law accorded the same status, even though their national rules did not arise as a result of international obligations. In addition, it was suggested that re-establishing a reference to “national law” in draft article 27 could allow more States to ratify the Convention and thus allow for broader acceptance of the instrument by as many States as possible.

94. Concern was also expressed in the Commission with respect to the fact that draft article 27 applied only to loss or damage of goods that could be identified as having occurred during a particular leg of the carriage. It was suggested that in most cases it would be quite difficult to prove where the loss or damage had occurred and that draft article 27 was likely to have limited operability as a result. It was further suggested that in those cases in which it was possible to localize the loss or damage, it would be particularly important to give way to national law governing that particular leg of the carriage.

95. While some support and sympathy were expressed for the reinsertion of a reference to “national law” in draft article 27, reference was made to the fact that the current text of draft article 27, including the deletion of the reference to “national law”, had arisen as a result of a complex compromise that had taken shape over the course of several sessions of the Working Group. Caution was expressed that that compromise had involved a number of different and difficult issues, including the establishment of the level of limitation of the carrier’s liability, and that reinserting the reference to national law could cause that compromise to unravel. The Commission was called upon to support the existing text that had been the outcome of that

compromise, and there was support for that view. A number of delegations noted that they had not been completely satisfied with the outcome of the compromise, but that they continued to support it in the interests of reaching as broad a consensus on the text as possible.

96. In further support of the text as drafted, it was observed that the inclusion of “national law” in draft article 27 was quite different from including international legal instruments. In the case of international instruments, the substance of the legislation could be expected to be quite well known, transparent and harmonized, thus not posing too great an obstacle to international trade. In contrast, national law differed dramatically from State to State, it would be much more difficult to discover the legal requirements in a particular domestic regime, and national law was much more likely to change at any time. It was suggested that those factors made the inclusion of national law in draft article 27 much more problematic and would likely result in substantially less harmonization than including international instruments in the provision. There was support in the Commission for that view.

97. It was suggested that, as draft article 27 was clearly no longer a provision governing conflict of conventions, the use of the phrase “do not prevail” in its chapeau might be misconstrued. In its place, it was suggested that the phrase “do not apply” might be preferable. However, it was observed that simply replacing the phrase as suggested could be problematic, as the conflicting provisions would not simply be inapplicable, but would be inapplicable only to the extent that they were in conflict with the provisions of the draft Convention. Further, it was recognized that a more substantial redraft of the text of draft article 27 would probably be necessary in order to achieve the suggested result. The Commission agreed that the current text of draft article 27 was acceptable.

98. After consideration, the Commission approved the substance of draft article 27 and referred it to the drafting group.

CHAPTER 7. OBLIGATIONS OF THE SHIPPER TO THE CARRIER

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

4. Rights and obligations of the parties to the contract of carriage (draft articles 7, 9 and 10)

(a) Obligations of the shipper (draft articles 7 and 10)

48. The Working Group proceeded to consider draft articles 7 and 10 dealing with obligations of the shipper and delivery to the consignee. It was observed that the prime obligation of the shipper was to pay freight with secondary obligations being to bring the cargo into the custody of the carrier and provide the carrier with goods in such a condition that they would withstand the intended carriage. The Working Group recognized that these obligations were reflected in many national laws and in business practices. It was further observed that the shipper was obliged to inform the carrier of the nature of the cargo, and in particular whether the cargo was dangerous.

49. It was pointed out that draft articles 7 and 10 had been drafted with the aim of providing balanced rights and obligations as between the shipper and the carrier, which improved on the approach taken in the Hague-Visby Rules and expanded in scope upon the approach taken in Hamburg Rules. It was observed that the draft text of article 7.5 imposed strict liability for failure on the part of the shipper to enable the carrier to carry the goods safely. There was general agreement that draft article 7 provided a basis for further debate. A suggestion was made that the shipper's obligation to deliver the goods ready for carriage should not be left entirely to the will of the parties as set out in draft article 7.1, particularly in view of the obligation of the carrier to provide information under draft article 7.2. It was stated that such an obligation was directly related to the safety and security of the vessel and thus should not be left entirely to party autonomy. A suggestion was made that in certain circumstances, for example where goods carried could be hazardous to the environment or a risk to third parties, the carrier or master of the vessel should be allowed to provide information on the goods to relevant bodies such as a port authority. It was questioned whether draft article 7.2, which dealt with an obligation of the carrier, was correctly located in chapter 7, given that this chapter dealt with obligations of the shipper.

50. The view was expressed that, as currently drafted, the obligations placed on the shipper might not be in total balance with those imposed upon the carrier. For example, draft article 7.6 only allowed a shipper to escape liability if it could show that the loss, damage or injury caused by the goods was caused by events that a diligent shipper could not avoid or the consequences of which a diligent shipper would be unable to prevent. By contrast, the corresponding liability provision in respect of the carrier set out in draft article 6.1.1 allowed the carrier to escape liability if it could show there had been no fault on its part. It was agreed that, whilst the obligations of the shipper and carrier should be properly balanced, this balance should be assessed from a global perspective rather than by an article-by-article or obligation-by-

obligation analysis. In that regard, it was noted that the carrier had the benefit of defenses and limitations that were not available to the shipper.

51. The Working Group generally agreed that draft articles 7 and 10 provided a good basis for further discussion of the obligations of the shipper and were particularly important from the point of view of protecting the safety of vessels. However, it was noted that there was no distinction between ordinary and hazardous goods in the text, in contrast to some existing regimes regarding safety and security. In that respect, it was suggested that, notwithstanding that the current text had a different focus, the Working Group should further examine relevant conventions relating to safety of goods such as the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), 1996. It was observed that in the context of draft article 7 it was not useful to make a distinction between dangerous and nondangerous goods since goods that might generally be regarded as non-dangerous might, in concrete circumstances, cause damage to other goods.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

General discussion

104. The Working Group was reminded that it had most recently considered the chapter of the draft convention on shippers' obligations during its thirteenth session (see A/CN.9/552, paras. 118 to 161).

105. It was observed that this chapter on the obligations of the shipper represented a break from previous practice in the field of maritime transport, since other international maritime instruments did not have such extensive provisions relating to shippers' obligations. It was noted that the Hague-Visby Rules had only one provision relating to shippers' liability (art. 4(3)), while the Hamburg Rules had two such rules (arts. 12 and 13). Some transport conventions did have similar provisions, such as the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (the CMNI Convention), but it was observed that the draft convention created a new and, some suggested, onerous liability regime for shippers.

106. Some doubt was expressed as to whether the chapter was in fact needed at all. The view was expressed that the chapter placed a heavy responsibility on shippers, and it was suggested that small shippers, particularly those from developing countries, could find it difficult to meet the requirements of the draft convention. Concern was also expressed with respect to the provisions of the chapter regarding the shipper's burden of proof and the basis of the shipper's liability, which are discussed in further detail in paragraphs 136 to 153 below.

107. There was general support expressed for including the chapter on shippers' obligations in the draft convention as it reflected the current context in which the contract of carriage required the shipper and carrier to cooperate to prevent loss of or damage to the goods or to the vessel. The view was expressed that obligations in the contract of carriage had evolved over the years beyond mere acceptance to carry goods and payment for such carriage. It was said that this cooperation between the shipper and the carrier should be reflected in the draft convention.

108. Although support was expressed for the inclusion of a chapter on shippers' obligations in the draft instrument, it was suggested that the current draft articles contained in the chapter

went too far beyond the scope of the relationship in the contract of carriage. As such, it was felt that aspects of the provisions that went beyond the contractual relationship and related to third parties, such as consignees, should be removed from this chapter. Against this background, it was noted that there was a need to strike an overall balance in the draft convention between obligations of the shipper and the carrier, and the view was expressed that it was not inappropriate for the draft convention to contain obligations on shippers. However, caution was expressed that unnecessarily detailed shippers' obligations could result in creating hurdles for the ratification of the draft convention. Significant support was however expressed for including the chapter in the draft convention in view of the current trends already alluded to in the paragraph above.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Obligations of the shipper—Chapter 8

173. The Working Group was reminded that it had most recently considered the chapter of the draft convention on shippers' obligations at its thirteenth and sixteenth sessions (see A/CN.9/552, paras. 118 to 161, and A/CN.9/591, paras. 104 to 187, respectively). It was also recalled that proposals concerning the obligations of the shipper had been presented for the consideration of the Working Group at its current session (see A/CN.9/WG.III/WP.67 and A/CN.9/WG.III/WP.69).

174. The Working Group agreed with the suggestion that it should consider shippers' obligations on the basis of the proposed revised text contained in the documents presented along the lines of what were thought to be the key outstanding issues:

(a) Whether draft article 29 on the carrier's obligation to assist the shipper by providing information and instructions should be modified to become the shipper's right to request and obtain reasonable information or to become a general provision based on mutual cooperation between the shipper and the carrier, and whether draft article 18 should be retained in light of that decision;

(b) Whether the application of draft article 29 should be broadened to include application to draft article 30, and possibly to draft article 33;

(c) The appropriate articulation of the obligation in draft paragraph 30 (b) on the shipper's compliance with rules, regulations and other requirements of authorities;

(d) The treatment in the draft convention of consequential damages for delay on the part of both the shipper and the carrier; and

(e) Any additional issues regarding the obligations of the shipper that were of concern to the Working Group.

Article 27. Delivery for carriage

1. Unless otherwise agreed in the contract of carriage, the shipper shall deliver the goods ready for carriage. In any event, the shipper shall deliver the goods in such condition that they will withstand the intended carriage, including their loading, handling, stowing, lashing and securing, and unloading, and that they will not cause harm to persons or property.
2. The shipper shall properly and carefully perform any obligation assumed under an agreement made pursuant to article 13, paragraph 2.
3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(a) Paragraph 7.1**

145. Notwithstanding the statement made in paragraph 112 of the note by the Secretariat (A/CN.9/WG.III/WP.21) that the “basic obligation of the shipper is to deliver the goods to the carrier in accordance with the contract of carriage”, it was suggested that, in fact, the basic obligation of the shipper was to pay the freight. Some delegations took the view that payment of freight was a primary obligation of the shipper with other obligations being ancillary to this one. However, an alternative view taken was that, even if the payment of freight was the most important obligation of the shipper, that matter was already dealt with in draft article 9 of the draft instrument. It was suggested that, to reflect more clearly the importance of the shipper’s obligation to ensure that the goods, when delivered to the carrier, were in a condition to withstand carriage, the word “and” should be removed from the statement of the shipper’s obligation in the first sentence of draft article 7.1. Wide support was expressed in favour of that suggestion.

146. Another suggestion was made that, as currently drafted, the obligation of the shipper to deliver the goods in a condition ready for carriage was subject to the provisions of the contract of carriage and that if the intention was that this should be a mandatory obligation then the opening words of draft article 7.1 (“Subject to the provisions of the contract of carriage”) should be deleted. It was observed that, as presently drafted, the provision could allow the parties to agree to change the obligation set out in draft article 7.1. It was stated that any such change should only apply as between the parties to the contract of carriage and that it should not apply to third parties. It was also stated that subjecting the shipper’s obligation to deliver the goods to the provisions of the contract of carriage could open a possibility for abuse by a carrier who might seek to include more onerous clauses. It was also said that there appeared to be an imbalance between the carrier’s obligation of care in respect of the goods as set out in draft article 5.2.1 and the obligations of the shipper in respect of the goods. It was pointed out that the obligation of the shipper in relation to the condition and packaging of goods was set out in far more detail than the corresponding obligation of the carrier and that this could cause confusion and also result in evidentiary problems. It was suggested that greater balance could be achieved by relying on the approach taken in articles 12, 13 and 17 of the Hamburg Rules.

Support was expressed in favour of that suggestion. In opposition to that suggestion, it was said that the obligations of the shipper in draft article 7.1 and those of the carrier in draft article 5 were different types of obligations and were correctly drafted in slightly different levels of detail.

147. It was suggested that the second sentence in draft article 7.1 should be deleted given that the definition of “goods” in draft article 1.11 also included “any equipment and container”. However, the suggestion was objected to on the grounds that the inclusion of the second sentence was necessary to put beyond doubt that the shipper’s obligation extended to the proper stowage of the cargo in containers or trailers, and to address the general concern that security issues should be given more prominent status. Examples were given of situations, particularly in the ferry industry, where the securing of the cargo in trailers on board ferry vessels was particularly important. In view of that concern, it was agreed that the second sentence should be retained. However, the Working Group noted that the relationships between draft articles 7.1 and 1.11 might need to be further reviewed at a later stage to avoid any possible inconsistency.

148. After discussion, the Working Group agreed to delete the word “and” from the second line in draft article 7.1 and place the phrase “ Subject to the provisions of the contract of carriage” in square brackets pending further consultations and discussions on the scope of the obligation of the carrier and the extent to which it was subject to freedom of contract. The suggestion to prepare alternative wording based on articles 12, 13 and 17 of the Hamburg Rules was noted by the Working Group. In addition, it was noted that the provision might need to be reviewed for consistency in terminology in the six official languages.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Chapter 7: Obligations of the shipper

Draft article 25

118. The Working Group considered the text of draft article 25 as contained in document A/CN.9/WG.III/WP.32.

“[Subject to the provisions of the contract of carriage,]”

119. It was widely felt that a reference to the contract of carriage should be made in draft article 25. However, the view was expressed that the current reference was misplaced. Under that view, the obligation of a shipper to deliver the goods ready for carriage could be deviated from by agreement between the shipper and the carrier, where, for example, the carrier agreed to use its equipment to position a shipper’s goods in order to ready them for carriage, but that a shipper should not be able to contract out of its obligation to prepare the goods to withstand the intended carriage. It was suggested that, therefore, the phrase in square brackets should be deleted, and the phrase “unless otherwise agreed, and” should be added after the phrase “the shipper shall deliver the goods ready for carriage”. There were no specific objections to this suggestion, provided that the intention of the language originally in the square brackets continued to be reflected in the draft article. A further proposal in this vein was to delete the language in square brackets, but to insert after the opening phrase of draft article 25, “[t]he shipper shall”, the phrase employed regarding the obligations of the carrier in draft article 10, “in accordance with the terms of the contract of carriage”.

120. The suggestion was made that the phrase in square brackets could be deleted entirely from draft article 25 in order to avoid the possible inference that it would be possible to increase the obligations of the shipper through contractual agreement. However, there was strong support for the retention of the draft article and of the principle expressed in the phrase in square brackets.

Regulations concerning safety and the environment

121. It was suggested that draft article 25 should acknowledge existing regulations in place for the safety of the transport or carriage by including language such as “without prejudice to regulations regarding safety”. A similar proposal was made with respect to the protection of the environment.

Second sentence of draft article 25

122. It was proposed that the second sentence of draft article 25 should be deleted as unnecessarily repetitious of the obligations of the shipper set out in the first sentence. However, concern was expressed that, while it might be desirable to improve the language in the second sentence, the container rule expressed therein was a separate obligation that should be maintained in the draft article. There was support for this position.

Conclusions reached by the Working Group on draft article 25

123. After discussion, the Working Group decided that:

- Draft article 25 should be retained in the draft instrument;
- The principle appearing in square brackets that the obligations of the shipper should be subject to the contract of carriage should be maintained, and the brackets deleted, but the Secretariat should consider redrafting this provision in appropriate language in light of the discussion in the Working Group and the suggested proposals;
- The Secretariat might consider possible improvements to the wording of the second sentence, while retaining its meaning.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 28. Delivery for carriage

General discussion

109. The Working Group was reminded that it had last considered draft article 28 at its thirteenth session (see A/CN.9/552, paras. 118 to 125). The Working Group considered the text of draft article 28 as contained in annexes I and II of document A/CN.9/WG.III/WP.56.

First sentence

110. General support was expressed for the text of the first sentence. In addition, it was proposed and generally agreed that the words “unless otherwise agreed” in the middle of the first sentence be moved to the beginning of the sentence. This was because if left in the middle of the sentence, the reading of the sentence would suggest that readiness of the goods for carriage was not something that the parties could agree on, and there could be cases where the shipper and the carrier agreed to carry goods that were not ready for carriage due to insufficient

time. In response to concerns raised, there was support for the view that moving the words to the beginning of the sentence was not seen to mean that parties could agree to contract out of securely and safely packing or stowing the goods, as those obligations would be subject to other provisions, as for example, with respect to dangerous goods. A contrary view was expressed, however, that the shipper should not be able to contract out of the obligations placed on it by the first sentence of the draft article.

Second sentence

111. There was some support for the view that the second sentence could be deleted altogether as it was superfluous and did not add anything not already covered by the first sentence. Its retention, it was thought, would only add ambiguity and interpretation problems to the draft article as a whole.

112. There was strong support for the view that the second sentence should be retained as having at least practical value in reminding the shipper of the importance of stowing and securing the goods to withstand the voyage. It was noted that the incidence of damage and injury as a result of poorly secured cargo was growing and there was need to emphasize the importance of properly securing goods to withstand the intended carriage.

113. Notwithstanding its decision to retain it, the Working Group heard that the second sentence was too detailed and too repetitive, and a suggestion was made for the second sentence to be simplified and essential aspects of it incorporated into the first sentence. There was support for the alternative view that the second sentence should be replaced by the text set out in footnotes 116 and 435 of A/CN.9/WG.III/WP.56.

114. A drafting suggestion was made that the shipper should have freedom to contract out of the obligation in the second sentence, and that the second sentence should also begin with the words “unless otherwise agreed in the contract of carriage”. Contrary views were expressed, including the suggestion that the second sentence should begin with the words “without prejudice to the foregoing” in order to clearly indicate its relationship with the first sentence.

115. Other drafting suggestions made were that the second sentence should become a separate paragraph because when translated into some other languages, the phrase “unless otherwise agreed in the contract of carriage” would relate to both the first and the second sentences. It was observed that the words “container” and “trailer” used in the second sentence, could be harmonized with text used elsewhere in the draft convention, such as in draft article 64(3), which referred to “articles of transport”.

Drafting suggestions for draft article as a whole

116. A number of general drafting suggestions were made with respect to the text of the draft article as a whole. There was support for the suggestion to revise the title of the chapter to better reflect its scope by indicating that it contained “Obligations of the shipper to the carrier”. It was also suggested that the text of the draft article itself should make clear to whom the shipper was liable, particularly in light of the possible breadth of the provisions in chapter 14 on rights of suit under the draft convention.

117. There was general support for the observation that the words “intended carriage” in both sentences was understood to cover all legs of the carriage. To clarify this understanding a suggestion was made that text such as “all transport legs of” be inserted before the words “the intended carriage” in both sentences.

118. Additional suggestions were that simpler language, such as “loading” and “unloading” could be used in both sentences instead of the listed obligations involved in stowing and securing the goods. It was also felt that listing these methods might be misleading if one method was left out, and as an alternative, it was suggested that the words “ready for carriage” could be used to replace the list. The list was also said to create redundancy and overlap of some terms when translated to other languages.

Use of the word “injury”

119. The view was expressed that the use of the word “injury” in the draft article was inappropriate since it could be seen to extend the scope of the provision outside of the contract of carriage between the shipper and carrier to third parties. It was felt that the word “injury” should be replaced with the word “loss”, in order to convey the intention that where, for example, goods improperly packed by a shipper caused injury to an employee of a carrier, the carrier would be entitled to seek compensation from the shipper for the loss suffered in compensating the employee. The view was also expressed that the word “loss” should replace the entire phrase “injury or damage” in the draft article. However another view was that while the provision should not establish any independent liability of the shipper for injury to a third party, but that the use of the term should be readdressed after the Working Group had considered draft article 31 on the basis of the shipper’s liability. Another drafting suggestion to limit the application of this provision to the parties to the contract of carriage was to add the words “for which the carrier is liable” at the end of the phrase “injury or damage”.

Conclusions reached by the Working Group regarding draft article 28

120. After discussion, the Working Group decided that:

- The title of the chapter should make reference to the shipper’s obligations to the carrier;
- Moving the phrase “unless otherwise agreed” should be one of the modifications to the text of the first sentence considered by the Secretariat in addition to other modifications suggested in the course of discussion;
- The second sentence should be retained, but its text should be simplified by the Secretariat, taking into account the text in footnotes 116 and 435 of A/CN.9/WG.III/WP.56, as well as the comments and suggestions made during the course of discussion in the Working Group; and
- The use of the term “injury” should be clarified, possibly placed in square brackets as alternative text, and reconsidered by the Secretariat in a future draft in light of the Working Group’s consideration of draft article 31.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 27. Delivery for carriage

207. The Working Group was reminded that its most recent consideration of draft article 27 on delivery for carriage was at its sixteenth session (see A/CN.9/591, paras. 109 to 120). The Working Group proceeded to consider draft article 27 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1

208. The Working Group was in agreement that draft paragraph 1 should be approved as drafted.

Paragraph 2

209. Although there was some support for the deletion of the provision, there was general agreement in the Working Group that draft paragraph 2 should be retained in the text of the draft convention and the square brackets around it removed.

210. It was indicated that reference was made in draft article 14(2) to parties other than the shipper, such as the person referred to in article 34, the controlling party, and the consignee, and it was suggested that, in addition to the shipper's obligation, there should also be an obligation in paragraph 2 on those parties to properly and carefully carry out such tasks as they are performed. In any event, it was noted that all of the tasks set out in paragraph 2 were unlikely to be performed by the shipper, such as discharge, and it was suggested that there should be alignment between the wording of draft article 14(2) and paragraph 2. One remedy suggested was that a phrase be added along the lines of "tasks that the shipper performs or causes to be performed". It was further indicated that draft article 34(1) on the liability of the shipper for other persons was also unclear, which added to the problem. In that regard, it was suggested that if draft article 34(1) included the shipper's liability for the consignee and the controlling party, paragraph 2 could remain the same, but that if draft article 34(1) did not include the consignee and the controlling party, those parties should be included in draft paragraph 2. There was support both for that view and for the view that the draft provision should remain as drafted and should be limited to the shipper's obligations, since draft article 14(2) referred to an agreement between the shipper and the carrier for the performance of those tasks by a person other than the carrier, and it was proper that any liability that might arise in the performance of those tasks should lie with the shipper.

211. The view was expressed that the wording of draft paragraph 2 was imprecise in that the entire list of tasks set out therein did not need to be performed properly and carefully by the shipper, but instead only those tasks agreed to pursuant to draft article 14(2). It was suggested that the list of tasks should be qualified through the addition of the phrase "as agreed" or "in accordance with the agreement". There was support for that suggestion, although other views were expressed that the use of the word "or" made the intention of the draft provision sufficiently clear without any additional text.

Conclusions reached by the Working Group regarding draft paragraph 2

212. After discussion, the Working Group decided that:

- The text of draft paragraph 2 should be retained in the draft convention as drafted and the square brackets removed;
- Regard should be had to whether the text of draft paragraph 2 should be aligned with that of draft articles 14(2) and 34(1) particularly in terms of the inclusion of the consignee and the controlling party; and
- The text of draft paragraph 2 could be clarified through the addition of a phrase such as "as agreed".

Paragraph 3

213. The Working Group was in agreement that draft paragraph 3 should be approved as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 28. Delivery for carriage**

88. As noted in footnotes 62 and 101 of A/CN.9/WG.III/WP.101, the obligation to properly and carefully unload the goods had been deleted from paragraph 2 of draft article 28 and moved to paragraph 2 of draft article 45 in the chapter on delivery of the goods, since it was thought that the obligation to unload the goods under an agreement pursuant to draft article 14(2) would usually be performed by the consignee and was not an obligation of the shipper. However, a concern was raised that there might be a gap in the draft convention with regard to the obligation to unload the goods, since under draft article 45, the consignee only had obligations pursuant to the draft convention when it had exercised its rights under the contract of carriage. It was thought that if the obligation to unload the goods was no longer one of the shipper's obligations, and if the consignee had not exercised any of its rights under the contract of carriage, no party would be required to perform this obligation. Therefore, two proposals were put forward: (a) to re-insert "unload" into paragraph 2 of draft article 28; or (b) to replace "load, handle or stow the goods" with "perform its obligations under that agreement".

89. A contrary view was expressed that there was in fact no gap with regard to the obligation to unload the goods. Although the consignee might have this obligation as a result of an agreement pursuant to draft article 14(2), it was traditionally not the obligation of the shipper to discharge the goods. It was further pointed out that the only situation where the shipper would be under an obligation to discharge the goods would be in an FOB sale, in which case the shipper would also be the consignee. Therefore, the obligation to unload the goods should not be dealt with in draft article 28 in any event.

90. However there was recognition that the discrepancy between the obligations listed in draft article 14(2) and those listed in draft article 28(2) might cause confusion, and the Working Group agreed with the proposal to replace "load, handle or stow the goods" with a phrase along the lines of "perform its obligations under that agreement" in order to avoid such concerns.

91. In addition, a preference was expressed in the Working Group for the clarity that would be lent draft article 28(2) by deleting the phrase "the parties", and by re-inserting the terms "the carrier and the shipper". Further, it was proposed that, in the interests of consistency, such an amendment would require a similar amendment to the provision in draft article 14(2). The Working Group supported those proposals, and agreed that further discussion regarding what would trigger the consignee's obligation to unload the goods could be considered under draft article 45.

92. Further, the Working Group was reminded that paragraph 3 of draft article 28, contained the phrase "container or trailer", which would require amendment depending on the Working Group's decision whether to include "road and rail cargo vehicles" in the definition of "container" in draft article 1(26), or whether to make the necessary adjustments to the substantive provisions in the draft convention (see above, paras. 73 to 80).

93. Subject to the implementation of the above changes, the Working Group approved the substance of draft article 28 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 28. Delivery for carriage

99. The Commission approved the substance of draft article 28 and referred it to the drafting group

Article 28. Cooperation of the shipper and the carrier in providing information and instructions

The carrier and the shipper shall respond to requests from each other to provide information and instructions required for the proper handling and carriage of the goods if the information is in the requested party's possession or the instructions are within the requested party's reasonable ability to provide and they are not otherwise reasonably available to the requesting party.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(b) Paragraph 7.2

149. The view was expressed that draft article 7.2 was inappropriate, since it introduced a subjective element into the mutual duties and obligations between the shipper and the carrier, and since it constituted an additional burden upon the carrier, which might lead to unnecessary litigation. In addition, it was stated that draft article 7, which dealt with the obligations of the shipper, should not be used to establish an obligation of the carrier. It was thus suggested that the draft provision should be deleted and that the issue of information and instructions to be provided by the carrier to the shipper should be dealt with on a case-by-case basis relying on existing trade practices.

150. However, the widely prevailing view was that draft article 7.2 should be maintained since it provided an appropriate balance between the duties of the shipper (as dealt with in draft chapter 7 and elsewhere) and the duties of the carrier to provide the shipper with the necessary information enabling the shipper to fulfil its duties. It was observed that, even if the duty such as the one in draft article 7.2 was not stated expressly, it existed as a principle anyway, as it was essentially dictated by the mutual duty of the contract parties to cooperate in good faith. In that connection it was stated that the draft instrument should contain a provision (included in other UNCITRAL texts such article 7 of the United Nations Convention on Contracts for the International Sale of Goods) to the effect that in the interpretation of the instrument regard was to be had to the observance of good faith. Nevertheless, it was widely considered that in this particular context it was beneficial to give expression to the general duty of good faith by a provision along the lines of draft article 7.2.

151. As to the drafting of the provision, it was said that it was necessary to make sure that it was clear in all language versions that the qualifying concept “reasonably necessary” referred to both “information” and “instructions”. Some doubts were expressed as to whether the draft provision, which focused on the duties of the carrier, was properly placed in the chapter covering the obligations of the shipper. However, it was considered that, in view of the close link between draft article 7.2 and the other provisions of draft chapter 7, the placing of the draft provision was not necessarily inappropriate. It was suggested that in view of the link between the carrier’s duty under draft article 7.2 and the shipper’s duties under draft chapter 7, it must follow that the shipper was not liable for non-fulfilment of its duties if the carrier did not provide properly requested information and instructions, and that it might be desirable to clarify that understanding. It was observed that article 7 of the Budapest Convention required a written form for information to be given in a similar context and that the question of form in draft article 7.2 might also be considered.

152. Subject to the expressed observations, the Working Group decided to retain the draft provision with a view to considering its details at a future session.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 26

124. The Working Group considered the text of draft article 26 as contained in document A/CN.9/WG.III/WP.32.

General discussion

125. Suggestions were made for the deletion of draft article 26, with or without deletion of draft article 25. Another suggestion was that draft article 26 should be merged with draft article 28. The prevailing view was that the substance of draft article 26 should be retained to balance the obligations set forth in draft article 25 in respect of the shipper.

Placement

126. For reasons already stated at the ninth session of the Working Group, doubts were expressed regarding the placement of draft article 26 in a chapter dealing with the obligations of the shipper (see A/CN.9/510, paras. 149-151). The prevailing view was that draft article 26 was appropriately located as a logical complement to draft article 25. To remedy the apparent inconsistency created by the presence of a provision dealing with an obligation of the carrier in a chapter dealing with the obligations of the shipper, it was generally agreed that titles should be given to the draft articles in chapter 7. A suggestion was made that the title of chapter 7 might also be revised along the lines of “Obligations of the shipper and ancillary matters”.

“on its request”

127. While the view was expressed that the obligations set forth in draft article 26 were formulated too subjectively (for example, by referring to instructions “that are reasonably necessary or of importance to the shipper”), the discussion focused on whether the carrier should provide information “on request” by the shipper.

128. Several delegations expressed support for deletion of the words “on its request”. It was explained that the carrier should be expected to take the initiative of providing the shipper with

“reasonably necessary” information in view of the nature of the cargo. In response, it was pointed out that the nature of the cargo might not always be known to the carrier and that, in view of the onerous liability created by draft article 29 for failure to comply with draft article 26, the obligations of the carrier under the latter provision should only be triggered by a specific request of the shipper. As a possible alternative for the words “at its request”, it was suggested that wording inspired from draft article 27 might be introduced in draft article 26 along the lines of “unless the carrier may reasonably assume that such information is already known to the shipper”.

Conclusions reached by the Working Group on draft article 26

129. After discussion, the Working Group decided that:

- The Secretariat should make proposals for titles of the draft articles in chapter 7;
- The substance of draft article 26 should be retained in chapter 7, including the words “at its request” for continuation of the discussion at a future session;
- Further consideration might need to be given to the above-suggested alternative wording.

[16th Session of WG III (A/CN.9/591 and Corr.1) ; referring to A/CN.9/WG.III/WP.56]

Draft article 29. Carrier’s obligation to provide information and instructions

General discussion

121. The Working Group was reminded that it had last considered draft article 29 at its thirteenth session (see A/CN.9/552, paras. 124 to 129).

122. It was observed that this provision reflected the duty of cooperation between the parties with respect to the exchange of information necessary for the performance of the contract of carriage. Reference was also made in this respect to the principle of good faith in contractual relations. Differing views were expressed regarding whether draft article 29 was intended to define the carrier’s duty to assist the shipper with its draft article 30 obligation to provide information, instructions and documents to the carrier, or with its draft article 28 obligation to deliver the goods ready for carriage. There was support for the view that the purpose of draft article 29 was not to establish independent liability of the carrier for its failure to provide the shipper with necessary information, but rather to deny the carrier the ability to rely on its failure in defending a cargo claim.

123. There was support for the view that draft article 29 should be deleted. It was suggested that the obligations of the carrier contained therein were already covered, at least implicitly, in draft chapter 5 on the obligations of the carrier. The view was also expressed that draft article 29 was too broad and too subjective to be of any additional benefit to the existing implied obligation of the carrier. There was support for the suggestion that draft article 29 should be substituted by a general provision on the duty of the parties to cooperate in the exchange of information in furtherance of the performance of the contract of carriage. In addition to deleting draft article 29, it was suggested that draft article 18 setting out the carrier’s liability for loss or damage resulting from its breach of draft article 29 should also be deleted.

124. However, the contrary view was also held that draft article 29 should be retained. There was support for the view that this provision could be particularly important in multimodal transport if the carrier was not required to choose the modes of transport prior to performance of the contract of carriage, yet where those modes could affect the shipper's fulfilment of its draft article 28 obligations to deliver the goods ready for carriage. In response to this, it was noted that the carrier might not actually know in advance which modes of transport it would use. In additional support of retaining draft article 29, it was suggested that it was useful to make explicit the obligations of the carrier and that the provision could also be seen to balance the parties' obligations with respect to the provision of information. In this regard, a view was expressed that the words "on its request" should be deleted from draft article 29, since there was no similar qualification to the shipper's obligation to provide information in draft article 30.

125. The suggestion was made that the Working Group's decision on draft article 29 should be deferred until after the discussion of the basis of the shipper's liability in draft article 31 to fully appreciate the interplay of the two provisions.

126. By way of specific drafting suggestions, the view was expressed that the bracketed phrase "and in a timely manner" and the last bracketed sentence of draft article 29 should be deleted, since the obligation to provide accurate and complete information and instructions in a timely manner was said to be implicit in the general obligation under draft article 29. Further, it was suggested that the retention of the last bracketed sentence of draft article 29 requiring accuracy and completeness would require the adoption of the same language in similar provisions requiring the provision of information, such as, for example, draft article 59. The contrary view was expressed that the phrase "in a timely manner" should be retained and the brackets around it deleted, since, it was suggested, the obligation of timeliness was separate and not implicit in the general obligation to provide information.

Conclusions reached by the Working Group regarding draft article 29:

127. After discussion, the Working Group decided that:

- Draft article 29 should be retained, but placed in square brackets pending the Working Group's discussion on draft article 31;
- In preparing a revised version of draft article 29, consideration should be given to deleting the existing text in favour of a more general provision focussing on the cooperation of the shipper and carrier in the provision of information; and
- Revisions made to the text of draft article 29 should take into account draft article 18.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 29. Carrier's obligation to provide information and instructions

175. The Working Group heard that there were three variants of draft article 29 offered for its consideration in paragraph 14 of A/CN.9/WG.III/WP.67, Variants A,B and C, and an additional text of draft article 29 set out in paragraph 3 of A/CN.9/WG.III/WP.69, which was identical to Variant C, but for the title of the provision and for the use of the word "cargo" rather than "goods".

Variant A, B or C of draft article 29

176. While the view was offered that Variant A did not appear to be substantively different from Variant B, there was little support in the Working Group for Variant A, which was text as it appeared in A/CN.9/WG.III/WP.56.

177. Variant B was the preferred text of a number of delegations for various reasons. Although it was framed as a right of the shipper, Variant B was said to adequately reflect the idea favoured by the Working Group at its previous session (see A/CN.9/591, paras. 121 to 127) that the provision should focus on the mutual cooperation of the shipper and the carrier in the provision of information and the successful completion of the contract of carriage. It was thought that this was particularly evident given the references in draft article 29 to draft articles 28 and 30 which contained the primary obligations of the shipper, and thus indicated that the carrier must provide necessary assistance to the shipper in order to enable it to fulfil those obligations. It was suggested that the phrase “within the carrier’s knowledge and as may be specified by the shipper” should be inserted in Variant B after the word “information”. There was some support for the view that the requirement that the carrier provide the information sought in Variant B should be limited to some extent, but the view was expressed that the insertion of the suggested text could render it too easy for the carrier to avoid assisting the shipper by providing the necessary information.

178. There was also support expressed for Variant C of draft article 29. The view was expressed that Variant C was a more general provision that was a better reflection of the view favoured by the Working Group at its last session as discussed in the paragraph above. Some concern was expressed regarding the notion of the “good faith” obligation in Variant C which, while common in some legal systems, might be regarded as merely hortatory in others.

179. However, the view was also expressed that Variant B and Variant C did not differ substantially, and some held the view that it was difficult to choose one over the other. It was generally agreed that Variant C was broader and more general than Variant B, but the concern was expressed that Variant C might be such a general and basic responsibility that it did not sufficiently specify any legal right or obligation. It was thought that Variant B accomplished that task better, and that it presented a middle position between the articulation of firm obligations and the general responsibility of both parties to cooperate. In addition, some views were expressed that if the Working Group did not accept a specific limitation on the information that a carrier would be required to obtain pursuant to Variant B, or if the reference to draft article 30 in Variant B were deleted (see paras. 182 to 184 and 186 below), that Variant C would be the better text for draft article 29.

180. It was suggested that given the importance of the mutual obligation for the shipper and the carrier to cooperate in supplying information for the completion of the contract of carriage, it might be better to give that obligation more prominence in the draft chapter. It was thought that it might be possible to accomplish this by means of incorporating the content of draft article 29 into draft paragraph 28(1). Another drafting suggestion was made to broaden the current reference in Variant C from “information and instructions required for the safe handling and transportation of goods” which might be interpreted too restrictively as referring only to draft paragraphs 30(a) and (b) (see paras. 183 and 184 below).

181. An additional view was expressed that draft article 31 was the basis of the shipper’s liability, and that as long as that key provision applied the standard of fault-based liability on

the shipper for breach of its obligations under draft articles 28 and 30, there was no need for draft article 29 and it should be deleted. While outright deletion of draft article 29 did not receive support, there was strong support for the view that the discussion in the Working Group regarding draft articles 29 and 30 was dependent on draft article 31 containing an appropriate fault-based liability standard with respect to the obligations of the shipper. In addition, it was observed that draft paragraph 17(3)(h) was of relevance to the discussion, since it relieved the carrier of all or part of its liability when the carrier could prove that the loss of, or damage to, the goods occurred as a result of the acts or omissions of the shipper.

Reference in draft article 29 to draft article 30

182. It was proposed that the application of draft article 29 should be broadened to include reference to draft article 30, and possibly to draft paragraph 33(2). The view was expressed it might be difficult to limit the actual text of draft article 30 through specific drafting, but that subjecting the provision to the mutual obligations of draft article 29 would be an appropriate technique through which to limit the breadth of the obligations of the shipper in draft article 30.

183. Some doubts were expressed regarding the appropriateness of inserting a reference to draft article 30 into draft article 29. The view was expressed that reference to draft article 28 in draft article 29 was appropriate, since draft article 29 was intended to provide the shipper with any assistance needed in terms of information from the carrier so that the shipper could fulfil its obligation to properly ready the goods for carriage. It was thought that the shipper's obligations set out in draft article 30 concerned information that was largely, if not exclusively, in the domain of the shipper, and thus the carrier could not assist in obtaining the information. In particular, it was noted that paragraphs (a) and (c) of draft article 30 referred to the handling and the characteristics of the goods, and the view was expressed that these were matters with which the carrier could grant little assistance. There was some support for that view.

184. However, some concerns were raised with respect to specific paragraphs in draft article 30. Some support was expressed for the inclusion of paragraph (a) in draft article 29, but there was stronger support for the inclusion of a reference to draft paragraph 30(b) only. It was thought that the paragraph (b) reference to "the intended carriage" clearly required that some information be provided by the carrier to the shipper in order to enable the shipper to fulfil its duties under the paragraph. A concern was raised that inserting a reference to draft paragraph 30(b) into draft article 29 would result in excessively regulating the requirement set out in paragraph (b), such that it could result in an endless circle of the shipper and the carrier blaming each other for failures to provide information. It was suggested that this example, in particular, indicated that the more general version of draft article 29 set out in Variant C above (see above, paras. 179 and 180) was preferable to Variant B in order to avoid such difficulties arising from excessive detail.

Retention of draft article 18

185. The view was expressed that, to some extent, the Working Group's decision regarding whether to choose Variant A, B or C of draft article 29 was related to its decision regarding whether or not to retain draft article 18 in the text of the draft convention. However, it was recalled that the Working Group had decided at its last session to delete draft article 18, pending the receipt of instructions by a few delegations (see A/CN.9/591, paras. 184 to 187). Although it was suggested that if the Working Group decided to retain the general provision in Variant C of draft article 29, it might want to consider whether it should retain the more

specific articulation of the carrier's liability for failure to provide information and instructions set out in draft article 18, the Working Group decided to delete draft article 18 from the draft convention.

Conclusions reached by the Working Group regarding draft articles 29 and 18:

186. After discussion, the Working Group decided that:

- The Secretariat should be requested to revise the text of draft article 29 based on the approach taken in Variant C in paragraph 14 of A/CN.9/WG.III/WP.67, with certain adjustments to the drafting to take into consideration the concerns expressed in the discussion above; and
- Draft article 18 should be deleted from the text of the draft convention.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 28. Obligations of the shipper and the carrier to provide information and instructions

214. The Working Group was reminded that its most recent consideration of the previous text on which draft article 28 on the obligations of the shipper and the carrier to provide information and instructions was based was at its seventeenth session (see A/CN.9/594, paras. 175 to 186). The Working Group proceeded to consider draft article 28 as contained in A/CN.9/WG.III/WP.81.

215. It was indicated that the title of the draft article, which in substance concerned mutual cooperation between the carrier and the shipper, was rather close to that of draft article 29, which concerned shipper's obligations, and it was suggested that a different title for draft article 28 might be preferable so as to avoid confusion and to indicate its status as something less than an obligation of the shipper. The Working Group approved the content of draft article 28.

Conclusions reached by the Working Group regarding draft article 28

216. After discussion, the Working Group decided that:

- The text of draft article 28 was approved, with any necessary adjustments to the title.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 29. Cooperation of the shipper and the carrier in providing information and instructions

94. It was noted that the reference to "article 31" in the opening phrase of draft article 29 appeared to be inaccurate, and that the reference should be amended to "article 30". Following further discussion, it was suggested that the entire opening phrase "Without prejudice to the shipper's obligations in article 31," was unnecessary and could be deleted. There was strong support in the Working Group for that suggestion.

95. Subject to the deletion of the opening phrase, the Working Group approved the substance of draft article 29 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 29. Cooperation of the shipper and the carrier in providing information and instructions

100. The Commission approved the substance of draft article 29 and referred it to the drafting group.

Article 29. Shipper's obligation to provide information, instructions and documents

1. The shipper shall provide to the carrier in a timely manner such information, instructions and documents relating to the goods that are not otherwise reasonably available to the carrier, and that are reasonably necessary:
 - (a) For the proper handling and carriage of the goods, including precautions to be taken by the carrier or a performing party; and
 - (b) For the carrier to comply with law, regulations or other requirements of public authorities in connection with the intended carriage, provided that the carrier notifies the shipper in a timely manner of the information, instructions and documents it requires.
2. Nothing in this article affects any specific obligation to provide certain information, instructions and documents related to the goods pursuant to law, regulations or other requirements of public authorities in connection with the intended carriage.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(c) Paragraph 7.3

153. Wide support was expressed for the formulation of draft article 7.3, which set out the requirement that the shipper should provide to the carrier certain information, instructions and documents. The view was expressed that the reference in paragraph (c) to “the name of the party identified as the shipper in the contract particulars” could create problems in practice when such information was contained in, for example, a bill of lading, with the name of the documentary shipper being different from the name of the contractual shipper. It was suggested that the words “contract particulars” should be replaced by the words “transport document”. In response, it was observed that the definition of “contract particulars” already referred to any information that appeared in “a transport document”. On that basis, the text of draft article 7.3 was approved as a sound basis for continuation of the discussion at a later stage.

(d) Paragraph 7.4

154. It was stated that draft article 7.4, which involved a mutual obligation on the shipper and carrier to provide information, instructions and documents in a timely manner and that these be accurate and complete, was an appropriate starting point for further discussions. The Working Group agreed that the text should be retained for further consideration.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 27

130. The Working Group considered the text of draft article 27 as contained in document A/CN.9/WG.III/WP.32.

General discussion

131. Support was expressed for the deletion of subparagraph (c), which was said to have little in common with subparagraphs (a) and (b) or with the obligations of the shipper. In support of deletion, it was explained that the issues addressed in subparagraph (c) were sufficiently dealt with in chapters 8 (documentation) and 10 (designation of the consignee). However, the Working Group was urged to exercise utmost caution in deleting a provision that was inspired from the Hague Rules and might not be sufficiently covered in chapters 8 and 10. It was generally agreed that the possible relationship of subparagraph (c) with chapters 8 and 10 might require further consideration at a future session.

132. Support was also expressed for the view that the closing words of subparagraph (c) (“unless the shipper may reasonably assume that such information is already known to the carrier”) should apply to subparagraphs (a) and (b). In respect of subparagraph (b), however, the prevailing view was that the obligation to provide accurate instructions and the documents necessary for compliance with regulations and other requirements of public authorities was distinct from the obligation to provide information under subparagraph (a), should avoid any ambiguity in view of the public policy considerations on which it was based, and, for those reasons, should not depend upon an assessment of what might or might not be known to the carrier.

Conclusions reached by the Working Group on draft article 27

133. After discussion, the Working Group decided that:

- The general structure of draft article 27 was acceptable;
- The current text of the draft article, including its three subparagraphs, should be maintained for continuation of the discussion at a future session;
- The words “unless the shipper may reasonably assume that such information is already known to the carrier” should be added at the end of subparagraph (a).

Draft article 28.

134. The Working Group considered the text of draft article 28 as contained in document A/CN.9/WG.III/WP.32.

Deletion of draft article 28

135. With a view to simplifying the text of the draft instrument, it was suggested that draft article 28 should be deleted and its operative intent (that the information, instructions and documents provided by the shipper and the carrier to each other should be accurate and complete, and given in a timely manner) should be reflected directly in draft articles 26 and 27. While the view was expressed that the ideas of accuracy and completeness of the information were implicit in the obligation to provide information established by draft articles 26 and 27, it was widely felt that, for practical reasons and in view of the frequency of misrepresentation in transport information and documentation, it might be necessary to include express reference to “accuracy and completeness” in both draft articles 26 and 27.

136. Broad support was expressed in favour of the simpler draft that might result from the deletion of draft article 28. Doubts were expressed, however, regarding the substance of the obligation to provide “accurate and complete” information and instructions. It was explained that a possible conflict might exist, for example, between the subjective notion of instructions being “reasonably necessary or of importance to” the shipper or the carrier and the more objective notion of such instructions being “complete”. It was generally agreed that the issue might need to be further discussed after the nature of the liabilities of the shipper and the carrier in draft articles 29 and 30 had been clarified.

Conclusions reached by the Working Group on draft article 28

137. After discussion, the Working Group decided that:

- Draft article 28 would be deleted and replaced by a mention in draft article 26 that the shipper should provide “in a timely manner” the information and instructions required and that “the information and instructions given must be accurate and complete”; similarly, draft article 27 should be amended to read that the shipper should provide to the carrier “in a timely manner, such accurate and complete information, instructions and documents ...”;
- The above amendments to draft articles 26 and 27 should be placed between square brackets for continuation of the discussion after liabilities of the shipper and the carrier under draft articles 29 and 30 had been considered.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Draft article 30. Shipper’s obligation to provide information, instructions and documents***General discussion*

128. The Working Group was reminded that it had last considered draft article 30 at its thirteenth session (see A/CN.9/552, paras. 130 to 137).

129. It was observed that this provision was thought to be especially important in light of the contemporary transport practice, in which a carrier seldom saw the goods it was transporting, even when they are non-containerized goods. In this context, the flow of reliable information between the shipper and the carrier was said to be of utmost importance for the successful

completion of a contract of carriage, particularly with respect to dangerous goods. It was said that while there were some drafting problems in paragraph (b) that required attention, the Working Group should be encouraged in the course of its deliberations to bear in mind the importance of the shippers' obligations set out in this provision. As a preliminary observation, it was suggested that the phrase in the chapeau "[in a timely manner, such accurate and complete]" should be dealt with in the same fashion as similar text found in draft article 29.

Objective and subjective tests

130. It was indicated that the words "reasonably necessary for" in the chapeau of draft article 30 introduced an objective test on the necessity of the information to be provided by the shipper, while the words "may reasonably assume" in paragraphs (a) and (c) of draft article 30 represented a subjective test of the shipper's assumption regarding the carrier's knowledge. It was suggested that the presence of both tests could be a source of some confusion. In addition, it was observed that if paragraphs (a) or (c) were ultimately subject to a fault-based liability scheme pursuant to draft article 31, there would be no need of the phrase "reasonably assume", and it could be deleted.

Paragraph (b)

131. The view was expressed that the current text of draft paragraph 30(b) was extremely broad and could lead to problems in its application, particularly since it could subject the shipper to strict liability pursuant to article 31. One example of the difficulty posed by this article was, for instance with regard to responsibility for the different customs requirements in the event that the mode of transport changed en route during multimodal transport.

132. In response, it was indicated that the broad language of draft paragraph 30(b) reflected the difficulties in providing a complete and detailed list of all the documents necessary in connection with the carriage. It was suggested that the adoption of a fault-based liability regime for this obligation could address a number of concerns relating to this provision, and that a strict liability regime could be limited to the violation of mandatory regulations.

Delay

133. It was observed that the inclusion in draft article 31 of a bracketed reference to delay as a basis of liability of the shipper compounded the difficulties noted with respect to draft paragraph (b). For example, if the shipper of a single container on a large container ship failed to provide a necessary document for customs authorities under paragraph (b), and was therefore responsible for the delay not just of the carrier, but with respect to every other shipper on the vessel, that shipper would be exposed to unforeseeable and potentially enormous losses for that one oversight. Further compounding the problem was said to be the fact that the draft convention currently contained no limitation on the shipper's liability. This problem was discussed in greater detail with respect to draft article 31 (see below, para. 147).

Paragraph (c)

134. It was suggested that draft paragraph 30(c) should include a reference to draft subparagraph 38(1)(a), and thereby include the accuracy of the description of the goods in the list of obligations for which the shipper was strictly liable pursuant to draft article 31. However, the Working Group was reminded that article 3(5) of the Hague-Visby Rules referred only to

accuracy of the description of the goods at the time of the shipment, but that draft paragraph (c) was much broader in its scope and would apply for the duration of the voyage. It was cautioned that, like draft paragraph (b), when the breadth of this provision was coupled with the potential strict liability provision in draft article 31, this provision could bring potentially severe consequences for the shipper. It was noted that, if variant B of draft paragraph 31(2) were adopted, the liability of the shipper would be limited to the information on the goods actually provided by the shipper and that this would relieve the shipper from some of the harsher aspects of the strict liability regime under variant A.

Conclusions reached by the Working Group regarding draft article 30:

135. After discussion, the Working Group decided that:

- The phrase in the chapeau “[in a timely manner, such accurate and complete]” should be considered in the same fashion as similar text in draft article 29;
- Paragraph (b) should be placed in square brackets, pending the Working Group’s consideration of draft article 31;
- Drafting improvements made to this draft article should bear in mind A/CN.9/WG.III/WP.55, as well as international instruments such as the CMNI Convention and suggestions made by delegations;
- The discussion of the Working Group with respect to the basis of the shipper’s liability in draft article 31 should be taken into consideration in future drafts of draft article 30; and
- The reference to draft article 38(1)(b) and (c) in draft paragraph 30(c) should be extended to draft article 38(1)(a).

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 30. Shipper’s obligations to provide information, instructions and documents

187. The Working Group was reminded that three alternative texts of draft paragraph 30(b) had been submitted for its consideration: Variants A and B in paragraph 20 of A/CN.9/WG.III/WP.67, and the version presented in paragraph 6 of A/CN.9/WG.III/WP.69. It was explained that Variant A was the text of draft paragraph (b) as it appeared in A/CN.9/WG.III/WP.56, and that the text in paragraph 6 of A/CN.9/WG.III/WP.69 differed slightly from that of Variant B in both the chapeau for draft article 30 and the text of paragraph (b) itself.

Chapeau of draft article 30

188. It was explained that the text of the chapeau of draft article 30 contained in A/CN.9/WG.III/WP.69, paragraph 6, included after the word “documents” the phrase “related to the goods”. There was general approval for the insertion of that phrase into the chapeau of draft article 30 as rendering the obligations it contained more specific and more appropriate in terms of scope.

Text of draft paragraph 30(b)

189. Some preference was expressed for Variant A of draft paragraph 30(b) since it provided a simple drafting approach for a provision that was said to become very complex when any further specificity was sought. However, concerns were expressed that Variant A was too broad and too unclear, and that more detail was needed in order to appropriately circumscribe the shipper's information obligations.

190. It was explained that while a fault-based liability on the part of the shipper as set out in draft article 31 would assist in narrowing the breadth of the shipper's obligations in draft article 30, it was thought that further refinements should also be made to draft paragraph 30(b). It was explained that the text of draft paragraph 30(b) as contained in paragraph 6 of A/CN.9/WG.III/WP.69 intended to specify that the information sought from the shipper in compliance with rules and regulations by government authorities would likely be sought under two alternative scenarios: either the shipper would be required by applicable law to provide it, or the carrier would advise the shipper in a timely fashion of the information required. Further it was thought that the shipper would not be required to provide the information if it was already reasonably available to the carrier.

191. While general support was expressed for the more specific text contained in draft paragraph 30(b) as set out in paragraph 6 of A/CN.9/WG.III/WP.69, some concerns were raised with respect to its structure. It was suggested that if the reference to "applicable law" in draft subparagraph (i) was intended to refer to mandatory rules of public law, the view was expressed that this should not be listed as an alternative to subparagraph (ii), since public law rules would apply regardless of whether or not they were mentioned in the draft convention. Further, questions were raised regarding what types of scenarios were envisioned pursuant to draft subparagraph (i). In response, it was clarified that this was intended to satisfy, for example, certain security requirements such as those requiring the carrier to provide the manifest information, which would have to be obtained from the shipper, to the customs authorities of a given country twenty-four hours in advance of loading the vessel for importation into that country.

192. Several drafting issues were also raised with respect to the text of draft paragraph 30(b) as set out in paragraph 6 of A/CN.9/WG.III/WP.69. Concern was raised regarding the use of the phrase "government authorities" as being too narrow, and it was suggested that a different phrase such as "local authorities", "public authorities" or merely "authorities" would be more appropriate. Further, some concerns were raised about the specification of "rules and regulations", and it was thought that that text might need to be revisited. In addition, several concerns were raised about the use of the phrase "applicable law", which could be said to refer to the law of the contract of carriage, or to rules of public law, and it was suggested that greater clarity could be attained, perhaps by deleting the phrase altogether. Further, the question was raised whether the text, "the shipper is required by applicable law" was appropriate, since any law was unlikely to specify who was required to provide the information in issue. In addition, it was suggested that "timely makes known to" could be replaced by "timely notifies", and that reference could also be made to the "intended voyage", in keeping with the text in Variant A.

193. In addition, in light of the above discussion in the Working Group, the importance of retaining a fault-based liability regime for the shipper pursuant to draft article 31 was reiterated by several delegations.

Conclusions reached by the Working Group regarding draft paragraph 30(b):

194. After discussion, the Working Group decided that:

- The text of draft paragraph 30(b) should be based upon that contained in A/CN.9/WG.III/WP.69, paragraph 6; and
- The Secretariat should be requested to make the necessary modifications to the text in light of the concerns raised in the paragraphs above.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 29. Shipper's obligations to provide information, instructions and documents**

217. The Working Group was reminded that its most recent consideration of the previous text on which draft article 29 on the shipper's obligations to provide information, instructions and documents was at its seventeenth session (see A/CN.9/594, paras. 187 to 194). The Working Group proceeded to consider draft article 29 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1

218. In reference to footnote 97 of A/CN.9/WG.III/WP.81, the suggestion was made to delete the word "reasonably" as it appeared before the word "necessary" in the chapeau of draft paragraph 1 for the reason that it was said to be redundant. Further, the view was expressed that the obligation to provide information, instructions and documents was an important shipper's obligation that should not in any way be qualified. However, the Working Group was in agreement that the draft paragraph should be approved as drafted.

Paragraph 2

219. The Working Group was in agreement that draft paragraph 2 should be approved as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 30. Shipper's obligation to provide information, instructions and documents**

96. The Working Group approved the substance of draft article 30 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 30. Shipper's obligation to provide information, instructions and documents**

101. The Commission approved the substance of draft article 30 and referred it to the drafting group.

Article 30. Basis of shipper's liability to the carrier

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.
2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.
3. When the shipper is relieved of part of its liability pursuant to this article, the shipper is liable only for that part of the loss or damage that is attributable to its fault or to the fault of any person referred to in article 34.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(e) Paragraph 7.5**

155. It was observed that draft article 7.5 imposed on both the shipper and the carrier strict liability to each other, to the consignee or to the controlling party for any loss or damage caused by either party's failure to provide the information required to be provided under draft articles 7.2, 7.3 or 7.4. It was said that this provision was important given that, in modern times, actual physical inspection of goods was rare and therefore the exchange of information relating to goods between shippers and carriers was of paramount importance to the success of carriage operations.

156. However, concerns were expressed with the current text of draft article 7.5. One concern was that the type of liability established by draft article 7.5 was inappropriate given that the obligations set out in draft articles 7.2, 7.3 and 7.4 were not absolute and involved subjective judgements. For example, paragraph 7.3 referred to the shipper providing information that was "reasonably necessary". Imposing strict liability for failure to comply with what was described as a flexible and imprecise obligation seemed excessive to some delegations. It was suggested that, in certain circumstances, a shipper might have a number of reasons for not providing the relevant information, for example where the shipper reasonably believed that the carrier was already in possession of the relevant information. Furthermore, it was stated that an approach based on strict liability might be inappropriate, for example, where a shipper had failed to provide relevant particulars under article 8.2.1(b) or (c) to be included in the transport document before receipt of the goods by the carrier (as required under article 8.2.1). In such a case, the effect of draft article 7.5 would be to make the shipper strictly liable for failing to comply with its obligation under article 7.4 to provide information "in a timely manner". It was stated that, as currently drafted, the provision was ambiguous and that it was not clear what its effect would be either as to liability to a consignee or a controlling party or as to whether a carrier would be liable to a consignee for the shipper's failure to provide adequate particulars and vice versa. It was suggested that a revised draft of the provision might need to differentiate between contractual liability to the other parties involved and extra-contractual liability to third parties.

157. Another concern was that the provision did not accommodate the situation where both the shipper and the carrier were concurrently liable by allowing for shared liability in such situations. As well, it was suggested that the provision was ambiguous in that it was not clear what was meant by “loss or damage” in draft article 7.5 as compared, for example, to the phrase used in draft article 7.6, which referred to “loss, damage or injury”. It was suggested that the Working Group should examine that question to better delimit what loss or damage was being referred to. More generally, it was suggested that the obligation imposed by draft article 7.5 should be further examined in detail to clarify its multiple implications.

158. It was concluded that draft article 7.5 should be placed between square brackets, pending its re-examination in the light of the above-mentioned concerns and suggestions. The Secretariat was requested to prepare a revised draft, with possible alternative texts to take account of the suggestions made. At the close of the discussion, the Working Group generally agreed that in revising the draft provision, due consideration should be given to the fact that the information referred to in draft article 7.5 might be communicated by way of electronic messages, i.e., fed into an electronic communication system and replicated with or without change in the transmission process.

(f) Paragraph 7.6

159. It was observed that draft article 7.6 held the shipper liable for damage caused by the goods (and for non-fulfilment of its obligations under article 7.1) based on fault with the burden of proof upon the shipper to show that the loss or damage was caused by events or through circumstances that a diligent shipper could not avoid or consequences of which a diligent shipper was unable to prevent. It was recognized that draft article 7.6 reversed the approach taken in both article 4.6 of the Hague-Visby Rules and article 13 of the Hamburg Rules, where strict liability applied for damage caused by dangerous goods. It was suggested that the commentary set out in paragraph 116 of the note by the Secretariat (A/CN.9/WG.III/WP.21) did not sufficiently justify the shift from the existing law set out under draft article 7.6.

160. One delegation considered that the reference to the standard of liability being that of the “diligent shipper” was too ambiguous. It was stated in response that this represented an appropriately flexible standard, which should be understandable in all legal systems. The view was expressed that the burden of proof placed on the shipper according to draft article 7.6 was heavier than that placed on the carrier under draft article 6.1. It was observed that draft article 7.6 imposed a heavy burden of proof upon the shipper, particularly in so far as it related to proving that the loss, damage or injury caused by the goods was caused by events that could not be avoided or prevented by a diligent shipper. It was suggested that the higher standard of proof should only apply in respect of the breach of obligations under article 7.1. In response, it was stated that the stricter standard was appropriate as it sent a proper message to shippers as to the paramount importance of safety at sea.

161. Given that the carrier had the benefit of exemptions and limitations that were not available to the shipper, it was suggested that the following text should be included in draft article 7.6: “A shipper is not responsible for loss or damage sustained by a carrier or a ship from any cause without the act, fault, or neglect of the shipper, its agents, or its servants”. It was suggested that such a text was intended to replace the existing text of draft article 7.6 but that it should be placed in square brackets to indicate that the question of determining upon whom the burden of proof should fall was still outstanding and would be subject to further

discussions. It was also suggested that neither that proposal nor the current text of draft article 7.6 adequately addressed the situation of contributory negligence where a carrier failed to comply with its obligations under draft article 7.2 and this contributed to the shipper's failure to comply with draft article 7.6. It was generally felt that the text needed to take account of that matter.

162. Broad support was expressed in favour of the suggested language. However, several comments were made in respect of the proposed text. It was suggested that the scope of responsibility of the shipper in draft article 7.6 needed to be examined from several different situations: first, where damage was done to the vessel by the goods themselves; second, where the goods caused damage to the crew on board the vessel; and, third, where the goods damaged other goods on board the vessel. It was stated that the proposed text might assist in better dealing with those three categories of damages. It was also stated that the proposed text might be better suited to dealing with shipper responsibilities vis-à-vis third parties, which were not covered by the current text of draft article 7.6. Another comment on the proposal was that it was largely based on both the Hague Rules and article 12 of the Hamburg Rules, and that such an approach based on liability for fault represented an improved formulation on the text set out in draft article 7.6. A further comment was that the reference to "ship" in the draft proposal might need to be reconsidered in the event that the draft instrument would apply to door-to-door transport rather than merely on a port-to-port basis. In the context of door-to-door transport, the text would need to be reviewed against the background of other unimodal conventions. Yet another comment was that the reference to third parties in the proposal was too broad and given that this issue was dealt with by other regimes regarding safety such as the HNS Convention, it would be better to restrict the proposal to the shipper and carrier.

163. The view was expressed that the main difficulty arising under draft article 7.6 was that the distinction between ordinary and dangerous goods, which existed in other maritime conventions, had been removed from the draft instrument. It was suggested that the distinction should be included in the draft instrument so that the shipper would have strict liability for damage to the vessel caused by dangerous goods. However a concern was expressed that it was important to assess the impact of including a clause with respect to dangerous goods particularly in respect of additional costs that might arise for cargo interests. There was no unanimity in the Working Group regarding the question whether to include a specific rule dealing with dangerous cargo, and this matter was left open for further consideration.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft articles 29 and 30

138. The Working Group considered the text of draft articles 29 and 30 as contained in document A/CN.9/WG.III/WP.32.

Proposal for a revision of draft articles 29 and 30

139. A proposal was made for the replacement of draft articles 29 and 30 by a provision along the following lines:

“1. Subject to articles 25, 27 and 28 the shipper is liable for damage or loss sustained by the carrier or a sub-carrier that the shipper has caused intentionally or by its fault or neglect.”

“2. If the shipper has delivered dangerous goods to the carrier or the sub-carrier without informing the carrier or sub-carrier of the dangerous nature of the goods and of necessary safety measures, and if the carrier did not otherwise have knowledge of the dangerous nature of the goods and the necessary safety measures to be taken, the shipper is responsible for the damage or loss sustained by the carrier.”

140. By way of explanation, it was stated that the shipper should be liable for damages it had caused to the carrier through fault or negligence. The proposed text was said to introduce a balance between the carrier's and the shipper's liabilities. Paragraph 2 of the proposed text was intended to establish a strict (no-fault) liability of the shipper for not informing the carrier of the dangerous nature of certain goods. As to the liabilities of the shipper to the consignee and the controlling party, it was suggested that these should be dealt with by reference to the contractual arrangements between the parties or to the law applicable outside the draft instrument, respectively. It was pointed out that the proposal was based on the assumption that any provision dealing with the liability of the carrier in the current text of draft articles 29 and 30 would need to be further considered in the context of (and possibly added to) the provisions of the draft instrument dealing more generally with the obligations of the carrier. The view was expressed that the sanction of a breach by the carrier of its obligation under article 26 should not be a liability but a loss of the carrier's right to invoke article 25.

141. While it was generally agreed that the text of the proposal might need to be improved, in particular to avoid ambiguities regarding the identity of “the sub-carrier”, the Working Group based its deliberations on the principles reflected in the proposal Principle of the shipper's liability being based on fault

142. Strong support was expressed for the principle that the liability regime applied to the shipper should be generally based on fault, thus mirroring the liability regime established by the draft instrument in respect of the carrier. As to possible cases where it might be necessary to hold the shipper strictly liable, the following exceptions to the general principle were suggested:

- The cases covered by subparagraph (c) of draft article 27 (information necessary for the carrier to establish the transport documents), which were already dealt with by way of strict liability in article III.5 of the Hague-Visby Rules;
- The cases covered by subparagraph (b) of draft article 27 (information required to allow the carrier to comply with regulations or requirements of public authorities).

143. As to the formulation of the above exceptions, it was widely felt that the phrase “subject to articles 26, 27 and 28” in the proposal might need to be amended, not only to specify the individual exceptions but also to clarify that, to be held strictly liable under this provision, the shipper should be in breach of its obligation to provide the carrier with the necessary information, instructions or documents.

Shipper's liability to the consignee or the controlling party

144. For the reasons put forward by the proponents of the text intended for the replacement of draft articles 29 and 30, support was expressed for not dealing with the liability of the

shipper to the consignee. The view was expressed, however, that the provisions dealing with the liability of the shipper should mirror the structure of the provisions dealing with the liability of the carrier, and the issue of liability to the consignee and the controlling party might need to be reconsidered at a later stage.

Joint liability

145. Support was expressed for retaining paragraph 3 of variant B of the initial text of article 29 for continuation of the discussion at a later stage on the issue of joint liability, which was not dealt with in the proposal. It was suggested that, should a provision on joint liability be eventually retained in the draft instrument, a provision regulating the exercise of recourse actions might be needed.

Dangerous goods

146. As to the substance of the proposal under which the shipper should be held strictly liable to inform the carrier of the dangerous nature of the goods and of the necessary safety measures, a concern was expressed that the proposed rule might be unnecessary and its effect uncertain, unpredictable, and overly onerous for the shipper, particularly in view of existing case law in a number of countries, under which goods, although not identifiable as dangerous before the carriage could later be declared dangerous by courts adjudicating the claim, for the sole reason that they had caused damage. The view was expressed that the issue of dangerous goods was sufficiently covered in the draft instrument, for example in draft articles 27 and 12, which appropriately avoided using the notion of “dangerous goods” itself. Additional views were that the issue of dangerous goods might be dealt with by reference to article 13(2) of the Hamburg Rules or through the insertion in draft article 27 of an obligation of the shipper to inform the carrier of the dangerous nature of the goods.

147. The discussion focused on the definition of dangerous goods. It was generally felt that, should a provision expressly referring to the notion of dangerous goods be retained, a definition should be provided in the draft instrument. The only possible reference was said to be the definition provided in the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances (HNS) by Sea but considerable doubts were expressed regarding the appropriateness of introducing such a definition in an international trade law instrument. Support was expressed for addressing in the definition the issue of goods that became dangerous during the carriage.

Conclusions reached by the Working Group on draft articles 29 and 30

148. After discussion, the Working Group decided that:

- The aspects of draft articles 29 and 30 dealing with the liability of the carrier should be moved for continuation of the discussion under those provisions that dealt specifically with the obligations of the carrier;
- Draft articles 29 and 30 should be redrafted entirely to reflect the general principle that the liability of the shipper should be based on fault;
- Exceptions to that general principle should be made and a rule of strict liability retained in cases where the shipper failed to meet the requirements of subparagraphs (b) and (c) of draft article 27; such exceptions should be placed between square brackets;

- As a further option, a provision similar to article III.5 of the Hague Rules should also be introduced in square brackets;
- Paragraph 3 of Variant B of draft article 29 (A/CN.9/WG.III/WP.32) should be retained for continuation of the discussion at a future session;
- A specific provision should be inserted at an appropriate place in the draft instrument to deal with the issue of dangerous goods, based on the principle of strict liability of the shipper for insufficient or defective information regarding the nature of the goods;
- A broad definition of the notion of “dangerous goods” should be provided; in drafting such a definition, the Secretariat was requested to bear in mind other existing international transport instruments and to address the issue of goods that became dangerous during the carriage.

[16th Session of WG III (A/CN.9/591 and Corr.1) ; referring to A/CN.9/WG.III/WP.56]

Draft article 31. Basis of shipper’s liability

General discussion

136. The Working Group was reminded that it had last considered draft article 31 on the basis of the shipper’s liability at its thirteenth session (see A/CN.9/552, paras. 138 to 148). The text of draft article 31 considered by the Working Group was that set out in annexes I and II of A/CN.9/WG.III/WP.56.

137. There was agreement with the general observation that draft article 31 was of particular concern with respect to the inclusion of more extensive shipper’s obligations in a chapter of the draft convention in comparison with existing maritime transport regimes. It was thought that the introduction in this provision of a fairly extensive strict liability regime on the shipper, without any right to limit its liability, was quite problematic, as was the introduction of a presumed fault concept in paragraph 1. There was support for the suggestion that the general approach of draft article 31 should be more in keeping with that of article 12 of the Hamburg Rules, with some possible adjustments.

Presumed fault and the burden of proof

138. Concerns were raised regarding the inclusion in draft paragraph 1 of the concept of presumed fault on the part of the shipper. It was observed that presumed fault amounted to a reversal of the burden of proof onto the shipper that had no parallel in existing maritime transport regimes. Generally, the carrier had the burden of proving that the loss or damage was caused by a breach of obligation or negligence of the shipper, such as a failure to provide necessary information. Once the carrier had proved the cause of the loss or damage, it was open to the shipper to prove that the loss or damage did not arise as a result of its fault. This general regime was thought to reflect the fact that the carrier was usually in a better position to establish what had occurred during the carriage, since it was in possession of the goods. There was general support for the view that the traditional approach to fault based liability as set out in article 12 of the Hamburg Rules and article 4(3) of the Hague-Visby Rules should be preserved as the general regime, with strict liability only in certain situations, as discussed below.

139. There was some support for the alternate view that the text in paragraph 1 was appropriate and that the approach taken in the Hamburg Rules was not necessarily fair to the carrier, since most containers in modern transport were packed by shippers, thus making it difficult for the carrier to prove the cause of the loss. It was also pointed out that article 12 of the Hamburg Rules did not set out the burden of proof, and that draft article 31 merely made explicit the logical conclusion that a court would reach that the shipper in defending a claim for loss arising from draft articles 28 and 30(a) would seek to prove its lack of fault.

Shipper's liability to whom

140. There was general agreement that the basis of liability of the shipper should apply only in the context of the contractual relationship between the carrier and shipper, possibly also extending to maritime performing parties who could be said to be sufficiently proximate to the contractual relationship. It was suggested that the title and text of the article should make clear that this provision was confined to the shipper's liability to the carrier, and that draft article 31(3) referring to liability to a consignee or a controlling party should be deleted, and its contents treated elsewhere in the draft convention.

Loss, damage or injury

141. There was support for the suggestion that "injury" should be deleted from draft paragraph 31(1), again in order to clarify that it did not intend to create a claim for third parties, as discussed earlier with respect to the inclusion of "injury" in draft article 28 (see above, para. 119). It was further suggested that "damage" should also be deleted and that reference should be made only to "loss" in draft paragraph 1. The proposal for the deletion of "injury" met with approval in the Working Group. There was support for the suggestion that despite this deletion, the draft convention should ensure that if a carrier paid out a claim as a result of injury caused by negligence of the shipper, the carrier should be able to claim compensation from the shipper as a loss suffered by the carrier. It was suggested that this could be achieved by referring to "loss sustained by the carrier" in draft paragraph 1. The Working Group was reminded that care should be taken regarding the use of the term "loss" on its own, as it could include not only physical loss, but consequential loss as well.

142. It was observed that article 12 of the Hamburg Rules included damage sustained by the ship in the shipper's liability. The question was raised whether damage occasioned to the ship should also be included in draft article 31, and the view was expressed that "loss" included damage to the ship. It was observed that the shipper's liability could become very broad in such cases.

Delay

143. There was support for the view that "delay" was particularly problematic as a basis for the shipper's liability, since it could expose the shipper to enormous and potentially uninsurable liability. For example, a shipper who failed to provide a necessary customs document could cause the ship to be delayed, and could be liable not only for the loss payable to the carrier, which could include enormous consequential damages, but also for the losses of all of the other shippers with containers on the ship. As a consequence, the suggestion was made that the shipper's liability for "delay" should be deleted from the draft text. It was also observed that if "delay" was retained in the text, a reasonable limitation should be placed on the liability of the shipper.

144. A contrary view regarding deletion of “delay” was also expressed. It was stated that the liability of the shipper and of the carrier for delay was an important aspect of the draft convention. It was observed that deleting “delay” called into question the rationale for creating strict liability for submitting incorrect information, since inaccurate information was the most common cause for delay.

145. There was some support for the view that, while problematic, delay should not too easily be discarded as a basis of liability, and it was suggested that it could be considered as a separate basis of liability, whether caused by the shipper or the carrier. It was noted that loss due to delay could not only be enormous, as noted above, but that it could have multiple causes.

146. The Working Group was reminded that the basis of liability of the carrier in the draft convention also included “delay”, and it was suggested that if delay was removed as a basis for the shipper’s liability, a corresponding change should be made to the carrier’s liability. It was explained that this was not simply a matter of balancing the overall rights and obligations of the shipper and the carrier in the draft convention, but that it would not be fair to hold the carrier liable for a delay for which it might not be responsible, and for which it could not claim compensation from the shipper who was responsible. There was support for that view.

Limitation of liability

147. There was some support for the suggestion that a limit should be placed on the shipper’s liability, if “delay” was retained as a basis for the shipper’s liability in draft article 31, given the large and potentially uninsurable liability that could be covered. The suggestion was also made that such a limitation on the liability of the shipper for consequential losses should exist in any event, as, for example, the shipper could be held responsible for broad, but likely insurable, liability for damage to the ship. However, the difficulties associated with arriving at a reasonable means of determining such a limitation on liability were also outlined. There was general agreement that such a limitation should be at a high enough level so as to provide a strong enough incentive for the shipper to provide accurate information to the carrier, but that it should be foreseeable and low enough so that the potential liability would be insurable. It was suggested that the language of article 31(2) variant B, i.e. “the shipper must indemnify the carrier against”, or reference to the value of the shipper’s goods, could be useful starting points for further discussion in this regard.

Strict liability

148. The Working Group next considered which of the shipper’s obligations should be subject to a strict liability regime such as that set out in draft paragraph 31(2). There was general support for the view that the shipper should be held strictly liable for the accuracy of information provided by the shipper to the carrier under article 30(c) unless the inaccuracy was caused by the carrier. It was also suggested that a separate provision could be created for such a strict liability obligation, along the lines of the special treatment given to dangerous goods in draft article 33. There was support for the creation of such a separate provision, as it was said that it would clarify the structure of the chapter and allow for the deletion of draft paragraphs 30(c) and 31(2). Further, there was some support for the view that strict liability should be limited to the accuracy of the information actually provided by the shipper for insertion in the transport documents. It was further observed that strict liability should not extend to misjudgement of the shipper of the necessity of the information required, and that the inclusion

of draft paragraph 30(b) in the strict liability regime would depend upon the texts following their reformulation.

149. There was support for the view that if separate provisions were created for liability of the shipper based on fault and liability based on strict liability, there would be less need for a provision such as draft article 29, and the Working Group could consider deleting it. However, the view was also expressed that it might nonetheless be preferable to include an explicit obligation for the carrier to provide necessary information on the intended voyage to the shipper, so as to enable the shipper to fulfil its draft article 28 obligations.

150. It was also suggested that in addition to the provision of inaccurate information to the carrier and with respect to dangerous goods, there was a third category of obligations for which there should be strict liability on the part of the shipper. That third category was said to be security-related, and should apply to those goods that are prohibited due to their potential relationship with weapons of mass destruction or similar uses. It was said that in these situations, the carrier could be subject to major losses and penalties as a result of the shipper's breach, and that the shipper's liability in these circumstances should be strict. Some interest was expressed in this proposal, but the contrary view was also expressed that strict liability should not apply to carriage of extremely dangerous goods, military or similar goods.

Draft paragraph 31(3)

151. A proposal was made to keep the text of draft paragraph 3 but to add the following to the end of the final sentence: "to the extent that each of them is responsible for any such loss or damage. Where the extent of individual fault cannot be attributed, each party shall be liable for one-half of the loss or damage". However, there was strong support for the view that paragraph 3 should be deleted in light of the agreement in the Working Group that draft article 31 should focus on the contractual relationship between the shipper and the carrier, and that a draft article on concurring causes should be included elsewhere in the draft convention to deal with the allocation of liability between the carrier and the shipper in cases where several causes had combined to produce the loss.

General drafting suggestions

152. In terms of preparing revised text to replace draft article 31, it was suggested that reference should be had to the texts appearing in paragraph 26 of A/CN.9/WG.III/WP.55 and draft paragraph 31(1) and variant B of paragraph (2) of A/CN.9/WG.III/WP.56, in addition to the approach in article 12 of the Hamburg Rules and in general, to article 4(3) of the Hague-Visby Rules. More specific suggestions were also made, such as deletion of the reference to "timeliness" and "completeness" in variant B of paragraph 2, in order to render the provision more in keeping with the approach set out in the Hague-Visby and Hamburg Rules. Another drafting suggestion to remedy some of the problems in the first paragraph was proposed as follows: "The shipper is liable for loss or damage resulting from the breach of its obligations under article 28 and article 30(a) unless ..." followed by the rest of draft paragraph 1 continuing from the word "unless", but it was suggested that this text might still preserve the reversed burden of proof onto the shipper.

Conclusions reached by the Working Group regarding draft article 31

153. After discussion the Working Group decided that:

- The title and text of draft article 31 should be adjusted to reflect that it concerned the relationships in the contract of carriage;
- A fault-based regime should be adopted as the general regime for the basis of a shipper's liability for breach of its obligations under draft articles 28 and 30;
- Strict liability should be the basis of shipper's liability in respect of dangerous goods under draft article 33 (see below) and for providing inaccurate information under article 30(c);
- The new formulation of draft article 31 should take into account the texts in A/CN.9/WG.III/WP.56 and in paragraph 26 of A/CN.9/WG.III/WP.55, as well as the regime in the Hamburg Rules, and the views of the Working Group as expressed above;
- The word "injury" should be deleted from the new formulation of draft article 31(1);
- In preparing the new formulation of draft article 31, regard should be had to the views expressed regarding the deletion of delay as a basis of liability of both the shipper and the carrier, and for the possibility of creation a limitation on the shipper's liability; and
- The reformulation of draft article 31 should take into account the discussion of the Working Group regarding draft article 29, and make the necessary adjustments to achieve consistency, including possible deletion or revision of draft article 29.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 31. Basis of shipper's liability: Delay

199. It was recalled that the Working Group had last considered the shipper's liability for delay at its sixteenth session (see A/CN.9/591, paras. 133 and 143 to 147) and that written proposals on this topic had been submitted for the consideration of the Working Group (see A/CN.9/WG.III/WP.67, para. 22, and A/CN.9/WG.III/WP.69, paras. 8 to 14). It was indicated that delay was an important pending issue in the chapter on shipper's obligations, as it gave rise to complex problems.

200. There was support within the Working Group for retaining the provisions of the draft convention dealing with carrier and shipper liability for delay. It was indicated that such provisions, which did not exist in earlier instruments such as the Hague Rules, would provide an important contribution to modernizing the law of carriage. It was also recalled that timeliness had a prominent importance in liner transportation and in modern logistics arrangements in the commercial world. It was also indicated that other persons in the transactions, especially the consignee, should be protected from any losses caused by the shipper or the carrier. It was indicated that the Working Group had already completed its consideration of carrier liability for delay at its thirteenth session (see A/CN.9/552, paras. 18 to 31), and that such liability was regulated under draft article 22, with the exception of the level of limitation of such liability, which was dealt with in draft article 65 in the chapter on limitation of liability. It was therefore indicated that the Working Group should not re-open the discussion on that draft article.

201. There were nevertheless strong objections to the inclusion of consequential damages for delay for both shippers and carriers in the draft convention. It was indicated that such inclusion

might create enormous, open-ended liability exposure for shippers. For instance, it was explained, a shipper's failure to provide a document might prevent the unloading of a single container loaded with goods of small value, and this in turn might prevent the entire ship of containers from arriving and unloading at its port of destination. In that case, it was added, while reasons of fairness would suggest that the carrier should be able recover from that shipper the damages for delay for which the carrier was responsible to other shippers with containers on board, if the shipper was to be held fully liable to the carrier for all damages caused by its delay of the vessel, its liability could not only have a devastating financial impact on it but would also be uninsurable. It was added that the difficulties surrounding the establishment of a reasonable and logical liability limit that could be applied to the shipper's liability for damages due to delay, as well as of a liability regime that allowed for insurability of the potential risks associated with damages for delay, supported the deletion of liability for delay on the part of the shipper from the draft convention. It was further indicated that, in order to ensure fairness and balance in the draft convention, liability for consequential damages for delay should likewise be eliminated from the carrier's liability to shippers, except as the parties to a shipment may expressly agree, since holding carriers liable to shippers for delay exposed them to significant potential liabilities in the same manner as holding shippers liable to carriers would.

202. Furthermore, it was said that in order to maintain a fair balance in the draft convention, it was essential to include a mirror provision establishing liability for a shipper who caused the delay and exposed a carrier to losses resulting from delay claims against it by other shippers, and that because carrier liability for delay damages would be limited, such shipper liability should also be subject to a reasonable limitation. However, it was added that efforts to develop an acceptable limitation on shipper liability for damages for delay had proven to be an extremely difficult task, since a limitation based on the freight paid by the offending shipper was deemed to be unreasonably low by carrier interests, while shipper interests found other formulations, such as full responsibility for damages for delay to all other shippers on the vessel, unreasonably high. It was also indicated that a carrier should be fairly protected against any losses it incurred for delay damages caused by a shipper, albeit the resultant liability on one shipper could be significant. It was concluded that the only equitable resolution to this dilemma would be to remove the concept of liability for damages for delay from the draft convention with regard to shippers and, unless they agreed in a contract of carriage or volume contract on a date certain for delivery of the cargo, for carriers as well. It was therefore suggested that draft article 22 should be amended to reflect that the carrier's liability for economic loss due to delay would be limited to those cases where the carrier had agreed to such liability.

203. It was recalled that a drafting proposal had been submitted to the Working Group (see A/CN.9/WG.III/WP.69, paras. 8 to 14), under which the shipper would have no liability for consequential damages arising from delay, and the carrier's liability would be limited accordingly. It was explained that such a result might be achieved by amending and deleting various references to delay in the draft convention, and by inserting a new draft article 36 bis (see A/CN.9/WG.III/WP.69, para. 14), whose scope was to prevent a possible interpretation of "damage or loss of goods" under the draft convention encompassing damage or loss caused by delay other than physical damage or loss. In response to a query, it was explained that the consequential damages caused by delay that would not be recoverable under the proposed text of the draft convention included damages for pure economic loss as well as damages that could be said to arise from partial economic loss such as, for example, market price fluctuation during

the period of time in which the delay occurred. It was further explained that the carrier, as well as the shipper, would continue to be held liable for physical loss or damage to goods under draft article 17, as well as in those cases in which the parties had concluded an express agreement on the delivery date.

204. In reply, it was indicated that the suggested approach would amount to depriving the parties of any remedy for economic loss that might be available under national law. While support was expressed for the concerns about the difficulties in drafting a satisfactory text, it was therefore suggested that the ideal solution to address the liability for delay under the draft convention would not consist of limiting such liability for the carrier, but to leave the matter under the domain of national law for all types of loss due to delay. It was further suggested that in order to fully exclude claims for economic loss under the proposal, it might not be sufficient to simply eliminate references to “delay” in the draft convention, but it might also be necessary to include a provision barring any claim in this regard by the carrier against the shipper. As a drafting suggestion, it was proposed that such a draft provision could be inspired by draft article 4, which might require some redrafting of draft article 36 bis contained in A/CN.9/WG.III/WP.69, paragraph 14.

205. The Working Group considered at length the above suggestions. It was further indicated that leaving the rules on liability for delay to national law would not only fail to unify the law on the matter, but would also perpetuate the existing unfair practice, pursuant to which the carrier inserted clauses exonerating it from liability for economic damages for delay in bills of lading, while the shipper had no corresponding safeguard. It was further indicated that the greatest level of unification of the law on this matter would be desirable, as this would improve not only legal predictability but also the insurability of the risk, while leaving the matter under different domestic legal regimes would run counter to those goals. A view was also expressed that the carrier’s and the shipper’s liability for delay need not be considered together, since the carrier’s liability for delay touched upon the primary obligation of the carrier to deliver the goods, while the same liability for the shipper touched upon secondary obligations of the same. It was also said that, while problematic, delay should not be too easily discarded as a basis of liability. For example, the shipper’s liability for delay could be limited as it would likely be fault-based, the burden of proof would be allocated to the claimant according to ordinary rules, and the action could be subject to a short limitation period, possibly of one year. In support of a provision in the draft convention on the liability for delay, it was also said that finding an equitable solution for limitation of liability for delay, albeit difficult, was not an impossible task, since indeed certain domestic legislation contained rules relating to the shipper’s liability for delay, which was, for example, limited with relation to the weight of the goods shipped. It was added that, under an alternative approach, the limitation of the shipper’s liability for delay could be linked to the freight paid, although problems with that approach were pointed out, as, for example, in the case where the measure would be the freight paid on a container of low value goods that had delayed the arrival of other containers of very high value goods. A view was expressed that a rule on the carrier’s liability for delay could be included even though there was no rule on the shipper’s liability for delay.

206. In response, the view was expressed that, while legal unification was indeed desirable result, insurability of the risk depended not on the uniformity of the rule, but rather on the limitation of the amount of liability. The Working Group was urged not to underestimate the difficulty of that task. In the search for a possible solution, the Working Group was invited to

consider the types of damages that might be covered in a system of liability for delay under the draft convention. In this respect, it was said that, while physical damages would always be recoverable, damages for pure economic loss and damages for partial economic loss due to market variations in the value of the goods during the period of delay should fall outside the scope of application of the draft convention. It was suggested that the parties should be allowed to derogate from draft article 22, on the liability of the carrier for delay, insofar as it related to damages pertaining to economic loss, through the exercise of their freedom of contract. It was specified that under such provision the carrier would be liable for delay unless there was contractual agreement otherwise. However, concerns were raised that, depending on the final text of draft article 94, such freedom of contract could also be used to increase the shipper's liability for delay, and that such an outcome would go against the intended scope of the draft provision.

Conclusions reached by the Working Group regarding liability for delay:

207. After discussion, the Working Group decided that:

- The consideration of the liability for delay in the draft convention should continue at a future session, after consideration of the issues presented;
- The submission of written submissions on the matter for consideration at its next session was strongly encouraged; and
- The consideration of any further issues of concern to the Working Group with respect to the obligations of the shipper was suspended pending the future consideration of delay.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 31. Shipper's liability for delay

General discussion of the problem of liability for delay

83. The Working Group was reminded that it had most recently considered the topic of the shipper's liability for delay at its seventeenth session (see A/CN.9/594, paras. 199-207), and that it had previously considered the topic at its sixteenth session (see A/CN.9/591, paras. 133 and 143-147). It was also recalled that a document containing information relating to delay had been presented by the Government of Sweden (A/CN.9/WG.III/WP.74), and that written proposals on this topic had been submitted for the consideration of the Working Group for this session (see A/CN.9/WG.III/WP.73, paras. 24-27), and at its seventeenth session (see A/CN.9/WG.III/WP.67, para. 22 and A/CN.9/WG.III/WP.69, paras. 8 to 14). The consideration by the Working Group of the provisions on the shipper's liability for delay was based on the text as found draft article 31 in annexes I and II of A/CN.9/WG.III/WP.56.

84. The Working Group recalled that, under draft articles 28 and 30, the shipper was obliged to deliver the goods ready for carriage and to provide the carrier with certain information, instructions and documents. It was further recalled that the shipper's liability for delay, due to breach of those obligations, was regulated in draft article 31, while the carrier's liability for delay was regulated in draft article 22, which had last been considered by the Working Group at its thirteenth session (see A/CN.9/552, paras. 18-31). The Working Group was also reminded that, during its sixteenth session, it had decided that the liability for breach

of the shipper's obligations should be generally based on fault with an ordinary burden of proof (see A/CN.9/591, para. 138). Two exceptions to this general rule were that the shipper would be held strictly liable for failure to inform the carrier of the dangerous nature of goods being transported or for failure to mark or label such goods accordingly (see draft article 33), or for loss or damage due to the inaccuracy of information and instructions actually provided to the carrier (see A/CN.9/591, paras. 148 to 150). It was also noted that the liability of the shipper in the present text of the draft convention was not limited, such that the shipper, if found liable, could be exposed to enormous and potentially uninsurable liability for any consequential damage as well as any physical loss that resulted from a breach of the shipper's obligations (see A/CN.9/WG.III/WP.69 generally, and para. 8, and A/CN.9/591, paras. 143-147). The Working Group recalled that, as a consequence of that concern, a proposal had been made at its seventeenth session that, in the absence of an acceptable limitation on the shipper's liability for economic loss or consequential damages arising from delay, liability for economic loss or consequential damages arising from delay on the part of the shipper and of the carrier should be deleted from the draft convention (A/CN.9/WG.III/WP.69, paragraphs 8 to 14).

Treatment of delay in other conventions and jurisdictions

85. By way of introduction of A/CN.9/WG.III/WP.74, the Working Group heard that the Hague-Visby Rules did not contain provisions on the carrier's liability for delay, but that the Hamburg Rules did contain such a provision based on fault, and limited to an amount equal to two and one-half times the freight payable for the goods delayed (article 6(1)(b)), but not exceeding the total freight payable under the contract of carriage of the goods by sea. Further, pursuant to the Hague-Visby and Hamburg Rules, the shipper may be liable on a fault basis for damage caused by delay (see articles 4(3) and 12, respectively) or on a strict liability basis for loss, including that arising from delay, as a result of providing inaccurate information (see articles 3(5) and 17(1), respectively), or from failure to mark, label, or inform regarding dangerous goods (see Hamburg Rules, article 13(2)(a)). It was further recalled that the liability of the shipper under these provisions was unlimited.

86. The Working Group was also reminded that, while liability for physical loss arising from delay was well known and already included in the draft convention, liability for pure economic loss or consequential damages arising from delay on the part of the shipper or the carrier was not a part of transport law in some legal systems. In those jurisdictions, pure economic loss or consequential damages could only be recovered when they were foreseeable, and when such recovery was referred to in the contract of carriage. It was suggested that inclusion of liability for such damages in the draft convention would constitute a major change to the status quo, and would thus have to be one of the issues in the draft convention that needed to be particularly carefully balanced in its treatment. In response to a question, it was clarified that the main concern of shippers with respect to their potential liability for delay was that their failure to provide timely and accurate information and documentation to the carrier, or that damage to the ship by the goods, could result in delaying the departure of the ship, and that the shipper responsible for the delay would be held liable on an unlimited basis for indemnifying the carrier for any amounts for which the carrier was found liable for delay to all of the other shippers with goods on board that ship.

Three possible options for dealing with delay

87. It was suggested that there were three possible approaches that could be taken in the text of the draft convention with respect to the treatment of liability for pure economic loss or consequential damages caused by delay on the part of the shipper or the carrier.

Option one: no liability for delay on the part of the shipper or the carrier

88. The first option was said to be to leave liability for delay completely outside of the scope of the draft convention, except for the liability for delay as a result of the submission by the shipper of inaccurate information. That approach would entail the deletion of all references to delay, which would mean that the question of liability for delay on the part of the shipper and of the carrier would be left to national law, and there would be no uniformity.

89. Some support was expressed for that approach. However, a disadvantage of this approach was said to be that some of the unimodal regional transport conventions, such as the Convention on the Contract for the International Carriage of Goods by Road, 1956, as amended by the 1978 Protocol (CMR) and the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (COTIF/CIM), contained provisions on liability for delay in delivery, which could create discrepancies in States that were parties to those conventions. An additional concern raised with respect to this approach was that in the modern transportation era, a key element was “just-in-time” delivery, which would not be taken into account by the draft convention if it were to remove all liability for delay. In addition, it was observed that simple deletion of all references to liability for delay on the part of the shipper in the draft convention would not necessarily absolve the shipper of liability for delay, given the shipper’s obligations set out in chapter 8, including the shipper’s liability for any loss caused by the goods or by breach of its obligations under draft article 31. If the shipper’s liability for economic loss should be left to national law, the entire chapter on shipper’s obligations, or at least draft article 31, should be deleted.

Option two: retain carrier liability for delay but delete shipper liability for delay

90. A second option was said to be to retain carrier liability for delay in the draft convention, but to delete shipper’s liability for delay and leave it to national law. This approach would leave the carrier with uniform limited liability, which was said to be of greater importance than uniform liability of the shipper for delay, since the primary obligation of the shipper under the contract of carriage was to pay the freight, while the primary obligation of the carrier was to deliver the goods. However, option two was still said to create an imbalance in the treatment of shippers and carriers.

91. In support of option two, it was said that liability of the shipper for delay had not been a great problem in practice. In response, however, it was observed that time was becoming increasingly important in modern transport, and as such, it could become a greater problem in the future. Further, it was noted that while, in theory, the carrier should not be responsible to all of the other shippers for one shipper’s delay, in practice, there was still a risk that the carrier would be held responsible to the other shippers, and would then look to the shipper at fault for compensation. Option two was thus said to be unacceptable because it would be unfair to impose broad liability on the carrier without providing the carrier with recourse against the party responsible for the delay. Additional concerns were raised regarding the importance of

weighing the perceived benefits of including shipper liability for delay against the difficulty of proceeding with and proving such a claim, whether or not a limitation on liability was in place.

Option three: retain carrier and shipper liability for delay and find an appropriate limitation level for shipper liability

92. A third option was said to be to have the draft convention cover delay on the part of the carrier as well as on the part of the shipper. Some concern was expressed regarding the inclusion of shipper's liability for delay, since it was thought that this could affect the non-liner trade where there were often damages for delay, and where it could further affect well-established contractual matters such as responsibility for demurrage and detention. Further, general concerns were expressed regarding the possibility of creating burdens on the shipper that could be said to exceed those in the Hague-Visby or Hamburg Rules.

93. Some of the advantages of option three were thought to be that the approach would be a uniform one that would provide predictability, certainty and balance to the draft convention. The support expressed for variant three was largely premised on finding an acceptable limitation level for shipper liability. It was suggested, however, to clarify the notion of the words "loss" and "delay" used in draft article 31.

Possible methods to limit shipper's liability for delay

94. A number of suggestions were made in the Working Group regarding how best to establish an appropriate limitation level for the liability of shippers. In general, it was thought that an appropriate limitation level could be fairly low, since it was not the goal of the draft convention to provide full compensation for the economic loss in issue. Further, it was thought that the basis of the limitation level should be high enough to provide an incentive for a shipper to do its utmost to meet its obligations under the draft convention.

95. One approach that was suggested was to hold the shipper fully liable for physical loss, such as loss and damage to the ship and other equipment, but limiting the shipper's liability for pure economic loss to an amount equal to the value of the goods shipped. Disadvantages of this approach were thought to be that it could create a certain disparity, since cargo of low value could cause as much damage as cargo of high value, and that it could be difficult to establish the value of the goods. But an advantage was thought to be that it would be equitable that shippers of large volumes of more expensive goods would have to take on greater risk. A further advantage was said to be that the value of most commodities in the liner trade was quite stable over time, and a Special Drawing Rights (SDR) approach could be avoided.

96. Another possible approach to establishing a limitation level for shipper's liability was thought possible by linking it to the amount of the freight payable on the goods shipped, similar to the approach to limit the carrier's liability for delay in draft article 65. One problem with this approach was thought to be that freight rates varied considerably over time, and that this limitation amount was in any event likely to be too low.

97. It was proposed that a further possibility for establishing an appropriate limitation level for shipper's liability would be to use the same limitation of liability as for the carrier in the case of loss or damage to the goods as set out in draft article 64. While the situation of the liability of the shipper for delay could not be said to be the same as that of the carrier for loss or damage to the goods, the advantage of this approach was said to be that it would be fair, and

that it was well known and predictable. It was observed that this approach had been taken in one domestic system, and that the results there had not been entirely successful.

98. An additional approach suggested for the establishment of a limitation amount was to simply take a fixed sum at a reasonably insurable rate. Again, the advantages of such an approach were thought to be certainty and predictability.

99. A suggestion was made that the limitation level established for the liability of the shipper should extend to all of its potential liabilities, including those for physical loss. That suggestion received some support. Another suggestion was to include a provision outlining the circumstances in which that limit could be exceeded. This suggestion was not taken up by the Working Group, nor was a suggestion that demurrage should be linked to delay, and thus subject to a limitation level.

Conclusions reached by the Working Group regarding the treatment of liability for economic or consequential loss occasioned by delay:

100. After discussion, the Working Group decided that:

- The approach to the treatment of liability for pure economic loss or consequential damages caused by delay on the part of the shipper or the carrier set out as “option three” should be pursued as the optimal approach for the draft convention, subject to the Working Group’s ability to identify an appropriate method to limit the liability of the shipper for pure economic loss or consequential damages caused by delay.

Proposals regarding the identification of an appropriate limitation level for shipper liability for delay

101. The Working Group recalled its earlier decision that the approach to the treatment of liability for pure economic loss or consequential damages caused by delay on the part of the shipper or the carrier set out in “option three” (as described in A/CN.9/WG.III/WP.74 and discussed in paras. 92-93 above) should be pursued as the optimal approach for the draft convention, subject to the Working Group’s ability to identify an appropriate method to limit the liability of the shipper for pure economic loss or consequential damages caused by delay.

102. The Working Group was reminded that the proposal to retain shipper liability for delay was to accommodate those jurisdictions where liability for pure economic loss arising from delay on the part of the shipper or the carrier was not recognized unless foreseeable, and such recovery was referred to in the contract of carriage. In such jurisdictions carriers were concerned that, where a shipper was responsible for a delay, the carrier could nevertheless be found liable under the draft convention in respect of that delay to all of the other shippers with goods on board that vessel. Shippers in those jurisdictions were equally concerned about a potentially very high exposure to liability in a recourse action brought by the carrier.

103. It was proposed that any provision on carrier liability for delay should include clarification that the carrier would not be liable for loss or damage to the extent that it was attributable to an act or omission of another shipper. That proposal received support although a concern was expressed that such clarification was unnecessary and might be confusing, given that such an exclusion was already encompassed within the general principle contained in draft article 17(1), which relieved the carrier of all or part of its liability if it proved that “the cause or one of the causes of the loss, damage or delay is not attributable to its fault or to the fault of any person referred to in article 19”. However, it was suggested that as draft article 17 could be

subject to differing judicial interpretation which nevertheless found a carrier liable, perhaps for an overall failure to put into place systems to prevent such a delay, the clarification would still be helpful.

104. It was noted that the intention behind such a provision was only to create a limit in respect of economic loss due to delay but that that limit would not apply to physical or consequential losses due to breach of other contractual obligations such as failure to inform the carrier of the dangerous nature of goods being transported or failure to mark or label such goods accordingly (see draft article 33) for which the shipper should be subject to strict unlimited liability (see para. 95 above). Further, the shipper would still be liable for consequential loss resulting from physical damage to the vessel, other cargo or personal injury, in respect of any breach of its obligations under articles 28, 30 and 32.

Possible limitation on shipper's liability for delay

105. Recalling the Working Group's earlier discussion on possible methods to limit the shipper's liability for delay (see paras. 94-100 above), it was suggested that a fixed sum of 500,000 SDRs could be considered. It was explained that the reason for proposing a fixed sum was that it had proven difficult to tie the limitation level to the weight or value of the goods or to the freight, as neither of these factors necessarily corresponded with the risk in question. For example, a shipper who shipped waste might cause the same amount of damage as a shipper who shipped electronic equipment. It was noted that, whilst this figure was somewhat arbitrary, the amount chosen was based on the average freight rates for a container of between 1,500 and 3,000 US dollars, and that the total amount of the limitation was thought to be sufficient to ensure shippers were fully liable for ordinary delay cases, but to protect them from excessive exposure in extraordinary cases.

106. It was suggested that insurers be consulted for their views on whether that figure suggested for the limitation was appropriate, or on whether a general limitation on all of the shipper's liability for pure economic loss would be more appropriate. It was suggested that it might be necessary to undertake a cost-benefit analysis of the proposal to determine whether the proposed limitation amount represented an insurable risk and whether or not it would affect freight rates and impact negatively on international trade. In response to a proposal that a general limitation for all liability of the shipper arising from delay might be more appropriate, it was said that such an approach might necessitate a higher limitation to accommodate the relatively remote chance of extraordinary losses.

Proposal regarding recoverability of damages

107. It was noted that the draft convention did not expressly refer to the issue, but that, as in various domestic jurisdictions, foreseeability and causality should be necessary elements for a successful claim for damages. It was said that the draft convention should contain a provision to clarify that the issue of recoverability of pure economic loss was not dealt with in the draft convention and was therefore referred to national law. To clarify such issues, a proposal was made to add an additional provision to the draft convention along the following lines: "Without prejudice to article 23, nothing in this Convention prevents the application of the rules regarding the scope of recoverable damages under the applicable law". It was suggested that that principle should be applicable to both carriers and shippers and that the Secretariat should examine how that principle would apply to the liability regimes covered under the draft convention.

108. A question was raised as to what was meant by the term “applicable law” under the proposal and whether it referred to the contractual law or the law of the forum. In that respect, it was suggested that, as the assessment related to economic loss, reference should be made to law of the forum. A suggestion was made that that question be left to interpretation by the courts. As well, a concern was raised that the proposal could have the effect that there would be no liability in respect of delay at all where, under the applicable law, there was no liability for economic loss.

Proposal on freedom of contract

109. A question was raised whether the limitation on the shipper’s liability should be subject to freedom of contract. As noted below (see paras. 190-194 below), the Working Group decided during its consideration of draft article 65 (which dealt with limitation of liability for loss caused by delay of the carrier) to retain the phrase “unless otherwise agreed” in square brackets until the Working Group had decided whether or not liability for delay on the part of the shipper was to be included in the draft convention. It was proposed that, if draft article 65 permitted a carrier to include a clause in its bill of lading that excluded or reduced its liability for delay, that exclusion or limitation should automatically benefit the shipper by a proportionate reduction in its liability for delay. It was suggested that creating a two-way benefit in such a provision would enhance the acceptability of the phrase “unless otherwise agreed” in the text in terms of draft article 65.

The “package” of three proposals

110. It was said that the proposals to render the liability limit subject to freedom of contract and to limit unduly remote damages pursuant to applicable law were complementary. It was noted that article 23 set out a calculation for determining the compensation payable by the carrier in respect of loss or damage to the goods. It was noted that the carrier might also be liable for other losses, and that the proposed provision with respect to the preservation of national rules regarding the causality and foreseeability of damages made explicit what had been implicit under the draft convention.

111. While the Working Group expressed generally positive views about the entire package of three proposals regarding the establishment of a limitation on the shipper’s liability for pure economic loss arising from delay, some concerns were raised regarding the proposal on freedom of contract. Some doubts were expressed about how the principle of proportionality would work in practice, particularly in situations where, for example, the contractual freedom was used to choose another measurement for the loss entirely. There was also some concern whether this approach would be appropriate in general, and it was said that it would be necessary to examine the proposed new text carefully.

112. There was support for the view that any text should make clear that the limitation on the shipper’s liability did not extend to contractual obligations, such as demurrage or damages for the detention of a vessel arising out of a charterparty. It was also agreed that no final decision on the proposals could be taken until a written text was available.

Conclusions reached by the Working Group regarding the three proposals pertaining to the limitation of the shipper’s liability for delay:

113. After discussion, the Working Group decided that:

- On the basis of the above discussions, a written proposal on the issue of a limitation on the shipper's liability for delay should be prepared for consideration at a future session;
- In addition, text should be prepared both regarding the preservation of national rules with respect to the recoverability of pure economic loss, and with respect to the possibility of freedom of contract for the adjustment of the limitation on both the shipper's and the carrier's liability, as linked with the term "unless otherwise agreed" in draft article 65.

[For discussion of delay, see also paragraphs 177-184, A/CN.9/621 (19th Session of WG III) under article 21 at p. 239]

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 30. Basis of shipper's liability to the carrier

Paragraph 1

220. The Working Group was reminded that it had most recently considered the basis of shipper's liability to the carrier at its seventeenth session (see A/CN.9/594, paras. 199-207) and earlier at its sixteenth session (see A/CN.9/591, paras. 136-153).

221. The Working Group was also reminded that it had decided that the liability for breach of the shipper's obligations should be generally fault-based with an ordinary burden of proof (see A/CN.9/591, para. 138). Thus, once a carrier had proved loss or damage was caused by the breach of obligations or negligence of the shipper, the shipper could seek to prove that the loss or damage was not due to its fault.

Variant A or B

222. It was noted that Variant A expressly placed the burden of proof on the carrier to show that the loss or damage was caused by the goods or by a breach of the shipper's obligations under draft articles 27 and 29, subparagraphs 1(a) and (b). By contrast, Variant B focussed on shipper liability for loss, damage or delay caused by the breach of its obligations under draft articles 27 or 29 provided such loss, damage or delay was due to the fault of the shipper. It was further noted that the second sentence, which relieved the shipper of all or part of its liability if it proved that the cause or one of the causes was not attributable to its fault or to the fault of any person referred to in draft article 34, was intended to apply regardless of which of the two variants was ultimately chosen.

223. Some support was expressed for Variant A for the reason that it appeared to implement the earlier decision of the Working Group that shipper liability should be based on fault and expressly imposed the burden of proof on the carrier.

224. However, support was also expressed for Variant B for the reason that it was a clearer expression that shipper liability was fault-based within a contractual relationship. It was said that Variant B was preferable as it expressly set out the responsibility of the shipper and

indicated that the carrier bore the onus of proving that the shipper had breached its obligations and that there was a link of causation between the breach and the loss or damage.

225. Some delegations indicated that Variant B would be acceptable provided that the second sentence of paragraph 1 were deleted. It was said that that sentence created confusion as to the fault-based nature of shipper liability and also cast uncertainty on the principle that the carrier bore the burden of proof in respect of a breach of shipper obligations. Concern was expressed that that sentence appeared to require a shipper to prove that it was not at fault which might lead to the situation that draft article 30 contradicted draft article 17 which dealt with carrier liability. For example, if two or more containers came loose and damaged the ship, the cause of damage could be due to the carrier's failure to load the goods on board correctly or the result of the shipper not having packed the goods in the containers correctly. It was said that, applying the second sentence, if a carrier sued the shipper, the shipper would have the burden of proof to show what occurred on board which would in practice be very difficult. For that reason, it was proposed that shipper liability, contained in draft article 30, should not exactly mirror carrier liability in draft article 17, which merely required that claimants prove that the loss, damage or delay occurred during the period of responsibility of the carrier. It was said that shipper liability should instead be based on fault based on ordinary principles of burden of proof that the shipper was at fault. It was also said that article 30 ought to regulate shipper liability for breach of its obligations due to fault and should not try to regulate who had the burden of proof.

226. In response, it was explained that the second sentence of paragraph 1 was not intended to reverse the burden of proof but rather to set out the position that applied in most legal systems that, once the carrier had discharged its burden of proof in relation to the breach of an obligation by the shipper, the shipper could, except in respect of obligations for which it had strict liability under draft articles 31 and 32, nevertheless bring proof to show that the loss or damage or delay was not attributable to its fault or to the fault of any person referred to in draft article 34.

227. Following that explanation, some support was expressed for variant B provided it was reformulated so as to clarify that the burden of proof lay on the carrier. It was noted that the confusion in respect of burden of proof that applied in draft article 30 had arisen because it had generally been referred to as an ordinary burden of proof as if it involved a case in tort, when in fact the article referred to a contractual cause of action. It was noted that that problem did not arise in some jurisdictions which classified the cause of action for delay as neither a claim in tort or contract but rather as a statutory claim. Given the potential for misunderstanding, it was said that paragraph 1 of draft article 30 should be reformulated to clarify the nature of the burden of proof and the standards that applied thereto.

228. However, some support was expressed for a reformulation of paragraph 1 to provide a straightforward rule of negligence that the carrier prove the fault of the shipper. It was said that neither variant appeared to make clear that the carrier be required to prove the loss was caused by the shipper and that the shipper could be relieved of liability where it showed that it was not at fault. On that basis, an alternative text to Variants A and B was proposed in the following terms: "Subject to the provisions of articles 31 and 32, the shipper is liable to the carrier for loss or damage caused by the breach of its obligations pursuant to article 27 and article 29, unless the shipper proves that the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34".

229. Some reservations were expressed to that formulation for the reason that it did not appear to emphasize the fault-based liability of the shipper. However, the proposal also received some support for the reasons that: it clarified that the burden of proof was in relation to contractual obligations; it indicated that the liability was fault-based such that the obligations of the shipper under articles 27 and 29 were “best efforts” obligations; and it also clarified that first the carrier was to prove the breach, damage and the causation between the two, and it was then for the shipper to show that it was not at fault.

230. It was suggested that, given that the Working Group had generally reached consensus on the nature of the shipper liability provision, the reformulation could be left to the Secretariat. A proposal was made that such a reformulation could be in the following terms: “Subject to the provisions of articles 31 and 32, the shipper is liable to the carrier for loss or damage proved by the carrier to be the result of a breach by the shipper of its obligations pursuant to articles 27 and 29, unless the shipper proves that the cause or one of the causes of the loss or damage was not attributable to its fault or to the fault of any person referred to in article 34”. Some support was expressed for that reformulation although it was suggested that it be modified to indicate that the carrier must not only prove the loss or damage but also that the shipper was in breach of its obligations. It was also suggested that the text might be improved if the questions of fault-based liability and strict liability contained in draft articles 31 and 32 were separated out into two separate sentences.

Reference to article 31 in second sentence of draft article 30, paragraph 1

231. A question was raised whether the reference in the second sentence to article 31 was correct. In that respect it was noted that draft article 31 contained an obligation on the shipper to provide accurate information in a timely manner (paragraph 1) and to guarantee the accuracy of that information (paragraph 2). It was said that strict liability that applied under the second sentence of draft article 30, paragraph 1 should apply only to paragraph 2 of draft article 31 and not to paragraph 1, given that the obligation to provide information in a timely manner should be subject to fault-based rather than strict liability. That proposal received some support.

“was caused by the goods”

232. It was questioned why it was necessary to include the expression “was caused by the goods” in variant A. Some support was expressed for inclusion of the term regardless which variant was chosen to cover situations where the damage was clearly caused by the goods. However, some concern was expressed that the term might be confusing under some systems of law. It was suggested that the formulation of the text seemed to place an obligation of result and not of means on the shipper. It was said that the inclusion of the term was illogical given that goods did not have a life of their own and could not, of themselves cause loss or damage. It was said that the words were also unnecessary given the obligations on the shipper to, inter alia, load the goods so that they would not cause harm to persons or property as set out in article 27, paragraph 1.

Delay

233. Given the Working Group’s earlier decision that carrier liability for delay should be limited to situations where the carrier had agreed to deliver the goods within a certain time (see paras. 180 to 184 above) it was suggested that, as a matter of fairness, a shipper should only be

liable for delay if it had so agreed. It was said that that approach would create fairness as between the carrier and shipper.

234. It was reiterated that the Working Group had decided to delete all references to delay. However, it was noted that mere deletion of all references to delay might not be sufficient to remove the possibility of delay being implied given that the term “loss” as used in both variants, could be interpreted to encompass loss caused by delay. As well, concern was expressed that deletion of all references to delay should not be interpreted as exonerating the shipper from any cause of action for delay that might arise under applicable national law.

235. To avoid any interpretation of implied liability for delay and ensure the preservation of applicable law on shipper’s delay, a proposal was made to add language along the following lines to draft article 30, paragraph 1: “The term ‘loss’ referred to in this article or in article 31 or article 32 does not include the loss caused by delay. Nothing in this Convention prevents the carrier from claiming shipper liability for delay under the applicable law”. It was explained that the first sentence of that proposal was intended to clarify that there was no implied cause of action against the shipper for delay under the draft convention, and the second sentence was intended to clarify that any applicable national law relating to the question of shipper’s delay remained unaffected. Some support was expressed for that clarifying text.

236. Nevertheless, it was said that the second sentence of the proposed text might be unnecessary as the applicable law would apply automatically to matters beyond the scope of the draft convention. In that regard, it was noted that obligations existed under the draft convention for which there was no corresponding liability on either the carrier’s or the shipper’s side, and the liability for those obligations was thus left to applicable law.

Conclusions reached by the Working Group regarding draft article 30, paragraph 1

237. After discussions, the Working Group decided that:

- The text of paragraph 1 be reformulated in accordance with its discussions bearing in mind that the liability of the shipper should be fault-based and take account of the contractual relationship between the shipper and the carrier; and
- That references to delay contained in paragraph 1 be deleted with the possible inclusion of text clarifying that the applicable law relating to shipper’s delay was not intended to be affected.

Paragraph 2

238. Subject to the deletion of the bracketed text “or delay” in accordance with its earlier decision to delete references to delay, the Working Group was in agreement that paragraph 2 should be approved as drafted.

Revised text of draft article 30

239. In accordance with its earlier decision to consider the reformulated text of draft article 30, paragraph 1 (see above, paras. 220 to 237), the Working Group continued its deliberations on the following revised text of that provision:

“Article 30. Basis of the shipper’s liability to the carrier

“1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper’s obligations pursuant to articles 27, [and] 29, subparagraphs 1(a) and (b) [and 31, paragraph 1].

“2. Except in respect of loss or damage caused by a breach by the shipper of its obligations under articles 31 [, paragraph 2,] and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.”

240. It was explained that the redrafted text was based on the proposal made to the Working Group (see above, para. 230), along with the general views expressed in the Working Group with respect to draft article 30. It was further explained that the text in square brackets in both paragraphs was intended to indicate only that the references therein should be adjusted according to the necessary clarifications to be made to draft article 31, in order to ensure that the obligation to provide accurate information was made subject to strict liability, and that the obligation to provide timely information was based on fault. It was also noted that a correction should be made to the final line of the draft text of paragraph 1, deleting the reference to “(a) and (b)”.

241. Although there was some support for the reinsertion of a reference in paragraph 2 that it was the shipper’s responsibility to prove that the cause of the loss or damage was not attributable to its fault, there was broad agreement in the Working Group for the structure and approach of the revised text as drafted.

242. Two drafting suggestions met with approval in the Working Group, and should be examined by the Secretariat:

(a) Paragraph 1 could be redrafted to refer to all of the shipper’s liabilities, including both the fault-based liability and strict liability, since the carrier had to prove the same loss or damage and breach of the shipper’s obligation in both contexts; and

(b) Paragraph 2 could be restructured to refer first to the general principle, and next to the exception.

Conclusions reached by the Working Group regarding the revised text

243. After discussion, the Working Group decided that:

- It was satisfied that the revised text corresponded to its earlier discussion;
- The drafting suggestions as set out in the paragraph above should be considered by the Secretariat; and
- The revised text was otherwise generally acceptable to the Working Group.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 31. Basis of shipper’s liability to the carrier

97. The Working Group approved the substance of draft article 31 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 31. Basis of shipper's liability to the carrier

102. The Commission approved the substance of draft article 31 and referred it to the drafting group.

Material misstatement by shipper [Deleted]

Article 32. Material misstatement by shipper

A carrier is not liable for delay in the delivery of, the loss of, or damage to or in connection with the goods if the nature or value of the goods was knowingly and materially misstated by the shipper in the contract of carriage or a transport document or electronic transport record.

[Last version before deletion: A/CN.9/WG.III/WP.56]

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 29 bis

149. The Working Group considered a proposal for the introduction of a draft article 29 bis in the draft instrument (A/CN.9/WG.III/WP.34, para. 43).

Causation

150. Questions were raised concerning the breadth of draft article 29 bis. It was suggested that the carrier should only be excused from liability for delay of, loss of, or damage to the goods that was caused by the material misstatement of the shipper. It was observed that lack of causality in the proposed draft article was not an innovation, and reference was made to the corresponding provision in article IV.5.h of the Hague-Visby Rules. The prevailing view was that draft article 29 bis contained a well-known provision that dealt with an important matter, and that it should be included in the text in square brackets in order to reflect the reservations expressed with respect to causation.

Delay

151. Questions were raised concerning the inclusion in draft article 29 bis of damages resulting from delay, particularly since the corresponding provision of the Hague-Visby Rules did not include damages for delay. The prevailing view was that the square brackets around the text would also reflect the reservations expressed with respect to the inclusion of damage for delay.

Placement

152. The view was expressed that consideration should be given to the possibility that draft article 14 might already govern situations of material misstatement by the shipper. It was agreed that the Secretariat would consider draft article 14 in deciding where best to locate draft article 29 bis in the draft instrument.

Conclusions reached by the Working Group on draft article 29 bis

153. After discussion, the Working Group decided that:

- The text of draft article 29 bis should be included in the draft instrument in square brackets;
- The issues of causation and the inclusion of damages for delay would be discussed at a future session;
- The Secretariat would consider placing draft article 29 bis in chapter 5 on the liability of the carrier.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Draft article 32. Material misstatement by shipper***General discussion*

154. The Working Group was reminded that it had last considered draft article 32 at its thirteenth session (see A/CN.9/552, paras. 149 to 153).

155. It was indicated that draft article 32 relating to knowing and material misstatement by the shipper regarding the nature or value of the goods was inspired by article 4(5)(h) of the Hague-Visby Rules. It was observed that the provision was seen to be problematic, since no causation was required between the shipper's misstatement and the loss, damage or delay. Further, it was thought that the obligation in this draft provision was already sufficiently covered by draft article 17 on the carrier's liability. A contrary view was expressed that draft paragraph 17(3) related to cases of acts of omissions, but not material misstatements, and that draft article 32 was helpful in that regard.

Conclusions reached by the Working Group regarding draft article 32:

156. After discussion, the Working Group decided that:

- Draft article 32 should be deleted from the text of the draft convention.

Article 31. Information for compilation of contract particulars

1. The shipper shall provide to the carrier, in a timely manner, accurate information required for the compilation of the contract particulars and the issuance of the transport documents or electronic transport records, including the particulars referred to in article 36, paragraph 1; the name of the party to be identified as the shipper in the contract particulars; the name of the consignee, if any; and the name of the person to whose order the transport document or electronic transport record is to be issued, if any.
2. The shipper is deemed to have guaranteed the accuracy at the time of receipt by the carrier of the information that is provided according to paragraph 1 of this article. The shipper shall indemnify the carrier against loss or damage resulting from the inaccuracy of such information.

[See also paragraphs 153-154, A/CN.9/510 (9th Session of WG III) under article 29 at p. 300]

[See also paragraphs 130-133, A/CN.9/552 (13th Session of WG III) under article 29 at p. 301]

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 30. Shipper's obligation to provide information, instructions and documents***General discussion***

128. The Working Group was reminded that it had last considered draft article 30 at its thirteenth session (see A/CN.9/552, paras. 130 to 137).

129. It was observed that this provision was thought to be especially important in light of the contemporary transport practice, in which a carrier seldom saw the goods it was transporting, even when they are non-containerized goods. In this context, the flow of reliable information between the shipper and the carrier was said to be of utmost importance for the successful completion of a contract of carriage, particularly with respect to dangerous goods. It was said that while there were some drafting problems in paragraph (b) that required attention, the Working Group should be encouraged in the course of its deliberations to bear in mind the importance of the shippers' obligations set out in this provision. As a preliminary observation, it was suggested that the phrase in the chapeau "[in a timely manner, such accurate and complete]" should be dealt with in the same fashion as similar text found in draft article 29.

Objective and subjective tests

130. It was indicated that the words "reasonably necessary for" in the chapeau of draft article 30 introduced an objective test on the necessity of the information to be provided by the shipper, while the words "may reasonably assume" in paragraphs (a) and (c) of draft article 30 represented a subjective test of the shipper's assumption regarding the carrier's knowledge. It was suggested that the presence of both tests could be a source of some confusion. In addition,

it was observed that if paragraphs (a) or (c) were ultimately subject to a fault-based liability scheme pursuant to draft article 31, there would be no need of the phrase “reasonably assume”, and it could be deleted.

Paragraph (b)

131. The view was expressed that the current text of draft paragraph 30(b) was extremely broad and could lead to problems in its application, particularly since it could subject the shipper to strict liability pursuant to article 31. One example of the difficulty posed by this article was, for instance with regard to responsibility for the different customs requirements in the event that the mode of transport changed en route during multimodal transport.

132. In response, it was indicated that the broad language of draft paragraph 30(b) reflected the difficulties in providing a complete and detailed list of all the documents necessary in connection with the carriage. It was suggested that the adoption of a fault-based liability regime for this obligation could address a number of concerns relating to this provision, and that a strict liability regime could be limited to the violation of mandatory regulations.

Delay

133. It was observed that the inclusion in draft article 31 of a bracketed reference to delay as a basis of liability of the shipper compounded the difficulties noted with respect to draft paragraph (b). For example, if the shipper of a single container on a large container ship failed to provide a necessary document for customs authorities under paragraph (b), and was therefore responsible for the delay not just of the carrier, but with respect to every other shipper on the vessel, that shipper would be exposed to unforeseeable and potentially enormous losses for that one oversight. Further compounding the problem was said to be the fact that the draft convention currently contained no limitation on the shipper’s liability. This problem was discussed in greater detail with respect to draft article 31 (see below, para. 147).

Paragraph (c)

134. It was suggested that draft paragraph 30(c) should include a reference to draft subparagraph 38(1)(a), and thereby include the accuracy of the description of the goods in the list of obligations for which the shipper was strictly liable pursuant to draft article 31. However, the Working Group was reminded that article 3(5) of the Hague-Visby Rules referred only to accuracy of the description of the goods at the time of the shipment, but that draft paragraph (c) was much broader in its scope and would apply for the duration of the voyage. It was cautioned that, like draft paragraph (b), when the breadth of this provision was coupled with the potential strict liability provision in draft article 31, this provision could bring potentially severe consequences for the shipper. It was noted that, if variant B of draft paragraph 31(2) were adopted, the liability of the shipper would be limited to the information on the goods actually provided by the shipper and that this would relieve the shipper from some of the harsher aspects of the strict liability regime under variant A.

Conclusions reached by the Working Group regarding draft article 30:

135. After discussion, the Working Group decided that:

- The phrase in the chapeau “[in a timely manner, such accurate and complete]” should be considered in the same fashion as similar text in draft article 29;
- Paragraph (b) should be placed in square brackets, pending the Working Group’s consideration of draft article 31;
- Drafting improvements made to this draft article should bear in mind A/CN.9/WG.III/WP.55, as well as international instruments such as the CMNI Convention and suggestions made by delegations;
- The discussion of the Working Group with respect to the basis of the shipper’s liability in draft article 31 should be taken into consideration in future drafts of draft article 30; and
- The reference to draft article 38(1)(b) and (c) in draft paragraph 30(c) should be extended to draft article 38(1)(a).

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 31. Information for compilation of contract particulars

244. The Working Group was reminded that its most recent consideration of the content of draft article 31 on information for the compilation of contract particulars was at its seventeenth session (see A/CN.9/594, paras. 187 to 194). The Working Group proceeded to consider draft article 31 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1

245. It was noted that due to a typographical error, draft paragraph 1 made reference only to draft article 37, subparagraphs 1(a), (b) and (c), and it was agreed that the reference should be corrected to include subparagraph 37(1)(d). It was further indicated that the draft provision had antecedents in the Hague-Visby and Hamburg Rules, and that it was a particularly important provision since it set out the shipper’s obligation that would trigger the strict liability provision in draft article 31(2). Given the serious consequences of a breach of the obligations set out in draft paragraph 1, it was suggested that the use of the word “including” in the draft paragraph was too broad and that it should be more precise in order to provide the shipper with greater predictability regarding its potential strict liability.

246. The Working Group was in agreement that draft paragraph 1 should be corrected through the addition of a reference to subparagraph 37(1)(d), but that the provision could be accepted, bearing in mind that an adjustment to the drafting might be necessary in order to render the text more precise, as indicated in the above paragraph.

Paragraph 2

247. It was recalled that the Working Group had agreed to delete from the text of the draft convention all instances of shipper’s liability for delay (see above, paras. 182 to 184), and that the reference to “delay” in square brackets in the draft paragraph would be deleted accordingly. A question was raised with respect to the fact that draft paragraph 2 set out the liability of the shipper for the accuracy of the information provided to the carrier, but not with respect to its timeliness. It was explained that, in keeping with the Hague-Visby and the Hamburg Rules, the

Working Group had decided at an earlier session to render a failure by the shipper to provide accurate information to be subject to strict liability, while it had intended to make a failure by the shipper to provide timely information subject only to liability based on the fault of the shipper.

248. The Working Group was in agreement that paragraph 2 should be approved as drafted, with the deletion of the reference to “delay.”

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

98. The Working Group approved the substance of draft article 32 and referred it to the drafting group.

99. With regard to the term “contract particulars” used in draft article 32, the Working Group approved the substance of the definition of that term provided in paragraph 23 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 32. Information for compilation of contract particulars; and draft article 1, paragraph 23 (“contract particulars”)

103. It was observed in the Commission that draft articles 32 and 33 provided for potentially unlimited liability on the part of the shipper for not fulfilling its obligations in respect of the provision of information for the contract particulars or in respect of shipping dangerous goods. Concern was expressed that the potentially unlimited liability of the shipper was in contrast with the position of the carrier, which faced only limited liability as a result of the operation of draft article 61. Given other contractual freedoms permitted pursuant to the draft Convention, it was suggested that some relief in this regard could be granted to the shipper by deleting the reference to “limits” in draft article 81, paragraph 2, thereby allowing the parties to the contract of carriage to agree to limit the shipper’s liability. (See the discussion of the proposed deletion of “limits” in respect of draft art. 81, para. 2, in paras. 236-241 below.) The Commission agreed that it would consider that proposal in conjunction with its review of draft article 81 of the text.

104. The Commission approved the substance of draft article 32 and of the definition contained in draft article 1, paragraph 23, and referred them to the drafting group.

Article 32. Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

(a) The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform; and

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

[See also paragraphs 48-51, A/CN.9/510 (9th Session of WG III) under General Discussion, Chapter 7 at p. 283]

[See also paragraphs 138-140 and 146-148, A/CN.9/552 (13th Session of WG III) under article 30 at p. 309]

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 33. Special rules on dangerous goods***General discussion***

157. The Working Group was reminded that it had last considered draft article 33 at its thirteenth session (see A/CN.9/552, paras. 138 to 148).

Paragraph 1***Definition of dangerous goods***

158. There was support for the view that, while existing maritime transport instruments did not contain a definition of dangerous goods, the general definition expressed in draft paragraph 1 was an appropriate starting point for discussion. Another view was expressed that the definition should instead refer to other existing international instruments relating to dangerous goods, such as the International Maritime Dangerous Goods Code (IMDG Code) or the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention). It was observed that the problem with tying the definition of dangerous goods to other instruments such as those suggested was that those definitions were created for public interest purposes and they were extremely technical and could risk becoming quickly obsolete. It was suggested that a

definition of dangerous goods should also clarify if illegal cargo, such as contraband, would fall under this category.

“or become” and “reasonably appear likely to become”

159. It was suggested that draft paragraph 33(1) did not adequately address the case of goods that were safe at the moment of shipment and later developed dangerous properties, and it was suggested that the words “, or become” should be added before the words “or reasonably appear likely to become,” to provide for such instances. However, concern was expressed regarding how that addition might affect the shipper’s marking, labelling and information obligations as set out in draft paragraphs 2 and 3. Further, a suggestion to delete the phrase “reasonably appear likely to become” was not supported, as the phrase was seen to be helpful to the overall definition.

“illegal or unacceptable danger to the environment”

160. There was support for the proposal that the words “or an illegal or unacceptable danger” should be deleted from draft paragraph 33(1) since they failed to add meaning to the term “danger to the environment”. It was also observed that the same changes should be made to similar text in variant A of draft article 15.

Conclusions reached by the Working Group regarding draft paragraph 33(1):

161. After discussion, the Working Group decided that:

- The words “, or become” should be added in square brackets before the words “or reasonably appear likely to become,” for further consideration by the Working Group; and
- The words “or an illegal or unacceptable danger” should be deleted.

Paragraph 2

162. It was indicated that draft paragraph 33(2) established strict liability with respect to the shipper’s obligation to mark or label dangerous goods in accordance with any rules, regulations or other requirements of authorities applicable during any stage of the intended carriage of the goods. The view was expressed that given the harsh burden of strict liability, this provision should be refined to cover only those cases in which the shipper failed to comply with mandatory regulations regarding marking or labelling. It was also proposed that packaging should be added to the shipper’s obligations referred to in this draft paragraph. Further, it was suggested that draft paragraph 33(2) should not impose strict liability on the shipper when the carrier was aware of the dangerous nature of the goods. There was support for the proposal that appropriate language inspired by article 13(3) of the Hamburg Rules should be inserted in draft paragraph 33(2) to refer to the carrier’s lack of knowledge.

The intended carriage

163. It was further indicated that, like draft articles 28 and 29 (see above, para. 124), the provision could place an excessive burden on the shipper, who might not be aware of the actual route of the goods, and might have difficulty determining all of the relevant regulations, particularly the “requirements of authorities”, which might not be publicly available. It was suggested that it might be advisable to require the carrier to provide the necessary information to the shipper in order to allow the shipper to fulfil its paragraph 2 obligations.

Proposed modifications to the text

164. The view was expressed that article 13(1) of the Hamburg Rules could provide an alternative text for the draft provision, but some doubts were raised whether the text was adequate in the modern context of the transport of dangerous goods.

165. There was support for the suggestion that the reference to the performing party should be deleted given the Working Group's agreement that draft chapter 8 of the draft convention should focus on the contractual relationship between the shipper and the carrier. Support was also expressed for the suggestion that the references to "delay" and "loss" in draft paragraph 2 should be adjusted to be consistent with the modification of the same phrase in draft article 31. It was suggested that the words "directly or indirectly" could interfere with issues of causation, and should be deleted. There was support for this proposal.

Conclusions reached by the Working Group regarding draft paragraph 33(2):

166. After discussion, the Working Group decided that:

- The reference to the performing parties should be eliminated from the provision;
- The words "directly or indirectly" should be deleted;
- The provision should be revised so as to treat "delay" and "loss" consistently in draft articles 33(2) and 31; and
- Consideration should be given to adding a reference to the carrier's lack of knowledge of the dangerous nature of the goods.

*Paragraph 3**Strict liability to inform the carrier*

167. It was indicated that draft paragraph 33(3) established strict liability for the shipper's obligation to inform the carrier of the dangerous nature or character of the goods in a timely manner before their delivery to the carrier. With respect to draft paragraph 2, it was suggested that given the harsh nature of the strict liability rules, this obligation should be limited to the shipper's failure to comply with mandatory regulations.

"such shipment"

168. It was indicated that the shipper's obligation set out in draft paragraph 33(3) was similar to the one set out in article 13(2)(a) of the Hamburg Rules. It was suggested that the phrase "such shipment" should be replaced with the phrase "such failure to inform", since it was thought that the possible breadth of the strict liability was too wide if it was tied to all losses arising from the shipment, and not limited to those attributable to the failure to inform. However, it was clarified that the Hamburg Rules contained similar text, and that the potential of being held liable for all losses in connection with the shipment was thought to be an adequate reflection of the serious nature of this obligation. In response, the view was expressed that the regime of strict liability for the shipper's failure to provide information already provided an adequate incentive for the shipper to comply, and that the draft convention should not contain penalty rules. It was suggested that a possible compromise approach might be to require there to be a causal link between the dangerous goods and the loss.

Proposed modifications to the text

169. As a general observation it was suggested that the references to the performing party and to the phrase “directly or indirectly” should be deleted from this provision or the same reasons indicated above for draft paragraph 33(2). In addition, it was suggested that “delay” and “loss” should be modified in the same fashion as those terms in paragraph 2 and in draft article 31.

Conclusions reached by the Working Group regarding draft paragraph 33(3):

170. After discussion, the Working Group decided that:

- The words “directly or indirectly” should be deleted as in paragraph 2;
- The provision should be revised so as to treat ‘delay’ and ‘loss’ consistently in draft articles 33(2), 33(3) and 31;
- The words “such shipment” should be placed in square brackets for further consideration by the Working Group;
- The words “such failure to inform” should be added in square brackets after the words “such shipment” for further consideration by the Working Group.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]*Requirement for similar obligation to draft article 29*

195. The Working Group was reminded that concerns had been raised during its sixteenth session regarding whether the paragraph in draft article 33 dealing with the obligation of the shipper to mark or label dangerous goods in accordance with the applicable local rules depending on the stage of the carriage could place too heavy a burden on a shipper if it was not aware of the intended voyage (see A/CN.9/591, para. 163). It was suggested at that time that it might be advisable to require the carrier to provide the necessary information to the shipper in order to allow the shipper to fulfil its obligations pursuant to draft article 33. It was proposed that the text of a new draft paragraph 33(4) as set out in paragraph 31 of A/CN.9/WG.III/WP.67 could be inserted into the provision in response to those concerns.

196. In light of the Working Group’s decision to revise the text of Variant C of draft article 29 based on a general obligation of mutual cooperation between the shipper and the carrier (see para. 14 of A/CN.9/WG.III/WP.67), it was suggested that the text of draft paragraph 33(4) would not be appropriate, since that text was intended to reflect the more specific obligations in Variant B of draft article 29. There was general support in the Working Group for the view that appropriately drafted text based on the approach in Variant C of draft article 29 would render the insertion of draft paragraph 33(4) unnecessary.

197. However, some concern was expressed that, since draft subparagraph 30(b)(ii) on the obligation of the carrier to timely make its information needs known to the shipper (as set out in para. 6 of A/CN.9/WG.III/WP.69) was still thought to be necessary in spite of the adoption of a provision along the lines of Variant C of draft article 29, it was thought that further clarification of the obligation in draft article 33 might also be necessary. In light of this possibility, it was suggested that draft paragraph 33(4) should be inserted into the text in square

brackets for future consideration by the Working Group, or, in the alternative, that some qualification along the lines of draft paragraph 30(b) that limited the shipper's obligation could be inserted in the appropriate paragraph of draft article 33. In response to those concerns, it was said that the text of draft paragraph 30(b) was a much broader obligation than that in draft article 33, and that it was therefore necessary to more specifically qualify it, and not merely rely on the general obligation of mutual cooperation articulated in Variant C of draft article 29.

Conclusions reached by the Working Group regarding draft paragraph 33(4):

198. After discussion, the Working Group decided that:

- Draft paragraph 33(4) would be unnecessary and could be deleted, provided that the redrafted text of draft article 29 based on the approach taken in Variant C (of para. 14 of A/CN.9/WG.III/WP.67) was sufficient to address concerns regarding the mutual provision of information necessary for the shipper to fulfil its obligations in draft article 33.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 32. Special rules on dangerous goods

249. The Working Group was reminded that its most recent consideration of the content of draft article 32 on special rules for dangerous goods was at its seventeenth session (see A/CN.9/594, paras. 195 to 198). The Working Group proceeded to consider draft article 32 as contained in A/CN.9/WG.III/WP.81, bearing in mind that the references to “delay” in square brackets were to be deleted in accordance with the previous decision of the Working Group (see above, paras. 182 to 184).

“[or become]”

250. The Working Group first considered the phrase “or become” as it appeared in square brackets in the chapeau of draft article 32. In light of concerns regarding the safety of shipping, it was suggested that the text should be retained in the draft provision and the brackets deleted in order to allow for the widest possible scope for the prevention of accidents involving dangerous goods, such that it would include those that were dangerous prior to and during the voyage. In response, doubts were raised as to whether the inclusion of the phrase “or become” was necessary in light of the inclusion in the chapeau of the phrase “reasonably appear likely to become”, which was said to be sufficiently broad to include all risks. Further, it was said that it would be unfair to hold the shipper liable for a failure to inform the carrier about the nature of the goods if they only became dangerous during the voyage, well after they had been delivered by the shipper for carriage. As such, it was thought that the best solution would be to delete the phrase “or become”.

251. There was broad support in the Working Group for the deletion of the phrase “or become”, however, a suggestion to delete the word “reasonably” as redundant in the phrase “reasonably appear likely to become” was not supported.

“[the carriage of such goods]/[such failure to inform]”

252. It was suggested that the variant “the carriage of such goods” in subparagraph (a) should be retained and the variant “such failure to inform” should be deleted, since the carrier

could suffer potentially enormous losses due to the shipper's failure to provide information on the dangerous nature of the goods, such that retention of the phrase offering the broadest protection was warranted. However, that suggestion was not taken up, and there was strong support in the Working Group for the retention of the phrase "such failure to inform" as better addressing the issue of causation of the damage than the phrase "the carriage of such goods", which should be deleted. It was further noted that the phrase "such failure to inform" was more consistent with the approach taken to causation in draft subparagraph (b).

Conclusions reached by the Working Group regarding draft article 32

253. After discussion, the Working Group decided that:

- The phrase "or becomes" in the chapeau of draft article 32 should be deleted along with the square brackets surrounding it;
- References to the shipper's liability for delay should be deleted and the text adjusted accordingly;
- The phrase "such failure to inform" should be retained in the text and the square brackets surrounding it deleted, and the phrase "the carriage of such goods" should be deleted along with the square brackets surrounding it; and
- The text of draft article 32 was otherwise accepted by the Working Group.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 33. Special rules on dangerous goods

100. It was observed that the term "consignor" was used in paragraph (a) of draft article 33, and that the Working Group had agreed to delete all references to the consignor (see above, paras. 21 to 24). It was proposed that the draft provision could be adjusted by deleting the phrase "the consignor delivers them" and replacing it with text along the lines of: "they are delivered". The Working Group agreed with that general approach.

101. Subject to that adjustment to the text in order to delete the reference to the "consignor", the Working Group approved the substance of draft article 33 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 33. Special rules on dangerous goods

105. The Commission approved the substance of draft article 33 and referred it to the drafting group.

Article 33. Assumption of shipper's rights and obligations by the documentary shipper

1. A documentary shipper is subject to the obligations and liabilities imposed on the shipper pursuant to this chapter and pursuant to article 55, and is entitled to the shipper's rights and defences provided by this chapter and by chapter 13.
2. Paragraph 1 of this article does not affect the obligations, liabilities, rights or defences of the shipper.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(g) Paragraph 7.7**

164. There was general support for the text of draft article 7.7 as a useful attempt to deal with the position of the FOB seller who, although not being the shipper, was nevertheless mentioned as the shipper in the transport document. However a concern was raised as to the use of the phrase "accepts the transport document". In that respect it was suggested that acceptance should be understood as the act or manner by which the documentary shipper became a holder of the bill of lading. It was said that the phrase should also be considered in the context of a situation when a non-negotiable transport document or non-negotiable electronic record was issued. Another concern was expressed as to whether all the liabilities and responsibilities that were imposed upon the shipper should also be imposed on the FOB seller. In response to that concern, it was stated that, given that the named shipper (as the first holder of the bill of lading) acted as the shipper with all the rights of the shipper, then it was logical that it should also assume all the obligations of the shipper. It was generally accepted that this issue should be considered a matter for further consideration. It was suggested that the draft provision should be expanded to deal with the situation where no shipper was named in the transport document with a suggestion that in such cases a presumption could apply that the person delivering the cargo was the shipper. A further concern was that the provision needed to distinguish more clearly between the shipper and the shipper named in the transport document. In that context, it was suggested that further attention should be given to determining whether the liability of the "person" identified in draft article 7.7 should be joint or joint and several with that of the shipper, or whether it should be exclusive of the liability of the shipper. It was agreed that further deliberation was needed in respect of the various views, concerns and suggestions mentioned above.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]**Draft article 31**

154. The Working Group considered the text of draft article 31 as contained in document A/CN.9/WG.III/WP.32.

General discussion

155. The Working Group was reminded that, of the three possible types of shippers, the documentary shipper, the contractual shipper and the actual shipper, draft article 31 was intended to deal with the position of the f.o.b. seller who was named as the shipper in the transport document (see A/CN.9/510, para. 164 and A/CN.9/WG.III/WP.21, paras. 118-122). Further, it was noted that, generally speaking, this provision was intended to mirror the identity of the carrier provision in paragraph 36(3), and there was some suggestion that perhaps that paragraph and this provision should be aligned. It was generally agreed that the most common situation that was likely to arise under draft article 31 was where a request would be made to change the name of the shipper in the transport document. In addition, it was also agreed that further investigations should be conducted to determine whether the problem of failing to name any shipper in the transport document was sufficiently common to warrant consideration in this provision. “subject to the responsibilities and liabilities imposed on the shipper”.

156. Questions were raised whether the intention of draft article 31 was that the responsibilities and liabilities of the contractual shipper would pass to the actual or documentary shipper, or whether the intention was that there would be joint liability. In response, it was noted that the intention of draft article 31 was to impose the responsibilities and liabilities on the documentary shipper not instead of, but in addition to, the contractual shipper. Further concerns were raised regarding whether it was appropriate that the documentary shipper should be subject to all of the responsibilities and liabilities imposed on the contractual shipper. It was suggested that it might be preferable to apply draft article 31 only in cases where the identity of the contractual shipper was unknown, taking care to ensure that the documentary shipper should be liable for providing false or inaccurate information whether or not the contractual shipper was known. The prevailing view was that square brackets should be inserted around the phrase “subject to the responsibilities and liabilities” pending further consideration of the concerns raised in the context of this draft article.

“accepts the transport document or electronic record”

157. Concern was expressed that the use of the word “accepts” was imprecise and allowed too broad an interpretation of the draft provision. While it was noted that the word “accepts” accurately reflected the situation where the documentary shipper became the first holder in the case of negotiable instruments, it was suggested that another word, such as “receives” might be preferable in terms of raising fewer concerns. The prevailing view was that the words “accepts” and “receives” should be placed in square brackets in the text.

Conclusions reached by the Working Group on draft article 31

158. After discussion, the Working Group decided that:

- The general intention of draft article 31 was acceptable, but that further thought should be given to the precise ambit of the provision, and whether it should only be a default rule where the identity of the contractual shipper was not known;
- The phrase “subject to the responsibilities and liabilities” should be placed in square brackets;
- The word “accepts” should be placed in square brackets for future discussion, together with the word “receives”.

[16th Session of WG III (A/CN.9/591 and Corr.1) ; referring to A/CN.9/WG.III/WP.56]**Draft article 34. Assumption of shipper's rights and obligations*****General discussion***

171. The Working Group was reminded that it had last considered draft article 34 at its thirteenth session (see A/CN.9/552, paras. 154 to 158).

172. It was indicated that draft article 34 was intended to deal with the situation of the FOB seller who was named as the shipper in the transport document, and the assumption by that documentary shipper of the contractual shipper's rights and obligations by virtue of the acceptance or receipt of the transport document. There was support for the view that the documentary shipper should be required to accept that identity before it could be held accountable, and it was suggested that the term "accepts" should be retained and the brackets and other possible terms deleted, as "accepts" best conveyed the intended requirement. It was also suggested that the words "that its name appears on the transport document or the electronic transport record as the shipper" should be inserted after the word "accepts", in order to narrow the interpretation of the draft provision. There was also support for this suggestion, although some concern was expressed that a requirement for acceptance by the documentary shipper could lead to abuses in situations where a party would attempt to avoid its liability by refusing to accept the document.

173. It was also suggested that the application of draft article 34 should be limited to cases where the carrier did not know the identity of the contractual shipper. However, some doubt was expressed regarding how often that would arise in practice, and it was observed that draft paragraph 37(b) required the instruction of the contractual shipper to include a person other than the contractual shipper in the transport document.

174. There was support for the suggestion that draft article 34 should clearly indicate that the provision did not relieve the contractual shipper from its obligations, as expressed in draft paragraph 34(2) contained in paragraph 39 of A/CN.9/WG.III/WP.55. Support was also expressed for a proposal to insert the bracketed text in A/CN.9/WG.III/WP.56 "subject to the responsibilities and liabilities" and to delete the brackets. There was agreement that the text as it appeared in A/CN.9/WG.III/WP.55 reflected these amendments and should be included in the draft convention.

Conclusions reached by the Working Group regarding draft article 34:

175. After discussion, the Working Group decided that:

- The text of draft article 34 contained in paragraph 39 of A/CN.9/WG.III/WP.55 should be inserted in the draft convention;
- The phrase "receives the transport document or the electronic record" in draft paragraph 34(1) of the text in A/CN.9/WG.III/WP.55 should be substituted with the words "accepts that its name appears on the transport document or the electronic transport record as the shipper".

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 33. Assumption of the shipper's rights and obligations by the documentary shipper**

254. The Working Group was reminded that its most recent consideration of the content of draft article 33 on the assumption of the shipper's rights and obligations by the documentary shipper was at its sixteenth session (see A/CN.9/591, paras. 171 to 175). The Working Group proceeded to consider draft article 33 as contained in A/CN.9/WG.III/WP.81.

255. It was observed that the definition of "documentary shipper" as set out in paragraph 10 of draft article 1 had been created from the first sentence of the previous version of the draft provision as found in A/CN.9/WG.III/WP.56.

256. The Working Group agreed that draft articles 1(10) and 33 should be approved as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 34. Assumption of shipper's rights and obligations by the documentary shipper**

102. The Working Group approved the substance of draft article 34 and referred it to the drafting group.

Paragraph 9 of draft article 1

103. With regard to the term "documentary shipper" used in draft article 34, the Working Group approved the substance of the definition of that term provided in paragraph 9 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 34. Assumption of shipper's rights and obligations by the documentary shipper; and draft article 1, paragraph 9 ("documentary shipper")**

106. A concern was expressed that draft article 34 was too broad in subjecting the documentary shipper to all of the obligations of the shipper. That view was not taken up by the Commission. In response to a question whether the documentary shipper and the shipper could be found to be jointly and severally liable, the view was expressed that there was not intended to be joint and several liability as between the two.

107. The Commission approved the substance of draft article 34 and of the definition contained in draft article 1, paragraph 9, and referred them to the drafting group.

Article 34. Liability of the shipper for other persons

The shipper is liable for the breach of its obligations under this Convention caused by the acts or omissions of any person, including employees, agents and subcontractors, to which it has entrusted the performance of any of its obligations, but the shipper is not liable for acts or omissions of the carrier or a performing party acting on behalf of the carrier, to which the shipper has entrusted the performance of its obligations.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(h) Paragraph 7.8**

165. It was stated that draft article 7.8 set out a classical principle that the shipper was responsible for the acts of omissions of its subcontractors, employees or agent and that this responsibility was properly limited to acts or omissions that fell within the scope of the person's contract, employment or agency. However, strong concerns were expressed that the provision as drafted imposed too broad responsibility for the shipper in respect of the acts of omissions of persons to whom it had delegated its responsibilities. It was suggested that the provision was too burdensome when compared to similar provisions in respect of the carrier. It was also suggested that draft article 7.8 should be further refined with reference to draft article 5.2.2 which, inter alia, allowed a carrier to act on behalf of the shipper. It was noted that there was a possibility that the carrier could attribute fault on its part to the shipper by virtue of draft article 7.8. It was agreed that this issue should be further examined.

166. It was further agreed that the proposal for alternative language made in respect of draft article 7.6 (see above, para. 161) should be further examined and that the reference to agents and servants of the shipper in the proposal might be deleted, as the matter might be dealt with in draft article 7.8.

167. A suggestion was made that the position of the shipper with respect to the activities of its subcontractors, employees or agents should be in line with the position of carriers in respect of such persons. In that respect, it was suggested that the language in draft article 7.8 should be more closely aligned with the language used in draft article 6.3.2. In opposition to that suggestion, it was said that, although the Working Group was seeking to maintain a fair balance between the shipper and the carrier, it should not necessarily use the exact same wording when describing both parties' responsibilities. In fact it was suggested that the circumstances under which a shipper should be liable for the actions of a third party pursuant to draft article 7.8 should be considered from a different angle than the circumstances under which a carrier should be liable for acts of third parties under draft article 6.3.2.

168. As a matter of drafting, it was suggested that the draft article should be examined in all languages to ensure that consistent terms were used to describe matters such as "responsibilities" or "obligations" of the shipper.

169. The Working Group agreed that draft article 7.8 was a basis on which to continue discussions whilst keeping in mind the various concerns that had been expressed as to its current wording. At the close of the discussion, it was suggested that draft article 7.8 should be

narrowed so as to apply only to shipper obligations that were delegable rather than those obligations that were non-delegable.

170. It was agreed that the text in draft article 7.8 should be retained along with the proposal set out above at paragraph 161 as an alternative for the current text of draft article 7.6 so that both texts could be considered again at a future session of the Working Group.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 32

159. The Working Group considered the text of draft article 32 as contained in document A/CN.9/WG.III/WP.32.

General discussion

160. It was agreed that there was a need for a provision such as draft article 32 in the draft instrument. It was observed that draft article 32 was intended to mirror the text of paragraph 15(3) (A/CN.9/WG.III/WP.36) regarding the liability of a performing party for the acts and omissions of any person to whom it had delegated the performance of any of the carrier's responsibilities under the contract of carriage, and that, in fact the two provisions used virtually identical language. Some concern was expressed regarding the persons who could be included in draft article 32, but it was suggested that the phrase "any person to which [the shipper] has delegated the performance of any of its responsibilities under this chapter" made the category of persons to whom it applied sufficiently clear. Concern was also expressed whether draft article 32 was sufficiently clear regarding the general rule that the liability of the shipper should be based on fault, but it was suggested that the phrase "as if such acts or omissions were its own" sufficiently clarified the basis on which liability would be assessed. The prevailing view was that the text of draft article 32 should be retained as drafted.

Conclusions reached by the Working Group on draft article 32

161. After discussion, the Working Group decided that:

- The general structure of draft article 32 was acceptable and the current text should be maintained for future discussion;
- Questions raised regarding the interaction of this provision with paragraph 11(2) and draft article 29 bis should be considered at a future session.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 35. Vicarious liability of the shipper

General discussion

176. The Working Group was reminded that it had last considered draft article 35 at its thirteenth session (see A/CN.9/552, paras. 159 to 161).

177. It was recalled that draft article 35 was intended to duplicate with respect to the shipper the provisions in draft article 19 relating to the liability of the carrier for its agents, employees,

and servants. However, the view was expressed that this provision could cause problems of interpretation in various provisions of the draft convention where, for example in draft subparagraph 17(3)(i), reference was made to “the shipper or any person referred to in article 35, the controlling party or the consignee”. It was observed that this construction could be interpreted to mean that the employees and agents of the shipper were included, but not the employees or agents of the controlling party or the consignee. Unlike draft article 35, draft article 19 with respect to the carrier’s employees and agents was a core provision of the draft convention and did not pose the same interpretation problems as the carrier was not often referred to in the same phrase as other parties so as to cause confusion. Given this difficulty, it was suggested that draft article 35 should be deleted.

178. However, general support was expressed for the inclusion of a provision such as draft article 35, notwithstanding the possible difficulties in interpretation given its current use in the draft instrument. It was further observed that if consideration were to be given to including in the draft instrument a provision on the limitation of liability of the shipper, a provision such as draft article 35 would be important to include agents, employees and servants who would receive the benefit of that limitation on liability. There was support for the proposal that the alternative draft contained in paragraph 41 of A/CN.9/WG.III/WP.55 be included in the draft convention as more clearly expressing the same principles as the text in A/CN.9/WG.III/WP.56.

179. It was suggested that the phrase “on the carrier’s side” in draft article 35(2) in the text in A/CN.9/WG.III/WP.55 was unnecessary since “performing party” was defined in the draft convention as persons acting on behalf of the carrier. It was further observed that draft article 35 might need further consideration in light of draft paragraph 14(2), when under “free in and out (stowed)” (FIO(S)) clauses, the carrier contracted out certain of its obligations to the shipper, and should not be liable for the actions of the shipper’s employees or agents in carrying out those obligations.

Conclusions reached by the Working Group regarding draft article 35:

180. After discussion, the Working Group decided that:

- The text of draft article 35 contained in paragraph 41 of A/CN.9/WG.III/WP.55 should be inserted in the draft convention;
- The Secretariat should be requested to verify and harmonize the references to draft article 35 in other articles of the draft convention;
- The title of the article should be revised to ensure linguistic uniformity in the various languages.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 34. Liability of the shipper for other persons

257. The Working Group was reminded that its most recent consideration of the content of draft article 34 on the liability of the shipper for other persons was at its sixteenth session (see A/CN.9/591, paras. 176 to 180). The Working Group proceeded to consider draft article 34 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1

258. It was suggested that the bracketed text in draft paragraph 1 should be retained and the brackets surrounding it deleted, since it was thought that the shipper should not be held responsible for the actions of the carrier. While it was questioned whether the text in square brackets was necessary, it was agreed that, if it provided clarification of the draft provision, its inclusion was acceptable. There was broad support for the retention of the text in square brackets. In addition, the Working Group requested the Secretariat to address the drafting problem raised during the consideration of draft articles 14(2), 27(2) and 17(3)(h) (see above, para. 157), which should be rendered consistent with draft article 34(1) with regard to whether the shipper was responsible for the acts and omissions of the controlling party and the consignee.

Paragraph 2

259. The Working Group agreed to delete draft paragraph 2, based on its earlier decision to delete draft article 18(2) (see above, para. 78).

Conclusions reached by the Working Group regarding draft article 34

260. After discussion, the Working Group decided that:

- The phrase in square brackets in draft article 34(1) should be retained and the square brackets surrounding it should be deleted;
- The Secretariat was requested to make the necessary adjustments to draft articles 14(2), 27(2), 17(3)(h) and 34 in order to render consistent the treatment of the shipper's responsibility for the acts of the consignee and the controlling party; and
- Draft article 34(2) should be deleted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 35. Liability of the shipper for other persons**

104. It was observed that the term “the consignor” appeared in draft article 35, and that the Working Group had agreed to delete all references to the consignor (see above, paras. 21 to 24). The Working Group agreed that the phrase “the consignor or” should simply be deleted.

105. Some concerns were raised in the Working Group regarding the clarity of the text since the phrase “as if such acts and omissions were its own” had been deleted as redundant as noted in footnote 76 in A/CN.9/WG.III/WP.101. It was suggested that the text was unclear regarding whether the provision concerned fault-based or strict liability, and regarding on whose part that liability ought to be considered. In response, it was noted that the provision simply stated the general principle of vicarious liability, rendering the shipper responsible for the acts of its employees, agents, subcontractors and the like, and that the liability standard would depend upon the particular obligation breached pursuant to the terms of the draft convention. In addition, it was observed that the re-insertion of a phrase such as that suggested could be rather complicated, since it could raise questions regarding the attribution of fault of the shipper under draft article 31, and since similar treatment would have to be given to draft article 19 regarding the liability of the carrier for other persons, which could raise significant complications

throughout the text. After discussion, the Working Group decided that the provision was sufficiently clear, particularly in light of the well-known principle that was enunciated therein.

106. The Working Group approved the substance of draft article 35 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 35. Liability of the shipper for other persons

108. The Commission approved the substance of draft article 35 and referred it to the drafting group.

Cessation of shipper's liability [Deleted]

Article 36. Cessation of shipper's liability

A term in the contract of carriage according to which the liability of the shipper or the documentary shipper will cease, wholly or partly, upon a certain event or after a certain time is void:

(a) With respect to any liability pursuant to this chapter of the shipper or a documentary shipper; or

(b) With respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security for the payment of such amounts.

[Last version before deletion: Annex to A/CN.9/645]

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 36. Cessation of shipper's liability

General discussion

181. The Working Group was reminded that it had last considered draft article 36 at its thirteenth session (see A/CN.9/552, paras. 162 to 164), when it was decided to delete draft chapter 9 of the draft convention on freight, but to retain draft article 36 for further consideration.

182. There was support expressed for draft article 36, which would render invalid cesser clauses, in which the liability of the shipper would cease upon a certain event. It was also indicated that draft article 36 was related to draft article 94(2) of the draft convention, which voided any provision that excluded or limited the obligations of the shipper, and that any decision on draft article 94(2) would affect the deliberations of the Working Group on draft article 36. However, the view was also expressed that draft article 36 was related to but distinct from draft paragraph 94(2), at least insofar as draft article 36 dealt with the payment of freight.

Conclusions reached by the Working Group regarding draft article 36:

183. After discussion, the Working Group decided that:

- The brackets around draft article 36 should be removed and its text should be retained; and
- Draft article 36 should be reconsidered in light of the decision taken with respect to draft article 94(2).

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 35. Cessation of shipper's liability**

261. The Working Group was reminded that its most recent consideration of the content of draft article 35 regarding the cessation of the shipper's liability was at its sixteenth session (see A/CN.9/591, paras. 181 to 183). The Working Group proceeded to consider draft article 35 as contained in A/CN.9/WG.III/WP.81.

262. It was noted that the reference in subparagraph (a) should be corrected to read "article 33" rather than "article 35", and that given the defined term "documentary shipper" in draft article 1(10), that term should be used instead of the reference to "a person referred to in article 33". In addition, the Secretariat was requested to consider whether the term "documentary shipper" could also be substituted for the phrase in the chapeau of the draft provision "any other person identified in the contract particulars as the shipper", and whether any adjustment should be made to the title of the draft article in terms of adding the documentary shipper. In addition, it was suggested that the term "void" should be used instead of "not valid" in the chapeau, and that draft subparagraph (c) should be retained in square brackets until the Working Group had made its final decision regarding chapter 12 on transfer of rights.

Conclusions reached by the Working Group regarding draft article 35

263. After discussion, the Working Group decided that:

- The reference to "article 35" should be corrected to "article 33", and the term "documentary shipper" as defined in draft article 1(10) should be used in subparagraph (a) and possibly in the chapeau;
- Consideration should be given to changing the word "not valid" to "void"; and
- Draft article 35(c) should be retained in square brackets pending a decision by the Working Group on chapter 12.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 36. Cessation of shipper's liability**

107. The view was expressed that draft article 36 should be deleted, since it was felt that the liability provision in paragraph (a) had been dealt with under other articles of the draft convention, and that the freight provision in paragraph (b) was inappropriate in the context of

the draft convention. While there was support for that view with respect to paragraph (b), and a remaining question regarding the underlying rationale of the provision, the Working Group declined to change its existing consensus and agreed to maintain the provision.

108. The Working Group approved the substance of draft article 36 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 36. Cessation of shipper's liability

109. Questions were raised in the Commission regarding the rationale for the inclusion of draft article 36 in the text, particularly in the light of the generally permissive approach of the draft Convention to freedom of contract. While it was recalled that certain delegations in the Working Group had requested the inclusion of a provision on the cessation of the shipper's liability, the Commission was of the general view that the provision was not necessary in the text and could be deleted.

110. The Commission agreed to delete article 36 from the text of the draft Convention.

CHAPTER 8.

TRANSPORT DOCUMENTS AND ELECTRONIC TRANSPORT RECORDS

General Discussion on the Chapter

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Transport documents and electronic transport records—Chapter 9

216. The Working Group was reminded that it had most recently considered the chapter of the draft convention on transport documents and electronic transport records at its eleventh session (see A/CN.9/526, paras. 24 to 61). It was also recalled that proposals concerning transport documents and electronic transport records had been presented for the consideration of the Working Group at its current session (A/CN.9/WG.III/WP.62 and A/CN.9/WG.III/WP.70). Further, it was noted that the text of the provisions set out in A/CN.9/WG.III/WP.62 was the current text of the draft convention as found in A/CN.9/WG.III/WP.56, without modification, while A/CN.9/WG.III/WP.70 suggested alternative text with respect to draft article 37 and draft paragraph 40(3).

217. The Working Group agreed with the suggestion that it should consider the chapter on transport documents and electronic transport records using an article-by-article approach, since it was the first time that it was considering the chapter during its second reading of the draft convention. Further, it was observed that while reference in the course of discussion was often made to “transport documents” only, it was understood that reference was made equally to “electronic transport records”.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Chapter 9 – Transport documents and electronic transport records

264. The Working Group was reminded that its most recent consideration of draft chapter 9 on transport documents and electronic transport records had commenced at its seventeenth session (see A/CN.9/594, paras. 216 to 233) and had continued at its eighteenth session (see A/CN.9/616, paras. 9 to 82). It was also recalled that the most recent complete consideration of the topic by the Working Group had taken place during its eleventh session (see A/CN.9/526, paras. 24-61), and that a written proposal regarding the identity of the carrier in then draft article 40 (3) had been submitted for the consideration of the Working Group for its eighteenth session (see A/CN.9/WG.III/WP.79). The consideration by the Working Group of the provisions of chapter 9 at the present session was based on the text as set out in A/CN.9/WG.III/WP.81.

265. The Working Group was reminded that the substantive articles contained in draft chapter 9 were closely related to a number of definitions, including those contained in subparagraphs 16, 17, 18, 20, 21, 22 and 23 of draft article 1.

Article 35. Issuance of the transport document or the electronic transport record

Unless the shipper and the carrier have agreed not to use a transport document or an electronic transport record, or it is the custom, usage or practice of the trade not to use one, upon delivery of the goods for carriage to the carrier or performing party, the shipper or, if the shipper consents, the documentary shipper, is entitled to obtain from the carrier, at the shipper's option:

(a) A non-negotiable transport document or, subject to article 8, subparagraph (a), a non-negotiable electronic transport record; or

(b) An appropriate negotiable transport document or, subject to article 8, subparagraph (a), a negotiable electronic transport record, unless the shipper and the carrier have agreed not to use a negotiable transport document or negotiable electronic transport record, or it is the custom, usage or practice of the trade not to use one.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(a) Paragraph 8.1***

25. The substance of paragraph 8.1 was found to be generally acceptable. It was pointed out that a purpose of paragraph 8.1 was to recall the traditional distinction between the evidentiary function served by a transport document as a receipt for the goods and the commercial function served by a negotiable transport document as representing the goods. Those two functions were reflected in subparagraphs (i) and (ii) respectively. With respect to subparagraph (i), a suggestion was made that the words “transport document” should be replaced by the word “receipt”. While the term “transport document” was generally preferred for reasons of consistency in terminology, it was acknowledged that, since not all transport documents as defined under paragraph 1.20 served the function of evidencing receipt of the goods by the carrier, it was important to make it abundantly clear that, under subparagraph 8.1(i), the transport document should serve the receipt function. Subparagraph (ii) was found particularly useful as a reflection of the practice under which the parties might agree to use non-negotiable transport documents. It was recalled that a third function of a transport document was traditionally to record the rights and obligations of the parties to the contract of carriage. It was not suggested that this contractual function should be reflected in the text of draft article 8.

26. A question was raised as to whether paragraph 8.1 might interfere with various existing practices regarding the use of specific types of transport documents such as “received for shipment” and “shipped on board” bills of lading. Concern was expressed that the draft instrument should not affect such practices, in particular in the context of documentary credit. It was stated in response that paragraph 8.1 had been drafted broadly to encompass any type of transport document that might be used in practice, including any specific type of bill of lading or even certain types of non-negotiable waybills. Thus the draft instrument remained neutral, in particular with respect to documentary credit practices.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]**Draft article 37. Issuance of the transport document or the electronic transport record**

218. The Working Group was reminded that the historical antecedents of draft article 37 were article 3(3) of the Hague and Hague-Visby Rules, where the carrier issued the bill of lading to the shipper on the shipper's demand, and article 14(1) of the Hamburg Rules, which provided for the issue of the bill of lading to the shipper, and, by way of the definition of the "shipper", the consignor. It was noted that the principal innovation of draft article 37 of the draft convention was the recognition that the "consignor" was not necessarily the same as the "shipper", for example, in the case of an FOB seller that was the "consignor" and an FOB buyer that was the "shipper". While it was acknowledged that in most cases the shipper and the consignor would be cooperating in light of the contract of sale, it was possible that a dispute would arise, and it would therefore be important which documents had been received by each party. It was explained that draft article 37 was intended to regulate those situations where a dispute had arisen by entitling the consignor to receive a transport document evidencing receipt only, while the shipper or the documentary shipper was entitled to receive a negotiable transport document in order to protect its interests until payment was made under the contract of sale.

219. It was observed that the proposed text of draft article 37 in A/CN.9/WG.III/WP.70 was substantively different from that currently in the draft convention. The approach taken in the text set out in A/CN.9/WG.III/WP.70 was that the consignor, and not the shipper, would effectively control the goods, and that the shipper would not control the goods until it was so permitted by the consignor.

220. Concern was expressed regarding the approach taken in draft article 37 of the current text of the draft convention. It was thought that under an FOB contract of sale, the FOB seller, or consignor, would not receive sufficient protection under draft article 37 because it would receive only a receipt rather than a negotiable document. It was suggested that there were two problems with draft article 37: the receipt obtained by the consignor had no legal status, and that one of the functions of a bill of lading was as evidence of receipt of the goods. In addition, it was said that in some jurisdictions, the person delivering the goods to the carrier had an independent right to obtain a negotiable transport document, and that the consignor in an FOB sale should receive the negotiable document as security for goods when it delivered them to the carrier. As such, a preference was expressed by some for the version of draft article 37 contained in A/CN.9/WG.III/WP.70.

221. However, the opposite view was expressed that the approach set out in draft article 37 of the current text of the draft convention was appropriate in the case of an FOB sale. Pursuant to paragraph (a) of draft article 37, the consignor had an independent entitlement to obtain a receipt from the carrier indicating that the goods had been delivered for carriage. Under paragraph (b) of draft article 37, the shipper was entitled to obtain the appropriate transport document from the carrier, and it was intended to be the choice of the shipper whether the transport document issued by the carrier was negotiable or non-negotiable, unless it was the custom in the trade not to issue a document at all. It was thought that reference in paragraph (b) to "the person referred to in article 34", or the documentary shipper, adequately protected the FOB seller or consignor. While under an FOB sale, the FOB seller would usually act on behalf of the FOB buyer, that was not the case under the contract of carriage, where the FOB seller

had an independent right to obtain the transport document. The only way for the carrier to know that the FOB seller, or consignor, was entitled to the negotiable transport document rather than the FOB buyer, or shipper, was if the shipper instructed the carrier that the draft article 34 documentary shipper, i.e. the FOB seller, should receive the negotiable transport document. Further, the shipper, or FOB buyer, would be under an obligation to notify the carrier in this regard under the terms of the contract of sale. Under this mechanism, the FOB seller, or consignor, would receive the negotiable transport document and was thought to be adequately protected. It was thought that this was an appropriate approach, and that the parties to the sales contract should build protection for their interests into that contract, and should not look to the parties to the contract of carriage to provide such protection.

222. There was support for the view that the documentary shipper should have an independent right to receive a transport document under paragraph (b) of draft article 37 rather than relying on the terms of the contract of sale for such protection. Therefore, a preference was expressed for the approach as set out in draft article 37 of the draft convention over that set out in A/CN.9/WG.III/WP.70, which was said to be imprecise regarding the identity of the consignor, given the broad definition of “consignor” in draft article 1(i), which included anyone who actually delivered the goods to the carrier, even, for instance, a truck driver. Further, it was said that the approach in A/CN.9/WG.III/WP.70 appeared to create a novel and complex system where the consignor obtained the receipt for the goods and could then exchange it for a negotiable transport document, and that this approach was not necessary to provide the FOB seller with a document in its own right to protect itself.

223. A number of drafting suggestions were made aimed at the clarification of draft article 37. It was generally agreed that the text in paragraph (a) should be clarified to indicate that it referred to a mere receipt and not to a transport document or a receipt, bearing in mind that the definition of “transport document” in draft article 1(n) included a receipt. There was also agreement that reference should be made in paragraph (b) to both negotiable and non-negotiable transport documents and electronic transport records, and that it could be clarified that it was the choice of the shipper whether the carrier issued a negotiable or a non-negotiable transport document. It was thought that the phrase “expressly or impliedly” was probably unnecessary in draft paragraph (b), and it was suggested that it be deleted. It was observed that that phrase was repeated in various provisions in the text of the draft instrument, and it was agreed that regard would be had to each such reference and whether it was necessary in each particular instance.

Conclusions reached by the Working Group regarding draft article 37:

224. After discussion, the Working Group decided that:

- The approach taken in the text of draft article 37 was acceptable; and
- The text of draft article 37 should be modified by the Secretariat to include: an appropriate reference in draft paragraph (a) to indicate that it referred to receipts; an indication in draft paragraph (b) that it was the shipper’s right to choose which document it wanted the carrier to issue; reference to non-negotiable transport documents should be included in draft paragraph (b); and the use of the phrase “expressly or impliedly” should be reviewed for possible deletion throughout the text of the draft convention.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 36. Issuance of the transport document or the electronic record**

266. The Working Group noted that draft article 36 had been amended as agreed by the Working Group at its seventeenth session (A/CN.9/594, paras. 223 and 224).

267. Support was expressed for draft article 36 as drafted. It was noted that subparagraph (b) entitled the shipper to obtain from the carrier either a negotiable or non-negotiable transport document but that the latter part of subparagraph (b) did not entitle the shipper to obtain a negotiable transport document if the shipper and carrier had agreed not to use a negotiable transport document or a negotiable electronic transport document. A clarification was sought as to whether a shipper could nevertheless obtain a non-negotiable transport document or non-negotiable electronic transport document in that circumstance. It was agreed that such was the intention of subparagraph (b) and if that was not clear then the text should be clarified. It was suggested that the subparagraph could be restructured so that the exception to the principle which was currently contained in the chapeau could appear after the principle which was stated in subparagraphs (a) and (b).

Conclusions reached by the Working Group regarding draft article 36

268. The Working Group decided that, subject to the proposed drafting suggestions, the text in draft article 36 as found in A/CN.9/WG.III/WP.81 should be approved.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 37. Issuance of the transport document or the electronic transport record**

109. It was observed that the term “consignor” was used in paragraph (a) of draft article 37, and that the text of that provision would have to be adjusted following the Working Group’s agreement to delete all references to the consignor (see above, paras. 21 to 24). A suggestion that the appropriate amendment could be accomplished by deletion of the chapeau of draft article 37 and of the whole of paragraph (a), but it was noted that while paragraph (a) could be deleted, the content of the chapeau of the text should be retained in order to cover the situation in some trades where no transport document or electronic transport record was issued.

110. The Working Group agreed to delete paragraph (a) and to request the drafting group to make such consequential changes to the remaining text as were necessary. The Working Group was also reminded that simple deletion of paragraph (a) might not be sufficient to implement the decision to delete the notion of the consignor from the text, and that further regard might have to be had to additional consequential changes throughout the text.

111. Subject to the deletion of paragraph (a) containing the reference to the “consignor” and to any necessary further adjustments to the text to effect that deletion, the Working Group approved the substance of draft article 37 and referred it to the drafting group.

112. After having concluded its deliberations on the substance of draft article 37, the Working Group proceeded to examine a number of related definitions.

Definition of “transport document”(draft article 1, paragraph 15)

113. It was pointed out that, in light of the deletion of paragraph (a) of draft article 37 (see above, paras. 109 to 110) and of the decision of the Working Group to delete all references to the consignor (see above, paras. 21 to 24), certain adjustments would also have to be made to the definition of “transport document” in paragraph 15 of draft article 1.

114. It was suggested that the “or” between paragraphs (a) and (b) of draft article 1(15) should be replaced with an “and” in order to reflect the Working Group’s agreement that a mere receipt would not constitute a transport document for the purposes of the draft convention. Therefore, the Working Group agreed that the two conditions set forth in paragraph 15 of draft article 1 should be made conjunctive rather than disjunctive. The Working Group was satisfied that such adjustments to the definition of “transport document” would not have adverse implications for other provisions in the draft convention, except for a minor redrafting of paragraph (a) of draft article 43.

115. Subject to those amendments, the Working Group approved the substance of paragraph 15 of draft article 1 and referred it to the drafting group.

Consequential amendments to draft article 6(2)(b)

116. An additional consequential change proposed in light of the deletion of the concept of the “consignor” and of the amendments to the definition of “transport document” was to delete the text of paragraph 2(b) of draft article 6 and replace it with the phrase “a transport document or an electronic transport record is issued”.

117. The Working Group agreed to amend paragraph 2(b) of draft article 6 accordingly and referred it to the drafting group.

Definition of “negotiable transport document” (draft article 1, paragraph 16)

118. With regard to the term “negotiable transport document” used in draft article 37, a suggestion was made to replace “to the order of the consignee” with “to the order of the specified/named person”, as the consignee would be the endorsee of an order bill of lading and it would be important to indicate who the endorser would be, in particular, if the bank was the consignee. Further, it was stated that such a change would not be a change in substance and would solve the perceived inconsistency that lay between paragraphs 12 and 16 of draft article 1.

119. In response, it was pointed out that that would introduce a new term, “specified/named person”, which would in turn need to be defined and could be inconsistent with the definition of “holder” in paragraph 11 of draft article 1. The term, it was also said, would introduce greater uncertainty and would be less advantageous for banks financing foreign trade contracts. Under current practice, transport documents usually contained space for inserting the name of the “consignee”, so that banks already had the opportunity to protect their rights by seeing to it that they were named as consignees in transport documents. The draft convention not only accommodated that practice, but also offered additional protection for banks that might be reluctant to accept being named as consignees out of concerns over possible liability or burden in respect of the goods by providing, in draft article 45, that the consignee was only obliged to take delivery of the goods if it had exercised its rights under the contract of carriage.

120. In response to a question as to what law was meant by the expression “the law applicable to the document” in paragraph 16 of draft article 1, it was observed that the draft convention refrained from determining which law should govern the instrument, a question to which domestic systems of private international law offered conflicting answers. In any event, it was also pointed out that the scope of the reference to applicable law was limited to the question of which expressions might legally be equivalents of words such as “to order” or “negotiable”.

121. The Working Group agreed to retain the definition provided for in paragraph 16 of draft article 1 and referred it to the drafting group.

Definition of “non-negotiable transport document” (draft article 1, paragraph 17)

122. The Working Group approved the substance of the definition provided for in paragraph 17 of draft article 1 and referred it to the drafting group.

Definition of “electronic communication” (draft article 1, paragraph 18)

123. In response to a question concerning the rationale for the differences between the definition of “electronic communication” in paragraph 18 of draft article 1 and the definition provided in the United Nations Convention on the Use of Electronic Communication in International Contracts (ECC), it was pointed out that the definition used in the draft conventions combined elements of the definitions of “electronic communication” and “data messages” as contained in the ECC with the criteria for functional equivalence of electronic communications set forth in the ECC.

124. The Working Group approved the substance of the definition provided for in paragraph 18 of draft article 1 and referred it to the drafting group.

Definition of “electronic transport record” (draft article 1, paragraph 19)

125. The Working Group approved the substance of the definition of “electronic transport record”, subject to the necessary amendments to align it with the revised version of the definition of “transport document” (see above, paras. 113 to 114), and referred it to the drafting group.

Definition of “negotiable electronic transport record” (draft article 1, paragraph 20)

126. With regard to the term “negotiable electronic transport record” used in draft article 37, the Working Group took note of the concern that had been expressed with regard to paragraph 16 of draft article 1 (see above, paras. 118 to 120). Nevertheless, the Working Group approved the substance of the definition provided for in paragraph 20 of draft article 1 and referred it to the drafting group.

Definition of “non-negotiable electronic transport record” (draft article 1, paragraph 21)

127. With regard to the term “non-negotiable electronic transport record” used in draft article 37, the Working Group approved the substance of the definition provided for in paragraph 18 of draft article 1 and referred it to the drafting group.

Definition of “issuance” and “transfer” of negotiable electronic transport records (draft article 1, paragraph 22)

128. With regard to draft article 1, paragraph 22, a question was raised whether this paragraph did in fact provide definitions of “issuance” and “transfer” and whether it dealt with a matter of substance. It was further noted that the provision was not clear, because whereas it was possible to transfer exclusive control, it was impossible to “issue” exclusive control.

129. Suggestions made in the contexts of the definition were: (i) to delete “issuance” entirely from the definition; and (ii) to refer to the “creation” of exclusive control. Other suggestions were made that paragraph 22 of draft article 1 should be moved to the other chapters of the draft convention, as it was a substantive issue. Proposals were made to move paragraph 22 to draft articles 8 or 9 or as a separate article in chapter 3.

130. The Working Group agreed to the suggestion that the concepts mentioned in paragraph 22 of draft article 1 would be more clearly understood if “issuance” and “transfer” of a negotiable electronic transport record were to be defined separately and if the definition of “issuance” of a negotiable electronic transport record would refer to the requirement that such a record must be created in accordance with procedures that ensured that the electronic record was subject to exclusive control throughout its life cycle. The Working Group referred paragraph 22 of draft article 1 to the drafting group with the request to formulate appropriate wording to that effect.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 37. Issuance of the transport document or the electronic transport record**

111. The Commission approved the substance of draft article 37 and referred it to the drafting group.

Article 36. Contract particulars

1. The contract particulars in the transport document or electronic transport record referred to in article 35 shall include the following information, as furnished by the shipper:

- (a) A description of the goods as appropriate for the transport;
- (b) The leading marks necessary for identification of the goods;
- (c) The number of packages or pieces, or the quantity of goods; and
- (d) The weight of the goods, if furnished by the shipper.

2. The contract particulars in the transport document or electronic transport record referred to in article 35 shall also include:

- (a) A statement of the apparent order and condition of the goods at the time the carrier or a performing party receives them for carriage;

- (b) The name and address of the carrier;
 - (c) The date on which the carrier or a performing party received the goods, or on which the goods were loaded on board the ship, or on which the transport document or electronic transport record was issued; and
 - (d) If the transport document is negotiable, the number of originals of the negotiable transport document, when more than one original is issued.
3. The contract particulars in the transport document or electronic transport record referred to in article 35 shall further include:
- (a) The name and address of the consignee, if named by the shipper;
 - (b) The name of a ship, if specified in the contract of carriage;
 - (c) The place of receipt and, if known to the carrier, the place of delivery; and
 - (d) The port of loading and the port of discharge, if specified in the contract of carriage.
4. For the purposes of this article, the phrase “apparent order and condition of the goods” in subparagraph 2 (a) of this article refers to the order and condition of the goods based on:
- (a) A reasonable external inspection of the goods as packaged at the time the shipper delivers them to the carrier or a performing party; and
 - (b) Any additional inspection that the carrier or a performing party actually performs before issuing the transport document or electronic transport record.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(b) Paragraph 8.2

(i) Subparagraph 8.2.1

27. As a matter of drafting, it was suggested that the words “as furnished by the shipper before the carrier or a performing party receives the goods” contained in subparagraph 8.2.1(c)(ii) should also apply to subparagraph 8.2.1(c)(i). That suggestion was generally accepted by the Working Group.

28. In that connection, a concern was expressed that the words “as furnished by the shipper before the carrier or a performing party receives the goods” might be read as placing a heavy liability on the shipper, particularly if article 8 was to be read in combination with paragraph 7.4. It was pointed out in response that subparagraph 8.2.1 was not to be read as creating any liability for the shipper under draft article 7. However, before issuing the transport document, the carrier should have an opportunity to verify the information provided by the shipper, a reason why that information should be provided before the goods were loaded on a vessel.

29. Another concern was expressed that, in certain practical cases, the combination of subparagraphs 8.2.1(c)(i) and (ii) as cumulative elements to be included in the transport document might be excessively burdensome for the carrier. The example was given of a

shipment of bricks, where it might be superfluous to indicate both the weight under subparagraph 8.2.1(c)(ii) and the quantity under subparagraph 8.2.1(c)(i). It was pointed out in response that, while the list of contract particulars contained in subparagraph 8.2.1 was more extensive than corresponding provisions in existing international instruments such as the Hague Rules, such contract particulars were to appear in the transport document only if the shipper so requested. Thus, subparagraph 8.2.1 was not to be regarded as establishing a general obligation on either the shipper or the carrier but rather as creating a way for the carrier to meet the commercial needs of the shipper.

(ii) Subparagraph 8.2.2

30. It was recalled that subparagraph 8.2.2 provided both an objective and a subjective component to the phrase “apparent order and condition of the goods”. Under subparagraph 8.2.2(a), the carrier had no duty to inspect the goods beyond what would be revealed by a reasonable external inspection of the goods as packaged at the time the consignor delivered them to the carrier or a performing party. Under subparagraph 8.2.2(b), however, if the carrier or a performing party actually carried out a more thorough inspection (e.g. inspecting the contents of packages or opening a closed container), then the carrier was responsible for whatever such an inspection should have revealed (see A/CN.9/WG.III/WP.21, paras. 135-136).

31. The Working Group found the substance of subparagraph 8.2.2 to be generally acceptable.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 38. Contract particulars

225. It was indicated that the goal of draft article 38 was to set out the minimum mandatory requirements of the contract particulars. It was recalled that in informal discussions, suggestions for additional items and for drafting adjustments to the text of the provision had been noted for the consideration of the Working Group (see A/CN.9/WG.III/WP.62, paras. 12 to 18).

226. Broad support was expressed in the Working Group for the text of draft article 38, as contained in A/CN.9/WG.III/WP.56.

227. It was indicated that the list of mandatory requirements should be limited as much as possible to strictly necessary items. It was added that the parties were free to agree on further requirements in the contract particulars should their commercial needs require them. The Working Group was, however, informed that a number of possible additional mandatory items had been mentioned in informal consultations on the chapter (see A/CN.9/WG.III/WP.62, para. 14). They included the name and address of the shipper or consignor; the name and address of the consignee; the places of receipt and discharge and the ports of loading and unloading; the number of originals of the transport document; a statement, if applicable, that the goods would or could be carried on deck; and an indication of the dangerous nature of the goods.

228. It was suggested that the words “as furnished by the shipper” should be added in draft paragraph 38(a). It was further suggested that the words “before the carrier or a performing party receives the goods” in draft paragraphs 38(b) and (c) should be deleted since the

information might be also usefully provided after the carrier or a performing party received the goods but before the goods were loaded on the vessel. It was thought that the element of timeliness of the information could be inserted by way of a reference to the information furnished by the shipper in accordance with draft article 30.

229. It was further added that the word “and” at the end of draft paragraph 38(c)(i) should be replaced by the word “or”. It was explained that such amendment would better reflect trade practice, under which the shipper provided the carrier with either the number of packages, the number of pieces, or the quantity of the goods, or with the weight of the goods, and that it would be an unnecessary burden to require the inclusion of both elements. In response, it was indicated that the provision was intended to require the carrier to include both information on the number of packages and the weight in the contract particulars only when the shipper had so requested and had provided the corresponding information. It was observed that this could also be accomplished by way of the insertion of the word “if” rather than the word “as” in subparagraph (c)(ii).

230. It was suggested that a reference to the number of originals of the negotiable transport document should be inserted in draft article 38. It was indicated that such a reference would protect third party holders of the negotiable transport document by indicating how many originals were in circulation. It was noted that, while the practice of issuing multiple originals of negotiable transport documents should be discouraged, the suggested provision could nevertheless be useful as long as the undesirable practice continued. It was also suggested that reference to the consequences of failing to include information on the number of originals of the negotiable transport document could be included in draft article 40.

231. It was suggested that reference to the places of receipt and discharge and the ports of loading and unloading should be inserted in draft article 38, as those places and ports were relevant to determine the scope of application of the draft convention as well as for the purpose of the applicability of the provisions on jurisdiction and arbitration. It was also suggested that a reference to the dangerous nature of the goods should be included for reasons of public order, as well as to ensure that the shipper fulfilled its obligation to provide information under draft article 33. It was further suggested that reference to carriage of the goods on deck should also be inserted in the same draft article. However, those suggestions did not gather sufficient support in the Working Group.

232. It was indicated that the chapeau of draft article 38 should be revised to ensure consistency with the agreed content of draft article 37 insofar as its reference to transport document or electronic transport record.

Conclusions reached by the Working Group regarding draft article 38:

233. After discussion, the Working Group decided that:

- The words “as furnished by the shipper” should be added in draft paragraph 38(a);
- The words “before the carrier or a performing party receives the goods” in draft paragraphs 38(b) and (c) should be substituted by a reference to the information required in draft article 30;
- A reference to the number of originals of the negotiable transport document should be inserted in draft article 38; and

- The Secretariat should prepare a revised version of draft article 38 bearing in mind the considerations expressed above including possible modification of the reference to draft article 37 contained in the chapeau.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 37. Contract particulars

269. The Working Group took note that draft article 37 had been redrafted as agreed by the Working Group at its seventeenth session (A/CN.9/594, paras. 225 and 233).

Paragraph 1

270. The Working Group considered paragraph 1 as contained in A/CN.9/WG.III/WP.81 and a proposal in respect of subparagraph (1)(a) of that draft article as contained in A/CN.9/WG.III/WP.86.

271. It was noted that subparagraph 1(a) obliged the carrier to include a “description of the goods” as furnished by the shipper and that the draft convention contained no limits as to the amount of information that could be provided by the shipper. In light of the increasing tendency of shippers to provide lengthy and detailed technical descriptions of goods for inclusion in the transport document particularly since the use of computers had facilitated such lengthy descriptions, a proposal was made to introduce a limit as to the length, nature and degree of detail of the information the shipper might seek to include in the transport document. It was noted that without such a limitation, a carrier would be obliged to perform a reasonable check of all information furnished by the shipper which was physically practicable and commercially reasonable to check in accordance with draft article 41, subparagraph 2(a). As well, it was noted that as the description of goods would often be transferred to the cargo manifest, overly lengthy descriptions could overburden customs and security authorities as well as banks. To address that concern it was proposed to amend subparagraph 1(a) so that it read as follows: “a description in general terms of the goods”. Support was expressed for that proposal given that it was based on the wording of subparagraph 1(a) of article 15 of the Hamburg Rules.

272. However, a concern was expressed that the reference to “in general terms” might be too vague and an amended proposal was made to include wording along the following lines: “a description as appropriate for the transport” to cover situations such as where import restrictions applied in respect of certain goods and to provide sufficient information, particularly in relation to dangerous goods. Support was expressed for that proposal and it was suggested that the word “relevant” might be substituted for, or included in addition to, the word “appropriate”.

273. In response, it was said that the proposal was not intended to affect the carrier’s right to reject information that did not meet the requirements needed for any customs clearances or relating to security. It was noted that subparagraph 1(b) of draft article 29 also required the shipper to provide information as reasonably necessary to, inter alia, allow the carrier to comply with the law. Nevertheless, support was expressed for the amended proposal for the reason that it appeared to reflect both a minimum and maximum limit for information that ought to be included.

Additional particulars

274. Proposals were made that the list contained in draft article 37, paragraph 1, should also refer to the consignee, the date of delivery, where it had been agreed upon, the name of the vessel, the loading and unloading ports and an indication of whether the goods were of a dangerous nature. In response, it was said that the list of contract particulars contained in article 37 had already been decided upon by the Working Group and should not be reconsidered without adequate consensus in that regard. As well, it was noted that requiring inclusion of the name of a vessel, whilst possible in a port-to-port context, would be almost impossible in the door-to-door context when a carrier was often not the ship owner but instead a non-vessel operating carrier. In response, it was said that the intention was not to revisit the issue but rather to align draft article 37 with draft article 31, which related to information for compilation of contract particulars, and which had been revised at the current session.

“the transport document or electronic transport document referred to in article 36”

275. It was noted that paragraphs 1 and 2 of draft article 37 referred to “the transport document or electronic transport document referred to in article 36”. It was suggested that that reference should be confined to a transport document or electronic transport document referred to in draft article 36, paragraph (b) only, given that the documents covered by paragraph (a) of that draft article merely evidenced receipt of the goods. There was support for that proposal.

Paragraph 2

276. It was suggested that the reference to the “name and address of a person identified as a carrier” could be misinterpreted as permitting the naming of a person other than a contractual carrier as the carrier in the transport document and thereby create a so-called “documentary carrier”. It was noted that such had not been the intention of the Working Group. To avoid such difficulties, it was suggested that the text refer simply to the name and address of the carrier, as contained in an earlier version of paragraph 2. It was noted that the text had been changed to follow the language used in UCP 500. However, it was said that the new UCP 600 no longer referred to the “name and address of a person identified as a carrier”. The Secretariat was requested to confirm that the language used in subparagraph 2(a) was consistent with the approach taken in UCP 600.

Conclusions reached by the Working Group regarding draft article 37

277. The Working Group agreed:

- To amend paragraph 1(a) to contain language along the following lines: “a description as appropriate for the transport”;
- To review paragraph 2(a) to ensure its consistency with UCP 600; and
- To approve paragraph 3.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 38. Contract particulars**

131. Draft article 38 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 38. Contract particulars

112. There was strong support for the view that, in its present formulation, the draft article was incomplete in that it related only to the goods and the carrier, but did not mention, in particular, other essential aspects, such as delivery and means of transport. It was observed that the shipper or the consignee, as the case might be, would require additional information to enable it to take action in respect of the shipment. Banks often required shippers to present “shipped” bills of lading, which required the shipper to name the vessel on which the goods were loaded. By the same token, a consignee that expected goods at a certain destination should not be surprised by requests to take delivery of the goods at a different place, and the draft Convention should require the transport document to state information that the consignee could rely upon. The consignee should further be able, on the basis of the information contained in the transport document, to take the steps necessary for an orderly delivery of the goods, such as hiring inland transportation, and would thus need to know at least the place of destination and the expected time of arrival. It was therefore proposed that the following information should be required to be stated in the transport document, in addition to those elements already mentioned in the draft article: the name and address of the consignee; the name of the ship; the ports of loading and unloading; and the date on which the carrier or a performing party received the goods, or the approximate date of delivery.

113. Another proposal for adding new elements to the list in the draft article argued for the inclusion of the places of receipt and delivery, as those elements were necessary in order to determine the geographic scope of application of the Convention in accordance with its article 5. In the absence of those elements, the parties might not know whether the Convention applied to the contract of carriage.

114. In response to those proposals, it was pointed out that the draft article was concerned only with mandatory contract particulars without which the transport could not be carried out and which were needed for the operation of other provisions in the draft Convention. Nothing prevented the parties from agreeing to include other particulars that were seen as commercially desirable to be mentioned in the transport document. It was further noted, however, that the proposed addition contemplated some factual information, such as the name of the vessel, the port of loading or unloading or the approximate date of delivery, which, at the moment of issuance of the transport documents, the parties might not yet know. One of the primary interests of the shipper, it was said, would usually be to obtain a transport document as soon as possible, so as to be able to tender the transport document to the bank that issued the documentary credit in order to obtain payment in respect of the goods sold. However, the issuance of the transport document would unnecessarily be delayed if all the additional information proposed for inclusion in the draft article were to be made mandatory. It was explained that in the case of multimodal transport, for instance, several days might elapse between the departure of the goods from an inland location and their actual arrival at the initial port of loading. Some more time would again pass before the goods were then carried by another vessel to a hub port, where they would be again unloaded for carriage to a final destination. In such a situation, which was quite common in

practice, usually only the name of the first vessel or of the feeder vessel was known at the time when the transport document was issued. In addition to that, the ports of loading and unloading were often not known, as large carriers might allocate cargo among various alternative ports on the basis of financial considerations (such as terminal charges) or operational considerations (such as availability of space on seagoing vessels).

115. It was argued that the mention of the name of the shipper should not be made mandatory either. It was true, it was said, that transport documents always stated a named person as shipper. In practice, however, the named person was often only a documentary shipper and carriers often received requests for changing the named shipper. In some cases, a shipper might even, for entirely legitimate commercial reasons, prefer to keep its name confidential. That practice never prevented the carriage of the goods, as carriers typically knew their clients and would know whom to charge for the freight. Similar reasons, it was further stated, gave cause for caution in requiring the transport document to mention other elements, such as the name and address of the consignee, as in many cases goods might be sold in transit and the name of the ultimate buyer would not be known at the time when the transport document was issued. The usual practice in many trades was simply to name the consignee as “to the order of the shipper”. Negotiating chains in some trades meant also that even the place of delivery might be not known at the time the goods were loaded. Shippers in the bulk oil trade originating in the Far East, for example, often described the destination of the cargo in unspecific terms (such as “West of Gibraltar”), a usage that in practice seldom caused problems but would be precluded by the proposed extension of the mandatory contract particulars.

116. Indication of the date of delivery was said to be equally unsuitable for becoming a mandatory element of the transport document, as in most cases a sea carrier might be in a position to give only an inexact estimate of the duration of the voyage. Uncertainty about the date of delivery was solved, and delivery to the consignee facilitated, by the current practice of advising the carrier about the notify party. The draft Convention further improved that practice by requiring the transport document to state the name and address of the carrier, a requirement not included in the Hamburg Rules, for example. The progress in information and communication technology, which was illustrated by the advanced cargo tracking system that many carriers had offered via the Internet in recent years, made it much easier for cargo interests to obtain details about the delivery of goods directly from the carrier, than it was in the time when consignees needed to rely essentially on the transport document itself for that information.

117. The Commission engaged in an extensive debate concerning the desirability of adding new elements to those already mentioned in draft article 38 and what the practical consequences of such addition would be. In response to a question, it was noted that the qualification of the elements listed in draft article 38 as “mandatory” contract particulars was to some extent misleading, as draft article 41 made it clear that the absence or inaccuracy of one or more of those contract particulars did not affect the legal nature and validity of the transport document. Accordingly, the consignee, for example, would not be deprived of its rights to claim delivery under a transport document if draft article 38 had not been entirely or accurately complied with owing to an error or omission of the shipper or the carrier. Similarly, the draft Convention did not affect any right that the shipper might have, under the applicable law, to obtain certain information that the carrier failed to insert in the transport document, or to rely on a certain factual assumption in the absence of information to the contrary. That did not mean, however,

that it would be reasonable to expand the list endlessly, as further requirements would necessarily increase the burden on the parties.

118. The Commission was sensitive to the arguments advanced in favour of keeping the list of requirements in draft article 38 within the limits of commercial reasonableness. Nevertheless, there was wide agreement that some additional requirements might be appropriate in order to place the shipper and the consignee in a better position to meet the demands of banks issuing documentary credit or to make the logistical and other arrangements necessary for collecting the goods at destination. It was pointed out that in view of the relationship between draft

articles 38 and 41, an expanded list would not negatively affect trade usage, as the transport document could still be validly issued even without some information not yet available before the beginning of the carriage. The Commission also recognized that some elements might necessitate some qualification as regards, for instance, their availability at the time of issuance of the transport document.

119. A proposal was made to insert into the text of draft article 38 the following paragraph:

“2 bis. The contract particulars in the transport document or the electronic transport record referred to in article 37 shall furthermore include:

“(a) The name and address of the consignee, if named by the shipper;

“(b) The name of a ship, if specified in the contract of carriage;

“(c) The place of receipt and, if known to the carrier, the place of delivery; and

“(d) The port of loading and the port of discharge, if specified in the contract of carriage.”

120. It was noted that although most of the suggestions for inclusion in draft

article 38 had been accommodated, it had not been possible to include reference to the expected date of delivery of the goods. Although efforts had been made to include that information, it was felt that such information was so closely related to draft article 22 and the liability of the carrier for delay in delivery of the goods, that it was best not to risk upsetting the approved content of those provisions. There was broad support in the Commission for the inclusion of the new paragraph 2 bis in draft article 38.

121. The Commission approved the substance of draft article 38, with the addition of paragraph 2 bis, and referred it to the drafting group.

Article 37. Identity of the carrier

1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.
2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (*b*), but the contract particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.
3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(ii) Subparagraph 8.4.2***

56. The Working Group heard that whilst paragraph 8.2 provided that the contract particulars should contain the name and address of the carrier, identity of carrier clauses have caused problems in some jurisdictions. It was explained that subparagraph 8.4.2 was intended to remedy this situation by providing that where the contract particulars fail to identify the carrier, but name a vessel, then the registered owner of the vessel is presumed to be the carrier, unless the owner proves that the ship was under a bareboat charter at the time of the carriage. It was noted that inclusion of such an article amounted to a policy decision that was controversial in some quarters. It was further noted that if the Working Group agreed to include a provision such as subparagraph 8.4.2, a further decision would have to be made with respect to the last sentence of the draft article, which was in additional square brackets, and which sets out the additional presumption that where the registered owner rebuts the presumption that it is the carrier, the bareboat charterer is presumed to be the carrier.

57. Opposition was expressed to the approach taken in this draft article, based upon the view that the registered owner of the vessel should not play a role in the draft instrument, but instead should have responsibility in conventions on liability where third parties were involved. It was also suggested that a party who was unrelated to the contract should not, in some situations, become liable as a result of it, and that a bareboat charterer should not be implicated as a result of a contract of carriage.

58. The view was expressed that a provision such as subparagraph 8.4.2 was both important and justified, particularly since, in practice, the issue of identifying the carrier is key when establishing liability. Support for the draft article was expressed based on its clarity, and the fact that it simply raised a presumption, rather than dictated a rigid rule. It was noted that there

could be additional problems with the draft article, such as where there was a consortium of carriers, but that overall, the principle embodied in the draft article filled a gap, and deserved the support and further examination of the Working Group. It was also noted that the inclusion of non-contracting parties was not a novel idea, since many jurisdictions already create a liability for registered owners on the basis of maritime liens for cargo claims. Another suggestion was made to create an irrebuttable presumption by retaining the first sentence and by deleting the final two sentences.

59. Further, concerns were expressed that a provision such as subparagraph 5.4.2 could create further uncertainty because its relationship with various case laws as to the identity of the carrier in some jurisdictions is not clear. Reference was made to case law that put emphasis on the heading of the transport document when it did not include the carrier's name on its face or which imposed liability on more than one carrier for one bill of lading, or on an apparent carrier when the document failed to identify clearly the carrier. A further reservation was expressed with respect to the second sentence of subparagraph 8.4.2, pursuant to which it was unclear whether this was the only way through which the registered owner could rebut the presumption set out therein. It was suggested that the registered owner should be free to introduce any evidence that defeats the presumption that it was the carrier. A note of caution was also voiced with respect to the possibility that since there is no requirement that the carrier provide its proper name and address, the carrier may have an incentive to intentionally fail to include that information, thus leaving the registered owner of the vessel in the position of the carrier, and potentially subject to liability. Other concerns were expressed regarding which document should be used to establish the identity of the carrier. It was also noted that the working assumption with respect to the draft instrument was that it was to cover door-to-door carriage, and that the presumption contained in the draft article could be quite inappropriate in the case where, for example, the carrier that failed to identify itself was a non-vessel operating carrier.

60. It was also suggested that parties to a contract should be more vigilant regarding the identity of their counterparties. It was noted that the principle embodied by the draft article was important to retain on behalf of cargo owners. The prevailing view in the Working Group was that subparagraph 8.4.2 identified a serious problem that must be treated in the draft instrument, but that the matter required further study with respect to other means through which to combat the problem, and that the provision as drafted was not yet satisfactory. The Working Group decided to keep subparagraph 8.4.2 in square brackets in the draft instrument, and to discuss it in greater detail at a future date.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 38. Identity of the carrier

278. The Working Group took note that draft article 38 had been redrafted as agreed by the Working Group at its eighteenth session (A/CN.9/616, para. 28).

Paragraph 1

279. A proposal was made to refer to “a carrier” rather than “the carrier” given that the words “the carrier” implied identification already.

280. A proposal was made to delete paragraph 1 as it appeared to act as an absolute presumption by providing that if a carrier was identified by name, then any contrary information in the transport document should have no effect. It was said that the naming of a carrier should merely raise a rebuttable presumption. However, support was expressed for the retention of paragraph 1 given that there might be doubts as to the identity of a carrier, particularly where there was inconsistency between the named carrier on the face of a transport document from that on the reverse of that document. Some concern was expressed that the words “by name” might be confusing in some language versions. However it was noted that the words “by name” were necessary to indicate that the actual name of the carrier, and not merely a logo or other circumstantial evidence, was the essential element.

Paragraph 2

281. A proposal was made to delete both variants of paragraph 2 for the reasons that:

- A presumption that the registered owner of the ship was the carrier was unfair given that the owner might have no knowledge of the contract of carriage;
- The registered owner was often a separate entity from the ship owner;
- A document holder that relied on a document that plainly did not state the name of the carrier and failed to take reasonable measures to ascertain the identity of the carrier did not deserve protection; and
- There was substantial jurisprudence on the identity of the carrier in a number of jurisdictions and the relationship of paragraph 2 to that jurisprudence was unclear.

282. That proposal received some support but it was suggested that, if paragraph 2 were retained, it should be limited in scope to situations where the wrong person was named in the contract of carriage. It was further suggested that, if paragraph 2 were ultimately retained, then paragraph 3 should also be kept to avoid the actual carrier from using the presumption that the registered owner of the ship was the carrier as a defence.

283. It was noted that retention of paragraph 2 was not of great import in those jurisdictions that allowed the shipper to seek the arrest of the ship directly against the registered owner to secure claims against the carrier, but it was suggested that retention of the paragraph was preferable. It was also said that a registered owner could not be said to be totally unrelated to the contract of carriage, since the owner of a ship should be expected to take interest in the purposes for which the ship was used.

284. Some support was expressed for the retention of Variant A, but broad support was expressed for the retention of Variant B as it was consistent with modern shipping practice in its recognition that the registered ship owner might not be the person who entered into the contract of carriage. It was said that Variant B represented a compromise approach that allowed a registered owner to identify the proper carrier and covered situations of registered owners as well as bareboat charterers which was more appropriate to modern practices, particularly in the liner container transport context. As well, it was noted that the rule contained in paragraph 2 was consistent with the new rule that performing parties were jointly liable with carriers given that the registered ship owner was a performing party.

285. Proposals were made to amend Variant B as follows:

- Delete “bareboat” from paragraph 2; and

- For the sake of clarity, delete “in the same manner” and substitute the words “in the same manner as the registered owner of the ship”.

286. Some support was expressed for the addition of the clarifying words “in the same manner as the registered owner of the ship”. However, opposition was expressed to deletion of the term “bareboat” given that the bareboat charterer would, in practice, often be treated in the same way as a ship owner, since it related particularly to a charter for a ship, and should therefore have the same possibilities of rebutting any presumption that were available to the registered owner of the ship. In that respect, it was noted that in simply referring to a “charterer”, reference would not necessarily be had to the charterer of a ship, but rather could encompass a voyage charterer or a time charterer, who only contracted for the services of the ship, and could thus not be considered akin to a registered owner for the purposes of identifying the carrier.

Paragraph 3

287. It was suggested that the purpose of paragraph 3 was better expressed in footnote 122 of A/CN.9/WG.III/WP.81 than the text as contained therein. It was agreed to reformulate the paragraph based on that footnote.

Conclusions reached by the Working Group regarding draft article 38

288. The Working Group:

- Accepted paragraph 1 as drafted;
- Accepted Variant B of paragraph 2 and referred the text to the Secretariat to consider whether or not the text should better clarify that the bareboat charterer might defeat the presumption of being the carrier in the same manner that the registered owner might defeat such a presumption; and
- Requested that paragraph 3 be redrafted based on the language used in footnote 122 of A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 39. Identity of the carrier

132. The draft article did not elicit comments. The Working Group approved the substance of draft article 39 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 39. Identity of the carrier

122. The Commission took note of a statement to the effect that the policy adopted in the draft article was unsatisfactory.

123. The Commission approved the substance of draft article 39 and referred it to the drafting group.

Article 38. Signature

1. A transport document shall be signed by the carrier or a person acting on its behalf.
2. An electronic transport record shall include the electronic signature of the carrier or a person acting on its behalf. Such electronic signature shall identify the signatory in relation to the electronic transport record and indicate the carrier's authorization of the electronic transport record.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(iii) Subparagraph 8.2.3

32. It was recalled that subparagraph 8.2.3(a) was intended to reflect the provisions of the Uniform Customs and Practices for Documentary Credits (UCP 500) published by the International Chamber of Commerce, under which a transport document should be signed, and an electronic record should be comparably authenticated. Subparagraph 8.2.3(b) was intended provide a definition of electronic signature based on the UNCITRAL Model Law on Electronic Signatures 2001, as specifically adjusted to bring its intended meaning within the scope of this provision. In that context, the Working Group agreed that the draft provision might need to be further discussed at a later stage with a view to verify its consistency with the Model Law. Subject to that agreement, the substance of subparagraph 8.2.3 was found to be generally acceptable.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Draft article 35—Signature

201. The Working Group next considered draft article 35. A number of questions were raised in respect of this provision of the draft instrument.

Definition of “electronic signature”

202. The view was expressed that there should be a specific definition of “electronic signature” in the draft instrument, and a view was expressed that, otherwise, States that did not have national law on this topic could have a legal vacuum. It was felt that the definition “electronic signature” in draft article 35 did not add anything to the concept set out in other international instruments, nor did it deal in any specific fashion with transport law. It was suggested that, in the interests of uniformity, the draft instrument should adopt a definition of “electronic signature” based on other UNCITRAL instruments such as the Model Law on Electronic Signatures (2001) and the Model Law on Electronic Commerce (1996). However, a better starting point was thought to be the more modern approach taken in article 9(3) of the

recently-concluded draft convention on the use of electronic communications in international contracts (annex to A/CN.9/577).

203. Other views were expressed that the term “electronic signature” should not be defined, and that it should be left to national law. However, it was suggested that leaving the matter to national law could lead to disharmony, and that an effort should be made to find a unifying international standard. Further, it was thought that, in order to be commercially practicable, a definition of “electronic signature” should be uncomplicated and inexpensively met in practice. It was proposed that the best policy would be to have a functional definition of “electronic signature”, rather than to lock in to a specific definition, and to leave the exact standard to national law or to the commercial parties themselves, as long as the functional requirements were met. There was support for this proposal, particularly in light of ensuring future flexibility for technology that had not yet emerged.

[See also paragraphs 206-210, A/CN.9/576 (15th Session of WG III) under articles 1(21) and (22) at p. 48]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 39. Signature

10. The Working Group considered the text of draft article 39 as contained in A/CN.9/WG.III/WP.56 and as reproduced in paragraph 19 of A/CN.9/WG.III/WP.62. It was recalled that draft article 39 had been accepted in substance at its eleventh session (see A/CN.9/526, para. 32) and that the only modification to the draft article since then had been to paragraph 2 to ensure that the text conformed with changes made to the text of the draft convention with respect to electronic communication (see A/CN.9/576, paras. 201-205).

11. The Working Group was informed that, in connection with informal consultations that took place in connection with draft article 39, it was suggested that the Working Group may wish to consider whether the draft convention should contain a definition of signature such as, for example, along the lines of that contained in article 14(3) of the Hamburg Rules or article 5(k) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (see A/CN.9/WG.III/WP.62, para. 22). No support was expressed in the Working Group for the inclusion of such a definition. It was suggested that such a definition was unnecessary and that what constituted a signature could be determined according to practical commercial needs.

12. Support was expressed for the drafting proposal (see A/CN.9/WG.III/WP.62, para. 24) that the references to “authority” should be deleted from draft paragraphs (1) and (2). It was agreed that the consequences of unauthorized signature should be left to national law.

Conclusions reached by the Working Group regarding draft article 39:

13. After discussion, the Working Group decided that:

- The text of draft article 39 contained in A/CN.9/WG.III/WP.56 should be retained;

- The expression “by the carrier or a person having authority from the carrier” in draft paragraph (1) be replaced by a phrase such as “by or on behalf of the carrier”; and
- The expression “of the carrier or a person having authority from the carrier” in draft paragraph (2) be replaced by a phrase such as “of the carrier or a person acting on behalf of the carrier”.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 39. Signature

Paragraph 1

289. The Working Group noted that draft article 39 had been redrafted as agreed by the Working Group when it has last discussed the draft provision at its eighteenth session (A/CN.9/616, para. 12 and 13) by substituting the phrase “by or on behalf of the carrier” for the phrase “by the carrier or a person having authority from the carrier”.

290. It was noted that, as drafted, paragraph 1 might not conform with the rules relating to transport documents contained in the UCP 600, which provided that any signature by an agent indicated that it was signing for or on behalf of the carrier. It was suggested that paragraph 1 be amended so as to conform with the language contained in UCP 600. A further proposal was made that the words “or a person duly mandated by the latter” should replace the words “or a person acting on its behalf” so as to clarify that the person was acting within a mandate granted by the carrier.

291. In reply, it was said that the UCP 600 had a different purpose to the draft convention, in that the former was concerned with facilitating the system of documentary credits, while the latter set out legal rules with legal consequences. It was recalled that, while the insertion of additional text might clarify paragraph 1, the Working Group had already agreed to leave issues of agency to the applicable law, rather than dealing with them in the draft convention. The Working Group agreed to accept paragraph 1 as drafted.

Paragraph 2

292. The Working Group was in agreement that draft paragraph 2 should be approved as drafted.

Conclusions reached by the Working Group regarding draft article 39

293. The Working Group accepted draft article 39 as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 40. Signature

133. Draft article 40 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 40. Signature**

124. There was support for understanding that the draft article did not specify the requirements for the validity of a signature, be it a handwritten or an electronic one, which was a matter left for the applicable law.

125. The Commission approved the substance of draft article 40 and referred it to the drafting group.

Article 39. Deficiencies in the contract particulars

1. The absence or inaccuracy of one or more of the contract particulars referred to in article 36, paragraphs 1, 2 or 3, does not of itself affect the legal character or validity of the transport document or of the electronic transport record.
2. If the contract particulars include the date but fail to indicate its significance, the date is deemed to be:
 - (a) The date on which all of the goods indicated in the transport document or electronic transport record were loaded on board the ship, if the contract particulars indicate that the goods have been loaded on board a ship; or
 - (b) The date on which the carrier or a performing party received the goods, if the contract particulars do not indicate that the goods have been loaded on board a ship.
3. If the contract particulars fail to state the apparent order and condition of the goods at the time the carrier or a performing party receives them, the contract particulars are deemed to have stated that the goods were in apparent good order and condition at the time the carrier or a performing party received them.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(iv) Subparagraph 8.2.4***

33. It was recalled that subparagraph 8.2.4 gave effect to the view that the validity of the transport document or electronic record did not depend on the inclusion of the particulars that should be included. For example, an undated bill of lading would still be valid, even though a bill of lading should be dated. Subparagraph 8.2.4 also extends the rationale behind that view to hold that the validity of the transport document or electronic record did not depend on the accuracy of the contract particulars that should be included. Under this extension, for example, a misdated bill of lading would still be valid, even though a bill of lading should be accurately dated (see A/CN.9/WG.III/WP.21, para. 138).

34. The Working Group found the substance of subparagraph 8.2.4 to be generally acceptable.

[* * *]

(d) Paragraph 8.4

(i) Subparagraph 8.4.1

53. The Working Group heard that subparagraph 8.4.1 regarding the date operated only if the date was inserted into the contract particulars without any statement of its significance. It was explained that this provision was inserted into the draft instrument in order to deal with problems that have arisen with respect to incorrectly dated bills of lading.

54. It was noted by way of general comment that the terms “transport document or electronic record” are repeated throughout the provisions of chapter 8 of the draft instrument, and that the repetition of this phrase emphasized the distinction between transport documents and electronic records, rather than focusing on the content of the document, as intended in the mandate of the Working Group. It was suggested that care should be taken to avoid this problem when reviewing the provisions in chapter 8 in light of existing instruments on electronic commerce.

55. The Working Group found the substance of subparagraph 8.4.1 to be generally acceptable, taking into account the issue raised with respect to electronic records.

[* * *]

(iii) Subparagraph 8.4.3

61. The Working Group found the substance of subparagraph 8.4.3 to be generally acceptable.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 40. Deficiencies in the contract particulars

14. The Working Group proceeded to consider draft article 40 as contained in A/CN.9/WG.III/WP.56 and reproduced in paragraph 25 of A/CN.9/WG.III/WP.62.

Paragraph (1)

15. It was noted that paragraph (1) provided a general rule that the absence of one or more contract particulars referred to in article 38(1) or inaccuracy of those particulars did not of itself affect the legal character or validity of the transport document or the electronic transport record. The Working Group approved the substance of paragraph (1).

Paragraph (2) “shall be deemed to be”

16. It was recalled that paragraph (2) provided a rule to overcome ambiguity with respect to the significance of a date specified in the contract particulars. Clarification was sought as to whether the phrase “is considered to be” raised a rebuttable presumption or was conclusive in respect of interpreting a date included in the contract particulars. Support was expressed for the view that the phrase “is considered to be” should be taken as conclusive and that the paragraph

could be revised to clarify that point, possibly by using a phrase such as “shall be deemed to be” in its stead.

Paragraph (3) and the identity of the carrier

17. The Working Group considered the text of paragraph 3 of draft article 40 as contained in A/CN.9/WG.III/WP.56 relating to transport documents and electronic transport records that were unclear with respect to the identity of the carrier. In connection with the discussion of draft paragraph 3, the drafting proposal set out in A/CN.9/WG.III/WP.79 was considered by the Working Group.

18. By way of introduction, it was explained that the various aspects of the drafting proposal contained in A/CN.9/WG.III/WP.79 were intended to deal principally with three perceived problems in connection with the identification of the carrier in transport documents and electronic transport records. The first problem was said to be when the face of the transport document or electronic transport record was unclear and contained, for example, only the trade names of the carrier or the name of the carrier’s booking agents, rather than identifying the carrier (see A/CN.9/WG.III/WP.79, para. 3). It was proposed that, in keeping with the identification of the carrier requirements of articles 23(a)(i) and 26(a)(i) of the Uniform Customs and Practices for Documentary Credits 500 (UCP 500), draft paragraph 38(1)(e) regarding the necessary contract particulars should be modified to read: “the name and address of a person identified as the carrier”. General support was expressed in the Working Group for this proposal, however it was recalled that the UCP 600 would soon be made public and should be reviewed to ensure the consistency of the draft convention in this regard.

19. The second practical problem intended to be addressed by the drafting proposal in A/CN.9/WG.III/WP.79 (see para. 4 thereof) was said to be the situation where the information in small print on the reverse side of a transport document in the so-called “identity of carrier” clause conflicted with the information identifying the carrier on the face of the document. In order to solve this ambiguity, it was proposed that a provision be inserted into the draft instrument (see A/CN.9/WG.III/WP.79, para. 4) ensuring that the information regarding the identification of the carrier on the face of the transport document or electronic transport record would prevail over contradictory information on the reverse side. Support was expressed for this proposal in the Working Group, with the caveat that care should be taken in the drafting of the provision to ensure that appropriate text was inserted to find an equivalent for the “reverse side” of an electronic transport record.

20. The third practical problem with which the drafting proposal in A/CN.9/WG.III/WP.79 was intended to deal was the situation when, despite existing requirements, the identity of the carrier remained unclear in the transport document or electronic transport record such as, for example, in the case where the document or record was signed by or on behalf of the master, without stating the basis of the master’s authority. In such cases, it was proposed that the fallback position for the identification of the carrier should be the text as set out in paragraph 5 of A/CN.9/WG.III/WP.79 whereby the registered owner was presumed to be the carrier, unless the owner identified the bareboat charterer, or unless the owner or the bareboat charterer defeated the presumption by identifying the carrier. A corollary of the acceptance of this aspect of the proposal was set out in paragraph 6 of A/CN.9/WG.III/WP.79, which provided for an extension of the limitation period for the commencement of actions by the claimant in such cases. It was stated that national law had in some cases provided a solution for this situation,

but that the response in this regard was not uniform. Further, it was said that while presuming the registered owner to be the carrier might be inappropriate in cases where, for example, the owner was a financial institution, it was thought that the owner was nonetheless in the best position to identify the carrier, and thus to rebut the presumption.

21. General support was expressed in the Working Group for this effort to find a compromise solution to the persistent problem of the identification of the carrier. Further, support was expressed in principle for the particular approach to the problem that had been taken in the proposal.

22. However, concerns were expressed regarding the presumption that the registered owner of the ship was the carrier. It was thought that such an approach to the identification of the carrier could be particularly troublesome in the context of multimodal transport, where the registered owner of the ship might not have any knowledge regarding the other legs of the transport. Further, it was noted that the probability of the registered owner being the carrier was small, and that there was likely to be a series of charters from the registered owner, such that the owner may have very little knowledge regarding the identity of the carrier. It was also said to be erroneous to assume that the registered owner could easily have access to the necessary information to rebut the presumption that it was the carrier.

23. It was said that there were additional complications related to the compromise approach to the identification of the carrier set out in paragraph 5 of A/CN.9/WG.III/WP.79. It was suggested that the presumption created in the proposal could reduce the flexibility of courts as they decided on the identity of the carrier responsible on a case-by-case basis by weighing all of the facts at hand, including the various indicators regarding the identity of the carrier on the transport document or electronic transport record, even though such indicators could conflict. Further, the concern was expressed that a provision such as the one proposed could prevent cargo interests from advancing their claims against the party they believed to be most responsible, and support was expressed for the suggestion that while deletion of the provision on the identity of the carrier was preferred, if it were retained, it was suggested that text along the following lines should also be adopted: “Nothing in this article prevents the claimant from proving that any person other than the registered owner is the carrier.”

24. It was also indicated in the Working Group that the discussion had revealed a number of issues on which there was general agreement. The first of these was said to be agreement that the contracting carrier should be responsible for any breach of the contract of carriage. Further, it had already been agreed by the Working Group that draft article 38 should require the carrier to identify itself in the transport document or electronic transport record. It was noted that a presumption regarding the identity of the carrier was necessary only in situations where the carrier had failed to identify itself and left the consignee in the position of not knowing against whom to pursue its claim. Support was expressed for the view that while it was clear that the registered owner may not always have the best information regarding the identity of the carrier, it was likely to have some information regarding its ship, and the approach proposed to that problem was simply a device to allocate the burden of identifying the carrier and to give the consignee an effective remedy. It was also suggested that in order to deal with cases where there was a succession of charters of a vessel, the provision could be modified so as to allow each person in the chain of contracts to rebut the presumption that it was the carrier.

25. In further support of the proposed approach to the identification of the carrier set out in paragraph 5 of A/CN.9/WG.III/WP.79, it was indicated that a number of remedies relating to maritime law adopted a similar approach with respect to the responsibility of the registered owner of the ship, such as in the case of maritime liens or the arrest of a ship.

Paragraph (4)

26. The Working Group approved the substance of paragraph (4).

Possible additional paragraph: Number of originals

27. It was recalled that the Working Group had decided at its seventeenth session to include in draft article 38 regarding the required contract particulars the number of originals of a negotiable transport document issued (see A/CN.9/594, paras. 230 and 232-233). In that regard, the question was raised whether reference should be made in draft article 40 regarding the consequences of failure to include such information in the contract particulars. The Working Group agreed to leave this matter as a drafting issue to be decided by the Secretariat.

Conclusions reached by the Working Group regarding draft article 40:

28. After discussion, the Working Group decided that:

- The text of draft paragraph (1) be adopted;
- The reference in draft paragraph (2) “is considered to be” is adjusted to render it conclusive;
- The drafting proposals contained in paragraphs 3 and 4 of A/CN.9/WG.III/WP.79 should be adopted into the text of the draft convention;
- The existing text of draft paragraph (3) should be maintained for the time being in square brackets;
- In addition, the Secretariat should prepare revised text of the approach to the identity of the carrier issue in draft paragraph (3) based on principles as enunciated in paragraph 5 of A/CN.9/WG.III/WP.79 and the concerns raised by the Working Group during its consideration of that text;
- Consideration of the proposal regarding the extension of the limitation period in which to take actions was deferred until the Working Group’s consideration of the revised text to be prepared regarding the identity of carrier problem;
- The text of draft paragraph (4) be adopted; and
- The Secretariat should prepare a new version of draft article 40 taking into account the above deliberations and conclusions.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 40. Deficiencies in the contract particulars

294. The Working Group was reminded that its most recent consideration of draft article 40 on deficiencies in the contract particulars was at its eighteenth session (see A/CN.9/616, paras.

10 to 13). The Working Group proceeded to consider draft article 40 as contained in A/CN.9/WG.III/WP.81.

295. Subject to a few adjustments to the text of the provision in different language versions, the Working Group accepted paragraphs 1, 2 and 3 of draft article 40 as drafted.

Proposed paragraph 4 of draft article 40

296. As indicated in footnote 129 of A/CN.9/WG.III/WP.81, the Working Group had in a previous session agreed to add to draft article 37(2) a new subparagraph (d) requiring the number of original negotiable transport documents to be included in the contract particulars when more than one original was issued. It was noted that the draft convention did not state the legal effect of a failure to include that information in the contract particulars. It was proposed that, in order to provide the holder of one of the original negotiable transport documents and the carrier with some certainty, the legal effect of such a failure should be that when there was no indication of the number of originals in the contract particulars, the negotiable transport document would be deemed to have stated that only one original was issued. It was suggested that such a provision should be included in the text as draft paragraph 4 of article 40. There was support in the Working Group for that suggestion.

Conclusions reached by the Working Group regarding draft article 40

297. The Working Group accepted draft article 40 as drafted, and requested the Secretariat to draft a new paragraph 4 in keeping with the approach discussed in the paragraph above.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 41. Deficiencies in the contract particulars

134. The Working Group agreed that paragraph 3 of the draft article needed some adjustment to reflect the decision of the Working Group not to use the term “the consignor” in the draft convention (see above, paras. 21 to 24). Subject to the required amendments, the Working Group approved the substance of draft article 40 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 41. Deficiencies in the contract particulars

126. Subject to terminological adjustments that might be needed in some language versions, the Commission approved the substance of draft article 41 and referred it to the drafting group.

Article 40. Qualifying the information relating to the goods in the contract particulars

<p>1. The carrier shall qualify the information referred to in article 36, paragraph 1, to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper if:</p>
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- (a) The carrier has actual knowledge that any material statement in the transport document or electronic transport record is false or misleading; or
- (b) The carrier has reasonable grounds to believe that a material statement in the transport document or electronic transport record is false or misleading.
2. Without prejudice to paragraph 1 of this article, the carrier may qualify the information referred to in article 36, paragraph 1, in the circumstances and in the manner set out in paragraphs 3 and 4 of this article to indicate that the carrier does not assume responsibility for the accuracy of the information furnished by the shipper.
3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:
- (a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or
- (b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.
4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:
- (a) Article 36, subparagraphs 1 (a), (b), or (c), if:
- (i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and
- (ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and
- (b) Article 36, subparagraph 1 (d), if:
- (i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or
- (ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(c) Paragraph 8.3

(i) Subparagraph 8.3.1

35. It was recalled that subparagraph 8.3.1 generally corresponded to existing law and practice in most countries (A/CN.9/WG.III/WP.21, para. 140). It was pointed out that, article

III.3 of the Hague and Hague-Visby Rules contained language excusing the carrier from including otherwise required information in the transport document if the carrier had no reasonable means of verifying that the information furnished by the shipper accurately represented the goods. However, for commercial or other reasons, a carrier would typically prefer to issue a transport document containing a description of the goods, and protect itself by qualifying the description of the goods. Subparagraph 8.3.1 was intended to address that issue through a variety of rules to reflect the fact that commercial shipments could occur in different forms.

36. Various suggestions were made regarding possible improvements of subparagraph 8.3.1. One suggestion, aimed at broadening the freedom of the carrier to qualify the information contained in the transport document, was that the opening words of the paragraph, which referred to the information mentioned in subparagraphs 8.2.1(b) and 8.2.1(c) should also mention the information mentioned in subparagraph 8.2.1(a). Another suggestion to the same effect was that language along the lines of subparagraph 8.3.1(a)(ii) should be included also in subparagraph 8.3.1(b) to address the situation where the carrier reasonably considers the information furnished by the shipper regarding the contents of the container to be inaccurate. With respect to subparagraph 8.3.1(c), it was suggested that appropriate wording should be added to cover the case where there was no commercially reasonable possibility to weigh the container.

37. Additional suggestions were made to complement the current provisions contained in subparagraph 8.3.1. One suggestion was that the carrier who decided to qualify the information mentioned on the transport document should be required to give the reasons for such qualification. The effect of such an obligation would be to avoid the use of general clauses along the lines of “said to be” or “said to contain”. Another suggestion was that the draft instrument should deal with the situation where the carrier accepted not to qualify the description of the goods, for example not to interfere with a documentary credit, but obtained a guarantee from the shipper. It was stated that it should be made clear that such a guarantee should not affect the position of third parties. Yet another suggestion was that, where the carrier acting in bad faith had voluntarily avoided to qualify the information in the contract particulars, such conduct should be sanctioned and no limitation of liability could be invoked by the carrier.

38. Questions were raised as to the standard of proof to be applied in the context of subparagraph 8.3.1(c)(i). It was pointed out that, depending on that standard of proof, it might be difficult for the carrier to demonstrate that a performing party had not weighed the container. It was explained in response that the provision was not intended to create a very high standard of proof and that there generally existed records of the use of weighing facilities in ports.

39. A more general question was raised regarding the possible interplay between the draft instrument and any domestic law that would prohibit the use of certain qualifications such as “said to contain” clauses. It was stated in response that the draft instrument was not intended to interfere with such domestic law.

40. Another general question was raised regarding the manner in which the transport document would reflect a possible conflict between the information provided by the shipper and the assessment by the carrier of what constituted accurate information. It was stated in response that the shipper should always be entitled to a document reflecting the information it

had provided. Should the carrier disagree with that information, it should also reflect its own assessment in the contract particulars.

41. After discussion, the Working Group came to the provisional conclusion that the above comments and suggestions should be borne in mind when preparing a revised draft of subparagraph 8.3.1 for continuation of the discussion at a future session.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 41. Qualifying the description of the goods in the contract particulars

29. The Working Group proceeded to consider draft article 41 as contained in A/CN.9/WG.III/WP.56 and reproduced in paragraph 35 of A/CN.9/WG.II/WP.62.

30. It was recalled that draft article 41 was based on the assumption that the shipper was always entitled to obtain a transport document or electronic transport record reflecting the information that it provided to the carrier but that in certain circumstances, a carrier should be entitled to qualify that information. The Working Group was informed that informal consultations had to some extent supported some of the drafting suggestions that had been made at its eleventh session (see A/CN.9/526, para. 37) but which had not been addressed in the text of the draft convention.

Distinction between containerized and non-containerized goods

31. One suggestion made was to either delete draft paragraph (b) and apply draft paragraph (a) to containerized goods, or to include text along the lines of draft article 41(a)(ii) in draft paragraph (b) to address the situation in which the carrier reasonably considered the information furnished by the shipper regarding the contents of the container to be inaccurate (see A/CN.9/526, para. 37 and A/CN.9/WG.III/WP.62, para. 38).

32. In that respect, a question was raised as to the validity of distinguishing between containerized and non-containerized goods in draft article 41. Some doubt was expressed as to whether that distinction adequately reflected the current state of the industry, given that other means of transport, such as trailers, were sometimes used for goods as well. It was also suggested that paragraph (b) added a new element to the discussion, namely the term “closed”, and that it was not clear what was meant by the term “closed container”, nor whether for example, a sealed door on a trailer could be considered a “closed container”.

33. In support of the current structure of the article, it was said that the distinction was valid for the reason that, in practice, containerized and non-containerized goods were treated differently, and that there was a presumption that a carrier would not open containerized cargo for inspection. The provision, it was further said, accommodated a wide range of practices, and the broad definition of the term “container” defined in article 1(y) was sufficient to cover other types of unit loads, such as trailers. However, some support was expressed for combining draft paragraphs (b) and (c), as both paragraphs dealt with closed containers, although draft paragraph (b) dealt with quantity and description of the goods within a container, while draft paragraph (c) referred to the weight of the goods. In addition, a suggestion was made to include a reference to a description of the goods in paragraph (b) along the lines of that contained in article 38(1)(a).

Requiring carrier to give reasons for qualification

34. Another suggestion made at the eleventh session was to require a carrier that decided to qualify the information mentioned on the transport document to give reasons for that qualification. That suggestion did not receive support.

Agreement by carrier not to include qualification in exchange for guarantee from shipper and the notion of “good faith”

35. A further suggestion was made to deal with the situation where a carrier agreed not to qualify the description of the goods in exchange for a letter of indemnity from the shipper, by providing sanctions and the loss of the right to invoke the limits of liability set forth in the draft convention when the carrier acting in bad faith voluntarily agreed not to qualify the information in the contract particulars. It was agreed, however, that questions of sanctions should be dealt with in provisions relating to the loss of the limitation on liability.

36. There was an extensive exchange of views on the notion of “good faith” in connection with the draft article. The use of the term “good faith” generally in the chapeau of article 41 was questioned not only because the concept of “good faith” had various meanings in different legal systems, but also because the explanation of what constituted “good faith” for the purposes of draft article 41, as set out in draft article 42, was felt to be too narrow. It was said, in that connection, that in legal systems that acknowledged a general obligation for parties to commercial contracts to act in good faith, a breach of such general obligation might also occur in a variety of situations not specifically mentioned in draft article 42.

37. Support was expressed for including examples of what “good faith” was, given that in circumstances where the carrier colluded with the seller it would be consignee who would suffer as a result. However, strong support was expressed for the deletion of the term “good faith”. It was said that the term was susceptible to differing interpretations in different legal systems and that the term was not merely relative to a contract but applied to the behaviour of all the parties. It was also noted that its inclusion could be misinterpreted as implying that good faith was not required elsewhere in the instrument. It was suggested that one option might be delete the term “good faith” but to include the elements in subparagraphs (b)(i) and (ii) of draft article 42 in a rule setting out the conditions for validity of qualifications made by the carrier under draft article 41.

“if the carrier can show”

38. Clarification was sought as to what was intended by the phrase “if the carrier can show” as used in draft paragraphs (a)(i) and (c)(i). It was suggested that if what was intended was that carrier could show to the seller or consignee then that should be expressly stated, but the view was also expressed that evidentiary matters should be left to national law, and that the references in these provisions to “can show” could simply be deleted.

Conclusions reached by the Working Group regarding draft article 41:

39. After discussion, the Working Group decided that:

- The term “good faith” in the chapeau in article 41 and the corresponding term in article 42 should be deleted with elements of the description contained in article 42 possibly being included at an appropriate place in article 41;

- The distinction between containerized and non-containerized goods should be maintained. However, consideration should be given to clarifying what was meant by a “closed container” to indicate that it referred to the situation where there was difficulty in inspecting the goods on the part of the carrier and streamlining paragraphs (b) and (c); and
- The Secretariat should prepare a new version of draft article taking into account the above deliberations and conclusions.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 41. Qualifying the description of the goods in the contract particulars

298. The Working Group was reminded that its most recent consideration of the content of draft article 41 on the qualifying the description of the goods in the contract particulars was at its eighteenth session (see A/CN.9/616, paras. 29 to 39 and 69 to 73). The Working Group proceeded to consider draft article 41 as contained in A/CN.9/WG.III/WP.81.

299. Some drafting suggestions were made with respect to draft article 41. A suggestion was made to adjust the title of the draft article so that it referred to “information” rather than to “description”, which seemed to limit it to draft article 37(1)(a) only. In paragraph 41(1)(a), it was suggested that the word “materially” before the phrase “false or misleading” could be deleted as redundant. An additional suggestion was made to coordinate the text of paragraphs 1, 2 and 3, which all used the term “qualify”, while paragraph 1 referred to a type of correction, and paragraphs 2 and 3 referred more to reservations. Finally, it was suggested that in draft paragraphs 1(b) and 2(b), reference was made to the accuracy of the information, for which the shipper was held strictly liable under the draft convention, and that in light of that fact, it might be preferable to use the phrase “the carrier has reasonable grounds to believe” rather than “the carrier reasonably considers.”

Conclusions reached by the Working Group regarding draft article 41

300. The Working Group accepted draft article 41 as drafted, subject to adjustments made to the text by the Secretariat in light of the suggestions in the paragraph above.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 42. Qualifying the information relating to the goods in the contract particulars

Proposal to deal with certain situations regarding inspection or actual knowledge of goods in a closed container

135. It was noted that draft article 42 set up a system through which the carrier could qualify information referred to in draft article 38 in the contract particulars. It was further noted that paragraph 3 addressed the context of goods delivered for shipment in a non-closed container, whereas paragraph 4 addressed goods delivered in a closed container.

136. In that connection, the view was expressed that draft article 42 left a possible gap, namely, in situations where the goods were delivered in a closed container but the carrier had actually inspected them, albeit not fully, for example when the carrier opened a container to ascertain that it indeed contained the goods declared by the shipper but was not able to verify their quantity. Such a situation, it was said, would be similar to the situations contemplated in paragraph 3 and deserved to be treated in essentially the same manner. Thus, it was suggested that the following additional paragraph should be inserted after paragraph 4:

When the goods are delivered for carriage to the carrier or a performing party in a closed container, but either the carrier or a performing party has in fact inspected the goods inside the container or the carrier or a performing party has otherwise actual knowledge of its contents before issuing the transport document or the electronic transport record, paragraph 3 shall apply correspondingly in respect of the information referred to in article 38, subparagraphs 1(a), (b), and (c).

137. In response, some concerns were expressed. In a situation where the carrier or a performing party had actual knowledge of the goods in a closed container, paragraph 2 of draft article 42 would apply and the carrier or a performing party would not be able to qualify the information. Another concern was that the relationship between the suggested additional paragraph and paragraph 1 was not clear. However, broad support was expressed for the rationale behind the proposal with regard to the situation in which the carrier or a performing party had actually inspected the goods. Therefore, it was suggested that a more appropriate and efficient way of addressing that situation was to add the phrase “or are delivered in a closed container but the carrier or the performing party has in fact inspected the goods” after the phrase “in a closed container” in the chapeau of paragraph 3. That proposal found broad support.

Proposal to clarify the conditions for the carrier to qualify the information in paragraph 4(a)

138. A proposal was made to replace the word “or” at the end of paragraph 4(a)(i) with the word “and” in order to clarify the conditions of the carrier to qualify the information relating to the goods in the contract particulars. It was widely felt that paragraph 4 in its current form was not clear and caused confusion. The Working Group was in agreement that with regard to the situation in paragraph 4, the carrier would not be able to qualify the information referred to in draft article 38, subparagraphs 1(a), (b) or (c), if the carrier or a performing party had inspected the goods or if the carrier or a performing party otherwise had actual knowledge of the goods.

Conclusions reached by the Working Group regarding draft article 42

139. Subject to the following adjustments, the Working Group approved the substance of draft article 42 and referred it to the drafting group:

- the phrase along the lines of “or are delivered in a closed container but the carrier or the performing party has in fact inspected the goods” should be inserted in the chapeau of paragraph 3 after “in a closed container”; and
- paragraph 4(a) should be drafted more clearly in order to reflect the cumulative approach, in which the carrier may not qualify the information referred to in draft article 38, subparagraphs 1(a), (b) or (c) if the carrier or the performing party had in fact inspected the goods inside the container [and/or] had otherwise actual knowledge of its contents before issuing the transport document or the electronic transport record.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 42. Qualifying the information relating to the goods in the contract particulars**

127. It was pointed out that, in practice, goods might be delivered for carriage in a closed road or railroad cargo vehicle, such as to limit the carrier's ability to verify information relating to the goods. The Commission agreed that the references to "container" in the draft article should be expanded in order to cover those vehicles as well. The Commission requested the drafting group to consider alternatives for making reference to those vehicles in a manner that avoided burdening the draft article with unnecessary repetitions and bearing in mind the use of similar references elsewhere in the text.

128. The Commission approved the substance of draft article 42 and referred it to the drafting group.

Reasonable means of checking and good faith [Deleted][Combined with article 41]*Article 42. Reasonable means of checking and good faith*

For purposes of article 41:

(a) A "reasonable means of checking" must be not only physically practicable but also commercially reasonable.

(b) The carrier acts in "good faith" when issuing a transport document or an electronic transport record if

(i) the carrier has no actual knowledge that any material statement in the transport document or electronic transport record is materially false or misleading, and

(ii) the carrier has not intentionally failed to determine whether a material statement in the transport document or electronic transport record is materially false or misleading because it believes that the statement is likely to be false or misleading.

(c) The burden of proving whether the carrier acted in good faith when issuing a transport document or an electronic transport record is on the party claiming that the carrier did not act in good faith.

[Last version before deletion: A/CN.9/WG.III/WP.56]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(ii) Subparagraph 8.3.2***

42. It was noted that this provision was intended to clarify the meaning of the terms used in subparagraph 8.3.1. It was pointed out that subparagraph 8.3.2(a) clarified that "reasonable means of checking" in subparagraph 8.3.1 must be both physically practicable and commercially reasonable, and that subparagraph 8.3.2(b) set out that the carrier acted in "good

faith” when issuing a transport document or an electronic record if the carrier had no actual knowledge that any statement was materially false or misleading and that the carrier had not intentionally failed to make such a determination because it believed the statement was likely to be false or misleading. It was also noted that subparagraph 8.3.2(c) assumed that the carrier was acting in good faith unless otherwise proven. In response to a question regarding the situation where a letter of indemnity was issued by the shipper, who requested a clean bill of lading even where the goods were damaged in order to fulfil the requirements of a bank, it was noted that subparagraph 8.3.2 did not address the issue of the enforceability of a letter of indemnity.

43. The Working Group found the substance of subparagraph 8.3.2 to be generally acceptable.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 42. Reasonable means of checking and good faith

40. It was recalled that at its eleventh session, the substance of draft article 42 was found to be generally acceptable (see A/CN.9/526, para. 43) and that in informal consultations since its seventeenth session, all of the delegates addressing the issue supported draft article 42 in substance as currently drafted (see para. 41 of A/CN.9/WG.III/WP.62).

41. It was agreed that issues addressed under draft article 41 should also be considered in relation to article 42 where relevant, for example, the decision to delete the reference to “good faith”.

42. A proposal was made to add the following wording at the end of paragraph (a): “and not require technical expertise or costs other than what follows from a customary examination of the goods”. It was suggested that if that proposal were accepted, then a consequential amendment would be to reword draft article 38(1)(a) as follows: “The carrier is required to include in the transport document a description of the goods as provided by the shipper. However, the carrier is not obliged to include lengthy descriptions irrelevant to the contract of carriage or detailed technical descriptions of the goods which, even if controllable by the carrier, are not necessary in order to reasonably identify the goods or may impose an undue burden of control upon the carrier.” Whilst there was some sympathy expressed for the potential problem of increased burden on the carrier or of burdensome inclusions in the contract of carriage, the proposed additional text did not receive support. It was agreed that the matter sought to be covered therein was already encompassed by the phrase “commercially reasonable”. Possible concerns that the term “commercially reasonable” was too imprecise to encompass the intention of the proposal could be addressed, for instance, in a commentary on the draft convention that the Secretariat might wish to prepare.

43. It was noted that the decision to delete references to good faith in draft article 41 would entail deletion of paragraphs (b) and (c) of draft article 42. For that reason, it was suggested that the remainder of draft article 42 (paragraph (a)) could be inserted at the appropriate juncture in draft article 41.

Conclusions reached by Working Group regarding draft article 42:

44. After discussion the Working Group decided that:

- Paragraph (a) be included in a revised version of draft article 41; and
- In accordance with the decision to delete references to “good faith” in article 42, paragraphs (b) and (c) be deleted and the elements that characterized a carrier’s action in good faith to be possibly included in a revised draft article 41.

Article 41. Evidentiary effect of the contract particulars

Except to the extent that the contract particulars have been qualified in the circumstances and in the manner set out in article 40:

(a) A transport document or an electronic transport record is prima facie evidence of the carrier’s receipt of the goods as stated in the contract particulars;

(b) Proof to the contrary by the carrier in respect of any contract particulars shall not be admissible, when such contract particulars are included in:

(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith; or

(ii) A non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith;

(c) Proof to the contrary by the carrier shall not be admissible against a consignee that in good faith has acted in reliance on any of the following contract particulars included in a non-negotiable transport document or a non-negotiable electronic transport record:

(i) The contract particulars referred to in article 36, paragraph 1, when such contract particulars are furnished by the carrier;

(ii) The number, type and identifying numbers of the containers, but not the identifying numbers of the container seals; and

(iii) The contract particulars referred to in article 36, paragraph 2.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(iii) Subparagraph 8.3.3

44. It was explained to the Working Group that the concept of a transport document or an electronic record that evidences receipt of the goods constitutes prima facie and conclusive evidence of the carrier’s receipt of the goods as described in the contract particulars was a concept included in the Hague-Visby and Hamburg Rules. It was noted that subparagraph 8.3.3(a) set out this principle with respect to prima facie evidence, whilst subparagraph 8.3.3(b) set it out with respect to conclusive evidence. It was suggested that subparagraph 8.3.3(b)(i) was not controversial because it dealt with the case of a negotiable transport document or a negotiable electronic record that had been transferred to a third party in good faith. It was further suggested that subparagraph 8.3.3(b)(ii) was more controversial, and its inclusion in the

draft instrument would have to be considered carefully, since it could include the situation where there was good faith reliance on the description of goods in a non-negotiable transport document.

45. Opposition was expressed to the inclusion of subparagraph 8.3.3(b)(ii) because it introduced a novel use for non-negotiable documents that was unknown in European law. It was suggested that this approach amounted to creating a new category of document that was somewhere between a negotiable and a non-negotiable document, and that this was an unnecessary complication for the draft instrument. Further concerns were expressed with respect to the lack of clarity of this draft article.

46. Some support was expressed for the retention of subparagraph 8.3.3(b)(ii) and the removal of the square brackets surrounding it in the draft instrument, since it was suggested that the draft article reflected current trade practice, where an estimated 50 per cent of letters of credit were being paid on cargo receipts. It was urged that the law should keep pace with these changes.

47. It was suggested that a conclusive evidence rule with respect to non-negotiable documents already existed with respect to sea waybills in article 5 of the CMI Uniform Rules for Sea Waybills, and that since the concept was not novel, subparagraph 8.3.3(b)(ii) should be retained. However, it was also noted that the requirements for this draft provision that a person acting in good faith must have paid value or otherwise altered its position in reliance on the description of the goods in the contract particulars was an unusual concept in civil law countries.

48. It was suggested that in spite of the problems that were noted with respect to the possible creation of a new category of document, the advantages of including a provision such as subparagraph 8.3.3(b)(ii) could outweigh its disadvantages. The prevailing view in the Working Group was to retain subparagraph 8.3.3(b)(ii) in square brackets in the draft instrument, and to request the Secretariat to make the necessary modifications to it with due consideration being given to the views expressed and the suggestions made.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 43. Prima facie and conclusive evidence

General discussion

45. The Working Group considered the text of draft article 43 as contained in A/CN.9/WG.III/WP.56 and as reproduced in paragraph 42 of A/CN.9/WG.III/WP.62. It was recalled that draft article 43 had been accepted in substance at its eleventh session (see A/CN.9/526, paras. 44-48).

46. By way of introduction, the Working Group was reminded that draft article 43 set out the conditions, subject to draft article 44, under which transport documents or electronic transport records that evidenced receipt of the goods would constitute conclusive evidence of the carrier's receipt of the goods as described in the contract particulars, and when they should

be regarded as being only prima facie evidence of such receipt. The Working Group was in agreement with the text as set out in draft subparagraph 43(a).

47. The Working Group agreed that the most controversial aspect of the provision was draft subparagraph 43(b)(ii) with respect to the evidentiary effect of non-negotiable transport documents or non-negotiable electronic transport records. It was recalled that Variant A of draft subparagraph 43(b)(ii) was slightly broader than Variant B, in that it did not restrict the protection it offered to third parties to those that had purchased and paid for the goods in reliance on the description of the goods in the contract particulars, and thus would include, for example, a bank that had relied on the contract particulars to advance money to the consignee.

48. The Working Group was reminded that a third variant of this subparagraph had been proposed as Variant C in A/CN.9/WG.III/WP.68, in order to take into account bills of lading consigned to a named person, which were approved by the Working Group for inclusion in the draft convention (see A/CN.9/594, paras. 208-211). The text of Variant C of subparagraph 43(b)(ii), which was intended to replace Variants A and B, was proposed as follows (see A/CN.9/WG.III/WP.68, para. 21): “If a non-negotiable transport document or a non-negotiable electronic transport record that indicates that it must be surrendered in order to obtain delivery of the goods has been issued, if such document or record has been transferred to the consignee acting in good faith.”

Negotiable versus non-negotiable

49. By way of explanation of Variant C, the Working Group was reminded that the basic rule with respect to evidentiary value was that negotiable documents and records were considered conclusive evidence, while non-negotiable documents and records were considered prima facie evidence. The sole exception to this general approach was said to be sea waybills, to which the Comité Maritime International (CMI) Uniform Rules for Sea Waybills had been agreed to apply. In an effort to elevate the status and use of sea waybills, such documents were deemed conclusive evidence as between the carrier and the consignee. It was said that the primary objection to extending conclusive evidence status to non-negotiable documents and records in the terms set out in Variant A or B was that it was thought to be improper to confer such evidentiary status on the basis of a unilateral act by the consignee, i.e. the act of having relied on the description of the goods. It was suggested that bills of lading to named persons that included a presentation rule were deserving of the status of providing conclusive evidence, but that other non-negotiable documents and records were not. Some support was expressed for the approach set out in Variant C.

50. By way of further clarification, it was observed that the Hague Rules had originally conferred only prima facie evidentiary status on bills of lading or similar documents of title, and that the 1968 Visby Protocol had amended the Hague Rules to provide for conclusive evidentiary status. It was suggested that this amendment had been effected in order to address problems that had arisen because of the lack of uniformity in the application of the prima facie evidentiary rule in regard to bills of lading that had been transferred to third parties acting in good faith. In addition, it was noted that the 1968 amendment had referred only to bills of lading and had not extended to non-negotiable transport documents, because the scope of application of the Hague-Visby Rules was limited to bills of lading and similar documents of title.

51. Some doubts were raised as to whether the appropriate evidentiary weight of a document or record should depend on its negotiable status. It was suggested that there were four categories of documents which should be considered in this regard: negotiable documents and records, which should constitute conclusive evidence; documents and records which were mere receipts and which should not be conclusive evidence; bills of lading to named persons which were non-negotiable but which should nonetheless have the effect of conclusive evidence; and finally, non-negotiable documents and records that evidenced a contract of carriage, such as sea waybills. Of these categories, the evidentiary treatment of the first three was thought to be essentially non-controversial, but it was proposed that the final category could be treated in one of two ways: one option was to provide that unless otherwise stated on its face, the document or record constituted conclusive evidence, while the other option was to provide that unless otherwise stated on its face, the document or record constituted prima facie evidence only. Some support was expressed for a rule holding this fourth category of documents to be conclusive evidence unless otherwise stated on its face. In further support of this proposition, views were expressed that such a rule could also be appropriate in terms of promoting increased recourse to the use of sea waybills in circumstances in which a bill of lading was not necessary. However, some concerns were raised that this approach could cause legal uncertainty by allowing parties to change the legal nature of a document by including a certain statement in it.

52. An additional alternative approach to the problem of how to decide which documents and records should represent prima facie evidence, and which should represent conclusive evidence, was also proposed. It was suggested that the distinction between documents and records based on their negotiable character should be abandoned in favour of an approach where the document or record would be considered prima facie evidence in all cases except those where three requirements were met: the relationship was between the carrier and a third party other than the shipper, and where the third party was acting both in good faith and in reliance on the description of the goods in the transport document or electronic transport record. Where those three requirements were met, the document or record would be considered conclusive evidence.

53. A strongly-held view remained that, with the sole exception of non-negotiable transport documents or electronic transport records that indicated that they had to be surrendered in order to obtain delivery of the goods, the prima facie evidence rule should be the general rule for non-negotiable documents or records such as sea waybills, while the conclusive evidence rule should apply only to negotiable transport documents and electronic transport records. It was said that any other approach risked causing significant confusion regarding the legal nature of the documents or records. Support for this view was said to arise from the basic rule that the transferor of a document or a record was not able to transfer to others greater rights than possessed by the transferor, and from the exception to that rule in the case of negotiable instruments, such as promissory notes or bills of lading, whose rights could be invoked from the face of the document or record itself. However, questions were raised whether this rationale unnecessarily intermingled concepts of the law of assignment with the evidentiary effect that the document or record, when functioning as a receipt, should have in respect of the protection of the rights of third parties acting in good faith.

54. A further observation was made that the question in issue should be less one of the law of assignment or of the strict consequences of negotiability, and more one of allocating the risk

of relying on inaccurate information in the contract particulars as between the carrier, who possessed specialized knowledge and entered the information, and the innocent consignee. In this vein, the Working Group was urged to depart from the confines of strict domestic legal principle and to make a policy decision to allow non-negotiable documents or records to be considered conclusive evidence in certain situations in order to facilitate trade.

55. In urging the search for a compromise, it was noted that the contents of the contract particulars were dictated by the requirements set out in draft article 38, and that subparagraphs (1)(a), (b) and (c) thereof referred to information to be furnished by the shipper, which the carrier was under no explicit obligation to check. Further, it was observed that, since the carrier never checked the contents of containers in practice, the issue of whether a document or record was to be considered *prima facie* or conclusive evidence was of limited operation, since it did not apply to the container trade at all, and the two types of evidentiary value had similar practical effect.

Notion of “reliance” and “good faith” in relation to third party

56. In addition, concerns were raised regarding the requirement in draft subparagraph 43(b)(ii) that the evidentiary value of a transport document or electronic transport record would depend on whether a third party had in fact relied on the description of goods in the contract particulars to its own detriment. This approach was said to be relatively unknown in civil law countries, and a preference was expressed for a more general solution linking the evidentiary value of the transport document or electronic transport record to the function it fulfilled, possibly coupled with a general rule protecting the holder in good faith, in a manner similar to the law that governed negotiable instruments, such as bills of exchange and promissory notes, in many jurisdictions.

Conclusions reached by the Working Group regarding draft article 43:

57. After discussion, the Working Group decided that:

- While in agreement with respect to the text of draft paragraph 43(a), the discussion of draft paragraph (b) indicated that the differences of approach with respect to the evidentiary treatment that should be conferred on certain transport documents or electronic transport records, be they negotiable or non-negotiable, had not yet sufficiently narrowed to allow for a consensus view to emerge in the Working Group; and
- Several different proposals had been made during the course of discussion, further to which the Secretariat was requested to prepare alternative draft text for consideration at a future discussion, taking into account the various views expressed in the Working Group.

Revised text of draft article 43

58. The Working Group recalled its earlier discussion of draft article 43 on *prima facie* and conclusive evidence, and its discussion of draft paragraph (b) which indicated differences in approach in the Working Group with respect to the evidentiary treatment that should be conferred on the information in certain transport documents or electronic transport records, be they negotiable or non-negotiable (see paras. 45-57 above). To resolve conflicting views

expressed on paragraph 43(b), a proposal was made to revise the text of draft article 43 as follows:

“Article 43. Evidentiary effect of the description of the goods in the contract

“Except as otherwise provided in article 44, a transport document or an electronic transport record that evidences receipt of the goods is prima facie evidence of the carrier’s receipt of the goods as described in the contract particulars; and

“(a) Proof to the contrary by the carrier in respect of any contract particulars relating to the goods shall not be permissible, when such contract particulars are included in:

“(i) A negotiable transport document or a negotiable electronic transport record that is transferred to a third party acting in good faith, or

“(ii) A non-negotiable transport document or a non-negotiable electronic transport record that indicates that it must be surrendered in order to obtain delivery of the goods and is transferred to the consignee acting in good faith.

“(b) Proof to the contrary by the carrier vis-à-vis the consignee, acting in good faith, shall equally not be permissible in respect of contract particulars relating to the goods included in a non-negotiable transport document or a non-negotiable electronic transport record, when such contract particulars are furnished by the carrier. For the purpose of this paragraph the number and type of containers is deemed to be information furnished by the carrier.”

Amendments in the proposal

59. It was clarified that the reference to “contract particulars furnished by the carrier” in the proposal included all information listed in subparagraphs 38(1)(d) to (f) (inclusive), as well as the new subparagraph to be added to draft article 38(1) regarding the inclusion of the number of original documents issued. It was noted that, in relation to the final sentence of subparagraph 43(b), some additional drafting might be necessary, such that information with respect to the number and type of containers would be deemed to have been provided by the carrier, whereas information as to the seals on the containers would be deemed to be provided by the shipper. To address those concerns it was proposed to add after the word “containers” in subparagraph (b), the words “, their identifying numbers and the information referred to in article 38, subparagraphs (1)(d) to (f) (inclusive),” as well as the number of original documents issued. Additionally a further sentence along the following lines was proposed to be added at the end of subparagraph (b): “The number of container seals is deemed to be information furnished by the shipper”. Those amendments received strong support.

60. It was noted that the chapeau of paragraph (a) had been modified to the simpler formulation of “proof to the contrary” from the “conclusive evidence” approach, which had been found to be problematic. Further, subparagraph (a)(ii) had been added to the text as representing what was thought to be a consensus in the Working Group regarding the appropriateness of including bills of lading consigned to a named person in draft paragraph (a) (see paras. 48, 49, 51 and 53 above).

61. It was explained that the intention of the proposal had been to preserve the status quo with respect to negotiable transport documents, and to provide a compromise approach for the

evidentiary treatment of non-negotiable transport documents in order to bridge the differing views expressed in this regard earlier (see paras. 49-55 above). On this aspect, the main innovation was in draft paragraph (b), which set out the nature of the compromise by drawing a clear demarcation line distinguishing the evidentiary value of information in the contract particulars of non-negotiable transport documents based upon whether that information was provided by the carrier or by the shipper. It was said that in respect of information it furnished in such documents, the carrier should not be permitted to provide proof to the contrary with respect to the consignee, but that such proof should be permitted when such information was furnished by the shipper.

General discussion

62. While some lingering concerns were expressed regarding the replacement of the requirement of reliance on the information with a “good faith” rule, and some doubts were expressed regarding granting any sort of non-negotiable transport documents status in terms of the evidentiary rule, it was generally recognized that the proposal represented a positive development in terms of a compromise approach. Strong overall support was expressed in the Working Group for the approach taken in the revised text of draft article 43 as representing a sound compromise on which to continue discussion.

Subparagraph (b)

63. It was suggested that the practical operation of paragraph (b) of the proposed provision might be unclear in terms of what evidentiary effect the information in the contract particulars in a non-negotiable transport document would have if a carrier chose to make a reservation under article 41(a)(ii) to shipper-provided information. In response, it was explained that if the carrier inserted a qualifying clause to the shipper information, such as “contents unknown” or “as provided by shipper”, the description of the goods would still be shipper-furnished, but if the carrier (believing that the shipper’s description was incorrect) inserted its own description clause based on article 41(a)(ii), it would do so at its own peril, and that clause would be considered to be carrier-furnished information.

Inclusion of a “mere receipt”

64. A concern was raised that the definition of a transport document or electronic transport record in draft article 1(n) was very broad and could include a mere receipt. The question was raised as to whether it was appropriate that a non-negotiable transport document that merely evidenced receipt should be covered in draft paragraph (b), given that a mere receipt was issued only as evidence of receipt as between the shipper and carrier and nothing more. A sea waybill, on the other hand, was a different type of non-negotiable document in that it evidenced the contract of carriage, and which identified the consignee. However, the view was expressed that mere receipts should sometimes be properly included in draft paragraph (b), depending on their nature. Further, it was noted that most domestic legal regimes contained a general principle preventing parties from presenting evidence contrary to statements made by them. Finally, it was observed that, under its terms, this draft paragraph was unlikely to operate frequently, since mere receipts would not often have a function in the relationship between the carrier and the consignee. However, some concerns remained regarding the inclusion of a mere receipt in draft paragraph (b), such that it would have an estoppel effect, in particular in respect of legal

regimes that did not have a general rule preventing reliance by a party on its own statement, and a suggestion was made that an effort could be made to investigate whether it was possible to exclude mere receipts from inclusion in draft paragraph (b).

“furnished by”

65. An additional question raised was whether the term “furnished by the carrier” was sufficiently clear, and concerns were raised that it might raise difficulties of proof, since the carrier most often entered the information in the contract particulars. In response, it was said that being required to prove from whom the information came would not be too onerous under modern transport conditions. It was noted that, in the past, carriers often had shipper instruction forms which required the shipper to provide certain specific information, but that nowadays there were established patterns within the industry regarding who had to furnish certain information.

“by the carrier vis-à-vis the consignee”

66. A question was also raised as to why the operation of draft paragraph (b) was limited to “the carrier vis-à-vis the consignee”. In that respect, it was noted that a transport document only had to be signed by the carrier and that article 39 did not require the shipper to sign the transport document, yet the shipper would not under the current provision be protected in the same way as the consignee. In response, it was noted that the position of the consignee was particular, since the consignee was involved in the transaction without having participated in the contract of carriage, but that the shipper did not require the same protection since it was involved in the contract of carriage and the provision of information in the transport documents.

Freedom of parties to increase evidentiary value of a document

67. In response to a question, it was suggested that pursuant to the draft convention, including draft article 94, parties would not be prevented from agreeing to upgrade the evidentiary value of a non-negotiable transport document by making a statement in that non-negotiable transport document that it was conclusive evidence. It was noted, however, that the parties could not downgrade the evidentiary status of a document, and that although such a statement on the face of a document could change its evidentiary value, it could not change the negotiable or non-negotiable status of the document itself.

Conclusions reached by the Working Group regarding revised text of draft article 43:

68. After discussion, the Working Group decided that

- The compromise proposal, as amended with respect to the closing line of paragraph (b), was acceptable in substance; and
- The Secretariat prepare a text taking account of the comments made for consideration at a future session.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 42. Evidentiary effect of the contract particulars**

301. The Working Group was reminded that its most recent consideration of the content of draft article 42 on the evidentiary effect of the contract particulars was at its eighteenth session (see A/CN.9/616, paras. 45 to 68). The Working Group was reminded that draft article 42 as contained in A/CN.9/WG.III/WP.81 was the product of extensive debate and compromise at its eighteenth session, and a preference was expressed to postpone the third reading of that provision until the twentieth session of the Working Group, in order to accord it sufficient time for thorough discussion of subparagraph (a), which had since been included in the draft article.

Conclusions reached by the Working Group regarding draft article 42

302. The Working Group agreed to postpone the third reading of draft article 42 until its twentieth session.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 42. Evidentiary effect of the contract particulars**

9. The Working Group proceeded to consider the text of draft article 42 as contained in paragraph 1 of A/CN.9/WG.III/WP.94. It was explained that that draft provision remained the same as it appeared in A/CN.9/WG.III/WP.81 except for corrections made to the cross-references to draft article 37. It was observed that the corrections to the text were not intended to alter its meaning.

10. The Working Group was reminded of the extensive debate that led to the formulation of draft article 42. As currently drafted, the text was the result of a careful compromise between conflicting views as to the treatment of the evidentiary value of transport documents.

11. It was pointed out that subparagraph (b)(i) used the term “third party”, while the term “consignee” was used in subparagraph (b)(ii). It was noted, in that connection, that the term “third party” seemed to suggest the “holder” of the transport document, as defined in draft article 1, paragraph 12. However, since the consignee might also be a holder of a transport document, the concern was expressed that the distinction between the two terms used in subparagraphs (b)(i) and (ii) was unclear and that it might need further clarification. The Working Group agreed that in preparing the final revised draft for consideration by the Working Group, the Secretariat should carefully review the text so as to ensure consistency in the use of those two terms.

12. It was further proposed that, whilst the principle that proof to the contrary by the carrier should not be admissible against a consignee acting in good faith, the notion of good faith could not stand alone but rather should relate to a particular subject matter. In that respect, it was proposed to refer to wording along the lines contained in article 16(3) of the Hamburg Rules by referring to “a consignee who in good faith has acted in reliance on the information therein”. There was support for that proposal.

13. A concern was expressed regarding the extension in draft article 42 of the conclusive evidentiary effect of the statements in a transport document to include not only non-negotiable transport documents, but also sea waybills.

Conclusions reached by the Working Group regarding draft article 42:

14. After discussion, the Working Group agreed that the text of draft article 42 as contained in A/CN.9/WG.III/WP.94 was acceptable subject to clarifying the context in which the notion of good faith would operate. The Working Group requested the Secretariat to review the use of terms throughout the draft convention, in particular the use of the terms “third parties” and “consignees” to ensure consistency of terminology.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 43. Evidentiary effect of the contract particulars

140. A concern was raised with respect to the estoppel rules in subparagraphs (b) and (c) of draft article 43, because the respective requirements of a third party and a consignee were different. Subparagraph (b) required a third party to act in good faith only, whereas subparagraph (c) required the consignee acting in good faith to also have acted in reliance on any of the contract particulars mentioned in subparagraph (c). A question was raised whether that discrepancy was the intention of the Working Group. In order to address that discrepancy, it was suggested that the requirements of subparagraph (b)(i) and (ii) should be aligned with subparagraph (c) following the approach taken in paragraph 3 of article 16 of the Hamburg Rules.

141. Despite some sympathy expressed for that proposal, the Working Group was reminded that draft article 43 had been the subject of intense negotiations during the second reading of the draft convention and that the draft article in the current form reflected the compromise reached. That compromise led to a distinction between the holder of a negotiable transport document and the holder of a non-negotiable transport document. While in the first case it had been accepted that the holder acting in good faith should generally be protected, in the second case the protection should only be available for a holder who in good faith had acted on reliance on the information contained in the non-negotiable transport document. It was further observed that an additional reliance requirement to subparagraph (b) with regard to a negotiable transport document or a negotiable electronic transport record would result in a substantial change to that common understanding.

142. The Working Group approved the substance of draft article 43, subject to the deletion of the phrase “that evidences receipt of the goods” following the revision of the definitions of “transport document” and “electronic transport record” (see above, paras. 113 to 114 and 125), and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 43. Evidentiary effect of the contract particulars**

129. There was not sufficient support for a proposal to replace the words “but not” with the word “and” in subparagraph (c)(ii) of draft article 43. It was noted that, unlike the identifying numbers of containers, the identifying numbers of container seals might not be known to the carrier, as seals might be placed by parties other than the shipper or the carrier, such as customs or sanitary authorities.

130. The Commission agreed that in the situation contemplated by subparagraph (c)(ii) of the draft article, it would not be appropriate to extend the provision in question to road or railroad cargo vehicles.

131. The Commission approved the substance of draft article 43 and referred it to the drafting group.

Evidentiary effect of qualifying clauses [Deleted][Combined with article 42]***Article 44. Evidentiary effect of qualifying clauses***

If the contract particulars include a qualifying clause that complies with the requirements of article 41, then the transport document or electronic transport document does not constitute prima facie or conclusive evidence under article 43 to the extent that the description of the goods is qualified by the clause.

[Last version before deletion: A/CN.9/WG.III/WP.56]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(iv) Subparagraph 8.3.4***

49. The Working Group heard that subparagraph 8.3.4 was a clarification of subparagraph 8.3.3, that stated that if there was a qualifying clause in the transport document that complied with the requirements of subparagraph 8.3.1, then the transport document, whether it was negotiable or non-negotiable, was not prima facie or conclusive evidence pursuant to subparagraph 8.3.3.

50. It was suggested that subparagraph 8.3.4 was too much in favour of the carrier, in allowing the carrier to rely upon the qualifying clause regardless of the condition in which it delivered the goods. It was noted that while it was appropriate to allow the carrier to rely upon the qualifying clause with respect to the situation where there was delivery of an unopened container, in the situation where the carrier delivered a damaged or opened container, and could not establish the chain of custody, the carrier should not be entitled to benefit from the qualifying clause. It was suggested that subparagraph 8.3.4 should be redrafted in accordance

with paragraphs 153 and 154 of the commentary on the draft instrument (A/CN.9/WG.III/WP.21).

51. Another view was that the validity of the qualifying clause should not depend upon the delivery of an undamaged container by the carrier, and that the issue of the liability of the carrier should not be confused with the issue of the description of the goods and the weight and contents of the container. It was emphasized that there was no connection between the qualifying clause and the condition of the container upon delivery, and that the carrier was not automatically relieved of responsibility by the existence of a qualifying clause in the transport document.

52. While some support was expressed for redrafting subparagraph 8.3.4, the prevailing view was that it should be retained in substance for continuation of the discussion at a future session.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 44. Evidentiary effect of qualifying clauses

69. The Working Group considered the text of draft article 44 as currently drafted and contained in A/CN.9/WG.III/WP.56 and as reproduced in paragraph 47 of A/CN.9/WG.III/WP.62, and an alternative text contained in paragraph 49 of A/CN.9/WG.III/WP.62. The Working Group was reminded that draft article 44 set out the practical effect of qualifying clauses that fulfilled the requirements of draft article 41, thus permitting the carrier's qualification to supersede the prima facie or conclusive evidence that would otherwise exist under draft article 43. It was further recalled that a view had been expressed at its eleventh session that draft article 44, in its current form, favoured the carrier because it allowed the carrier to rely on its qualifying clauses regardless of its treatment of the goods (A/CN.9/526, para. 50, see also paras. 49-52). The alternative text offered a narrower approach, permitting the carrier to rely on qualifying clauses only when it could demonstrate a chain of custody by delivering a container in substantially the same condition in which it had been received.

70. Some support was expressed in the Working Group for the alternative text reproduced in paragraph 49 of A/CN.9/WG.III/WP.62, as it was said to represent a commercial compromise that preserved a balance between the interests of shippers and carriers. It was further explained that the alternative text had been carefully crafted to permit qualifying clauses where they had previously seldom been allowed, but that care had been taken to ensure that the text did not broadly allow such qualifications without regard to the care that the carrier had taken with respect to the goods.

71. Strong support was expressed in the Working Group for the text of draft article 44 as currently set out in A/CN.9/WG.III/WP.56. In response to the concerns expressed regarding the need to ensure that care that had been taken by the carrier with respect to the goods, the view was expressed that the fact that qualifying clauses must fulfil the requirements of draft article 41 should be sufficient for that purpose, in addition to the fact that draft article 44 only allowed their operation to the extent that they qualified the description of the goods.

72. Clarification was sought as to the relationship between draft articles 41 and 44, and particularly whether draft article 44 was necessary in light of the phrase in draft article 41 that “the carrier does not assume responsibility for the accuracy of the information furnished by the shipper”. In response, it was explained that, whereas draft article 41 provided for the inclusion of a specific qualifying clause that met certain requirements, article 44 was thought to be necessary since it set out the legal effect of such a clause. It was also clarified that *prima facie* or conclusive evidentiary effect of the document or record was not completely superseded by the qualifying clause, since there was certain information in the document or record on which no reservations were allowed. However, a drafting suggestion was made that, given the Working Group’s preference for the text as it appeared in A/CN.9/WG.III/WP.56, consideration could be given to simplifying the text by merging article 44 into article 41.

Conclusions reached by the Working Group regarding draft article 44:

73. After discussion, the Working Group decided that:

- The text of draft article 44 be retained but that its drafting be revisited once the text of draft article 41 had been finalized, with consideration being given to merging draft article 44 into draft article 41.

Article 42. “Freight prepaid”

If the contract particulars contain the statement “freight prepaid” or a statement of a similar nature, the carrier cannot assert against the holder or the consignee the fact that the freight has not been paid. This article does not apply if the holder or the consignee is also the shipper.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

(a) Paragraph 9.4

108. The Working Group heard that paragraph 9.4 consisted of declaratory provisions intended to provide clarity and to put the consignee and others, particularly those outside of the contract of carriage, on notice in advising what the notations “freight prepaid” or “freight collect” meant when found on the bill of lading. Subparagraph 9.4(a) advised that if “freight prepaid” was mentioned on the transport document, neither the holder nor the consignee was liable for payment of the freight. Further, pursuant to subparagraph 9.4(b), if “freight collect” appeared on the transport document, the consignee might be held liable for payment of the freight. General support was expressed for the aim of paragraph 9.4 to ensure that frequently-used contractual wording was understood. It was also considered that paragraph 9.4 could settle uncertainty in international maritime law in a manner consistent with actual practice.

109. However, it was suggested that paragraph 9.4 was so vague as to be of little assistance in the unification of maritime law, and that there were certain reservations with respect to whether a provision in the draft instrument on freight was necessary.

110. The suggestion was made that the declaration in subparagraph 9.4(a) was too radical in freeing the holder and consignee of any responsibility for the payment of freight, and instead that it would be better to create a presumption of the absence of a debt for freight. However, the alternative view was expressed that subparagraph 9.4(a) should not create a presumption that the freight had been paid.

111. It was pointed out that subparagraph 9.4(b) was particularly problematic, and given the vagueness of the words “may be liable”, it was of little utility. It was also said that draft articles 12.2.2 and 12.2.4 were intimately linked with subparagraph 9.4(b), and that consideration of these provisions should be undertaken at the same time. It was suggested that if the consignee took any responsibility for the delivery of the goods, it should also be responsible for the freight. At the same time, it was noted that subparagraph 9.4(b) could serve to provide information or a warning that freight was still payable. However, it was suggested that the payment of freight should be a condition for the consignee to obtain delivery of the goods, rather than an obligation. It was further noted that subparagraph 9.4(b) should focus on the payment of freight in fact, rather than on who should bear the obligation for the unpaid freight.

112. One proposal that was made to remedy the perceived problem in subparagraph 9.4(b) was to replace the words “such a statement puts the consignee on notice that it may be liable for the payment of the freight” with the words, “the payment of freight is a condition for the exercise by the consignee of the right to obtain delivery of the goods.”

113. An alternative suggestion for subparagraph 9.4(b) was as follows: “If the contract particulars in a transport document or an electronic record contain the statement ‘freight collect’, or a statement of a similar nature, that constitutes a provision that, in addition to the shipper, any holder or consignee who takes delivery of the goods or exercises any right in relation to the goods will thereupon become liable for the freight.”

114. The Working Group agreed that the text in paragraph 9.4 should be retained, noting that subparagraph (b) should be revisited in light of the comments above, and the texts proposed could be presented as alternatives in future drafts of the instrument. It was further noted that the content of the text would need to be further discussed together with draft article 12.2.2 and 12.2.4.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 45. “Freight prepaid”

74. It was recalled that, notwithstanding the deletion of the proposed chapter on freight at its thirteenth session, draft article 45 from that chapter had been retained in the text of the draft convention in square brackets. The Working Group was reminded that the provision preserved the carrier’s right to collect freight from the consignee unless an affirmative statement, such as “freight prepaid”, appeared in the negotiable transport document or negotiable electronic transport record. It was further recalled that proponents of the draft article said its inclusion was primarily intended to protect and provide clarity for third party holders of transport documents, such as banks (A/CN.9/552, paras. 163-164).

75. The Working Group considered three options in relation to the treatment of draft article 45: to delete it entirely; to revise the article so as to conform in substance with article 16(4) of the Hamburg Rules, or to retain the draft article in its current form.

Deletion of the draft article

76. Some support was expressed for the deletion of draft article 45. In that respect, it was suggested that given that the general conditions in which freight should be paid had been left to national law, it was not appropriate to address the circumstances when freight would not have to be paid in the draft convention. As well, it was suggested that the payment of freight was a commercial matter that should be left to be resolved by the parties.

Revision in conformity with article 16(4) of the Hamburg Rules

77. There was some support for revision of draft article 45 in conformity with article 16(4) of the Hamburg Rules. However, concern was expressed regarding that provision of the Hamburg Rules, since it contained a reverse presumption regarding payment of freight from that of draft article 45, such that the carrier's right to collect freight from the consignee under the Hamburg Rules was defeated unless an affirmative statement, such as "freight payable by the consignee", appeared on the transport document.

Retention of draft article

78. While it was generally thought that this provision addressed a practical problem but was not a core provision of the draft convention, support was expressed in favour of retaining the provision as currently drafted. It was said that the provision merely represented what was uncontroversial international practice, namely that if freight had been stated to be prepaid the carrier could not claim it from the consignee.

79. In additional support of retention of the draft provision, it was recalled that the draft provision was intended to solve two practical problems. First, if a transport document or electronic transport record contained the statement "freight prepaid" then it would clarify that banks (and third parties generally) would never become liable for freight; and it would defeat a shipper's unjustified defence to a carrier seeking to collect freight therefrom on the basis that a "freight prepaid" document was a receipt issued by the carrier evidencing that the freight had in fact been paid (see A/CN.9/WG.III/WP.62, para. 57). Support was expressed for the retention of the draft article on the basis that it addressed these practical problems.

Carrier's right of retention and other drafting proposals

80. It was noted that, whilst the draft article, as currently drafted, confirmed that a consignee or other third party did not have an obligation to pay the freight, it did not explicitly exclude the possibility of a carrier asserting a lien or right of retention so as to force the consignee or other third party to pay the freight in order to take delivery. Although some concern was raised regarding inclusion of the right to retention in this provision given the agreement of the Working Group to include it elsewhere in the draft convention (see A/CN.9/594, paras. 114-117), support was expressed for inclusion of text along the lines contained in paragraph 59 of A/CN.9/WG.III/WP.62 to address that situation.

81. It was explained that this provision had been historically limited to negotiable transport documents because it was with respect to them that problems had arisen. However, there was support for the proposal that the draft provision should be extended to cover both negotiable and non-negotiable transport documents and electronic transport records, but that this decision could require reconsideration following a decision by the Working Group on the text of draft article 43 on prima facie or conclusive evidence (in this regard, see the revised text and discussion thereon at paras. 58-68 above). In addition, it was suggested that draft article 45 could include a requirement that parties act in good faith along the lines contained in article 43.

Conclusions reached by the Working Group regarding draft article 45:

82. After discussion, the Working Group decided that:

- The text of draft article 45 should be revised:
 - o By incorporating text along the lines of that contained in paragraph 59 of A/CN.9/WG.III/WP.62;
 - o By broadening the language to cover both negotiable and non-negotiable transport documents; and
 - o By considering the inclusion of a requirement that parties must act in good faith in conformity with article 43.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 43. “Freight prepaid”

303. The Working Group was reminded that its most recent consideration of draft article 43 on “freight prepaid” was at its eighteenth session (see A/CN.9/616, paras. 74 to 82). The Working Group proceeded to consider draft article 43 as contained in A/CN.9/WG.III/WP.81. A suggestion to insert a good faith requirement was rejected on the grounds that such a requirement was self-evident.

Conclusions reached by the Working Group regarding draft article 43

304. The Working Group accepted draft article 43 as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 44. “Freight prepaid”

143. In response to a question whether draft article 44 was intended to be a substantive provision or an evidentiary rule, it was noted that the provision was intended as a substantive one. In response to a further question regarding the meaning of the phrase “or a statement of a similar nature”, it was explained that the precise phrase “freight prepaid” need not appear in the contract particulars for the provision to apply, but that an equivalent term, such as “freight paid in advance” or a similar phrase, would suffice.

144. The Working Group approved the substance of draft article 44 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 44. “Freight prepaid”

132. The Commission approved the substance of draft article 44 and referred it to the drafting group.

Chapter on Freight [deleted]

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(b) Freight (draft article 9)

52. It was observed that, based on international practices, draft article 9 dealt with a variety of issues, including time for the payment of freight, exceptions to the payment obligation, and the right of retention of the goods by the carrier until such payment had been received. A question was raised regarding the meaning of “other charges incidental to the carriage of goods”, which were mentioned but not defined in draft article 9.3(a). It was suggested that such a mention might make it necessary to specify in draft article 9.4(a) that, where the transport document contained the statement “freight prepaid”, no payment for either freight or other charges was due. The Working Group expressed general support in favour of the structure of draft article 9 and of the policy on which it was based. The discussion focused on whether and to what extent the provisions of draft article 9 should be open to variation by agreement of the parties and on the scope of the right of retention.

53. With respect to the mandatory or non-mandatory nature of the provisions, the view was expressed that, in view of their possible impact on third parties, certain provisions contained in draft article 9 should not be open to variation by contract. For example, draft article 9.2(b) was said to be declaratory in nature and not subject to contrary agreement. The opposing view was that draft article 9 would serve a more useful function if it offered a set of default rules applicable only in the absence of any specific provision in the contract of carriage. It was stated that even draft article 9.2(b) could lead to unjustified results if no exception to it could be envisaged in any circumstances. It was thus suggested that the entire text of draft article 9 should be made subject to contrary agreement. At the close of the discussion, it was generally felt that, in reviewing the individual provisions of draft article 9 at a future session, the Working Group would need to decide, in connection with each subparagraph, whether the provision should function as a default rule or not.

54. As to the right of retention, a question was raised as to whether draft article 9.5 limited the exercise of the right of retention to cases where the obligation to pay freight resulted from a corresponding obligation under applicable domestic law. It was suggested that the scope of the right of retention should be clarified or extended to avoid the possibility of such a limitation. It was stated in response that the application of draft article 9.4(b) and draft article 9.5(a) was not intended to be contingent upon a notion of liability; the right of retention was intended to arise directly from the failure by the consignee to pay freight if the consignee had been put on notice that such freight was due. It was widely felt, however, that the draft provisions, in particular the reference to the consignee being “liable for the payment of freight” might need to be further discussed.

[* * *]

(a) Paragraph 9.1

172. By way of general comment it was said that neither the Hague nor the Hamburg regimes contained provisions on freight and that it was questionable whether the draft instrument would benefit from dealing with this issue. If there should be provisions on freight, they should be balanced and, for example, appropriately deal with the situation where the goods were delivered in a totally damaged condition (in which case, according to the current draft, full freight was payable). However, in response it was noted that, in the case of damaged goods, the freight already paid or owed, formed part of the claim for damages. Further reservations as to the inclusion of freight provisions were based on the fact that practices varied widely between different trades, a situation that would be further complicated by the fact that the draft instrument might apply to door-to-door carriage.

173. However, wide support was expressed for the inclusion of provisions relating to freight which respected the principle of the freedom of contract, on the basis that such provisions would assist in the unification of this area of maritime law particularly in light of the fact that national legislation in a number of jurisdictions took differing approaches on the payment of freight. It was said that if the draft instrument were to apply on a door-to-door basis, then provisions relating to freight that applied in existing unimodal conventions would need to be considered.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]**2. Draft article 9 (Freight)**

106. The Working Group resumed its deliberations regarding draft article 9. Due to the absence of sufficient time, the Working Group had only discussed paragraphs 9.1 to 9.3 at its ninth session (A/CN.9/510, para. 190). The text of draft article 9 as considered by the Working Group was reproduced in the report of the Working Group on the work of its ninth session (A/CN.9/510, para. 171).

107. The general view was expressed that it was necessary to include provisions relating to freight in the draft instrument. It was pointed out that practices in that respect varied widely between different trades and that the payment of freight was a commercial matter that should be left to the parties.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]**Chapter 9: Freight**

162. The Working Group considered the text of chapter 9 as contained in document A/CN.9/WG.III/WP.32.

General discussion

163. It was suggested that chapter 9 on freight was a non-mandatory regulation that dealt with purely commercial matters, and that it should be deleted. In response, it was observed that while chapter 9 was non-mandatory, its provisions could be helpful to fill gaps left by

commercial parties in their agreements. It was further observed that some of the provisions contained in chapter 9 were not, strictly speaking, devoted solely to the issue of freight: paragraph 43(2) dealt with the cessation of the shipper's liabilities and the transfer of rights; the "freight prepaid" provision in the opening two sentences of paragraph 44(1) was intended to provide protection and clarity for third party holders of a transport document; and draft article 45 was an attempt to bring some uniformity to the subject of liens. It was suggested that given that these provisions contained important rules while only incidentally touching on freight, they should be retained for future consideration despite the general desire to delete the chapter on freight. There was general agreement with this approach, except with respect to draft article 45, which, it was suggested, was too complex and dealt with a subject matter too diverse to lend itself to uniform legislation, and should be left to applicable law. The prevailing view favoured deletion of chapter 9 in its entirety, but it was generally agreed that draft article 43(2) and the first two sentences of draft article 44(1) should be maintained (and placed elsewhere in the draft instrument) for future consideration by the Working Group.

Conclusions reached by the Working Group on chapter 9

164. After discussion, the Working Group decided that chapter 9 should be deleted. Draft article 43(2) and the first two sentences of draft article 44(1) should be retained in square brackets and placed by the Secretariat in an appropriate location in the draft instrument for further discussion at a future session.

When freight earned [Deleted]

Article 41

[1. Freight is earned upon delivery of the goods to the consignee at the time and location mentioned in article 7(3), [and is payable when it is earned,] unless the parties have agreed that the freight is earned, wholly or partly, at an earlier point in time.

2. Unless otherwise agreed, no freight becomes due for any goods that are lost before the freight for those goods is earned.]

[Last version before deletion: A/CN.9/WG.III/WP.32]

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(a) Paragraph 9.1

[* * *]

174. The Working Group undertook a discussion as to what was meant by the term "earned upon delivery". It was said that this meant that the claim existed at the time of the delivery. It was suggested that the provision should more clearly distinguish between when a claim arose and when it was earned. Further explanation was sought as to what was meant by the term "earned" in the context of draft article 9(1). In response, it was suggested that the term "earned" referred to when a debt accrued although it may be actually payable at some later date. The view was expressed that the distinction was borne out by the fact that draft article 9(1) dealt

with the question when freight was earned, whereas draft article 9(2) dealt with when freight was payable. Concerns as to the clarity of this provision were however maintained. It was also suggested that draft article 9.1 required that the carrier could not claim freight for the transport until the transportation of the goods had been carried out but that this was subject to contrary party agreement. It was suggested that whilst the time for when freight became payable should be non-mandatory, the question of whether or not the claim for freight came into existence should not be open to contractual negotiation. Overall there were differences in opinion in the Working Group as to what was meant by the terms “earned” and “due”. It was agreed that further clarity be sought in any future drafts of this provision. There was general agreement that the principle of freedom of contract should apply to determining when the payment of freight was earned as well as when the payment of freight became due. As well, it was suggested that the provision should expressly state that the amount of freight should be established by agreement between the parties.

175. As to the provision that freight was earned upon delivery of the goods, it was considered that if a shipper failed to hand over goods to the carrier as agreed, the carrier should still be entitled to receive at least part of the freight. However, it was stated in reply that freedom of contract offered sufficient flexibility to address such issues.

176. In respect of paragraph (b) of draft article 9.1, it was suggested that the provision was drafted too broadly. In this respect, it was said that simply stating that no freight was due for any goods that were lost before the freight for the goods was earned, was too broad. It was suggested that the operation of this provision needed to be clarified with reference to different causes for non-delivery, such as: when the carrier was responsible, when nobody was responsible (force majeure) and when the shipper was responsible.

177. It was noted that there existed rules, practices and regulations, including rules elaborated at regional levels, the example was given of COCATRAM (Comisión Centroamericana de Transporte Marítimo), which dealt with issues such as, the currency of freight, the effects of devaluation or appreciation of the currency, as well as the carrier’s right to inspect goods and correct the amount of freight if the basis for calculating it was found to be inaccurate. It was suggested that the draft instrument should not interfere with any current or future arrangements of that nature.

[See also paragraph 164, A/CN.9/552 (13th Session of WG III) under General Discussion, Chapter on Freight at p. 410]

*When freight payable [Deleted]**Article 42**Variant A*

1. *Freight is payable when it is earned, unless the parties have agreed that the freight is payable, wholly or partly, at an earlier or later point in time.*
2. *If subsequent to the moment at which the freight has been earned the goods are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery.*
3. *Unless otherwise agreed, payment of freight is not subject to set-off, deduction or discount on the grounds of any counterclaim that the shipper or consignee may have against the carrier, [the indebtedness or the amount of which has not yet been agreed or established].*

Variant B

If subsequent to the moment at which the freight has been earned the goods are lost, damaged, or otherwise not delivered to the consignee in accordance with the provisions of the contract of carriage, unless otherwise agreed, freight shall remain payable irrespective of the cause of such loss, damage or failure in delivery, nor is payment of freight subject to set-off, deduction or discount on the grounds of any counterclaim that the shipper or consignee may have against the carrier the indebtedness of which has not yet been agreed or established.

[Last version before deletion: A/CN.9/WG.III/WP.32]

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]**(b) Paragraph 9.2**

178. By way of analysis of the structure of paragraph 9.2, it was observed that draft article 9 established a distinction between the conditions under which the obligation to pay freight came into existence (which were dealt with in paragraph 9.1) and the circumstances under which freight became payable (which were dealt with under paragraph 9.2).

179. A concern was expressed as to the interplay and the possible inconsistency between paragraphs 9.1(a) and 9.2(b). Assuming that, under paragraph 9.1(a), freight was earned upon delivery of the goods, a question was raised as to the circumstances under paragraph 9.2(c) where, subsequent to delivery, the goods would be “lost, damaged, or otherwise not delivered”. In response, it was explained that paragraph 9.2(b) was intended to address only the situation where the freight had been stipulated payable in advance, a situation that would probably be the most commonly found in practice in view of the general inclusion of clauses on the time when freight was earned in transport documents. With a view to alleviating the above-mentioned concern, a proposal was made that draft article 9.2(b) should be redrafted along the following lines: “Where freight is earned before delivery of the goods, the loss, damage and/or non-

delivery of the goods to the consignee does not render the earned freight non-payable, irrespective of the causes of such loss, damage and/or failure in delivery”.

180. It was observed that, should the draft instrument govern non-maritime transport in the context of door-to-door contracts of carriage, particular attention would need to be given to the interaction and possible conflict between the maritime regime under which freight remained payable even if the goods were lost and other unimodal transport regimes such as that established by the CMR, where the carrier had an obligation to refund freight if the goods were lost.

181. More generally, the view was expressed that establishing an international regime where freight remained payable even if the goods were lost, while consistent with a number of existing national laws, might be regarded by some as unfair and difficult to justify in a uniform international instrument. It was stated that no attempt should be made towards providing a uniform solution regarding that matter, which should be left to national laws. It was observed, however, that the policy under which freight remained payable even if the goods were lost was not unfavourable to the shipper. If the goods were lost, the amount of freight would be added to the value of the goods for the purposes of calculating compensation under draft article 6.2. If freight were included, the amount of compensation would therefore be calculated on the basis of a higher value.

182. With respect to paragraph 9.2(c), a question was raised regarding the reasons for which the draft provision established the general prohibition of set-off as a default rule. It was stated that such a policy might run counter to the general law of obligations in certain countries. The contrary view was that the policy reflected in paragraph 9.2(c) was satisfactory in that it insisted on the need for the parties to agree mutually on the set-off, thus preventing unilateral set-off by the shipper. That policy was said to be in line with the general principle on which draft article 9 was based that party autonomy should prevail in respect of freight. With a view to reconciling the two positions, wide support was expressed for including in the draft provision the words currently between square brackets (“the indebtedness or the amount of which has not yet been agreed or established”).

183. After discussion, it was provisionally agreed that, for continuation of the discussion at a later stage, the draft provision should be restructured, with paragraphs 9.1(a) and 9.2(a) being combined in a single provision, paragraph 9.1(b) standing alone and paragraphs 9.2(b) and 9.2(c) also being combined. It was also provisionally agreed that appropriate clarification should be introduced to limit the application of paragraph 9.2(b) and (c) to cases where specific agreement had been concluded between the parties.

[See also paragraph 164, A/CN.9/552 (13th Session of WG III) under General Discussion, Chapter on Freight at p. 410]

*“Freight collect” [Deleted]**Article 43*

1. *Unless otherwise agreed, the shipper is liable to pay the freight and other charges incidental to the carriage of the goods.*

2. *If the contract of carriage provides that the liability of the shipper or any other person identified in the contract particulars as the shipper will cease, wholly or partly, upon a certain event or after a certain point of time, such cessation is not valid:*

(a) *with respect to any liability under chapter 7 of the shipper or a person mentioned in article 31, or*

(b) *with respect to any amounts payable to the carrier under the contract of carriage, except to the extent that the carrier has adequate security pursuant to article 45 or otherwise for the payment of such amounts.*

(c) *to the extent that it conflicts with article 62.*

[Last version before deletion: A/CN.9/WG.III/WP.32]

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(c) Paragraph 9.3

184. It was noted that draft provisions 9.3(a) provided a fall-back, non-mandatory rule in case the transport contract did not settle the question who was the debtor for the freight and other incidental charges.

185. It was observed that the draft instrument provided no explanation as to what was covered by the term “charges incidental to the carriage of the goods” and that the term might be understood as covering a rather broad category of claims that might include, for instance, demurrage (damages for detaining the ship beyond the time contractually allowed for operations such as loading or unloading), other damages for detention, general average contributions and other reimbursable costs incurred by the carrier. It was considered in reply that the charges, being limited to those “incidental to the carriage of the goods”, would cover only those that the carrier was justified to claim from the shipper; for example, where the shipper had the free use of the carrier’s container but it would use the container beyond the agreed period, the shipper would be liable for the cost of using the container beyond the period of free use. The carrier might also have to incur costs in relation to the goods when, for example, they were refused entry by the customs authority and the carrier had costs therewith; it was suggested, however, that such costs more properly fell within draft provision 7.6, in particular in its proposed revised version (see above, para. 161). The Working Group took note of those statements and did not take any decision as to whether further clarification of the term was needed.

186. As to draft provision 9.3(b), it was noted that it addressed situations, relevant in particular to trade under charter parties (which were not to be covered by the draft instrument),

where the charterer, having paid part of the freight in advance or having transferred to a shipper the right to have goods carried, wished to be relieved of any other obligations relating to the carriage. In such a situation the parties would include in the charter party a clause (in practice often referred to as a “cesser clause”) to the effect that the charterer’s liability for freight would cease on shipment of the cargo; that meant that the carrier was to claim freight from the cargo owner or shipper and could for that purpose rely on the security interest (or lien) in the cargo.

187. As to the relevance of draft article 9.3(b) to transport contracts governed by the draft instrument, it was noted that, normally, the shipper’s liability would not cease upon events such as the shipment of the cargo or the transfer of the bill of lading (and, to that extent, the draft provision was not needed). However, should the parties include in the transport contract governed by the draft instrument a clause with the effect of a cesser clause (which it was recognized would not be frequent in practice) or should a cesser clause become part of the bill of lading because the terms and conditions in the charter party would be incorporated in it by reference (and the cesser clause would indeed operate to terminate the shipper’s liability for freight and other incidental claims, which was not necessarily the case because of the way such incorporated cesser clauses were interpreted by courts), draft provision 9.3(b) would ensure that the shipper would remain bound to the carrier as specified in subparagraphs (i), (ii) and (iii). It was noted that the draft provision was mandatory, i.e. that it overrode the agreement of the parties.

188. Some support was expressed for the draft provision, since it ensured that the carrier’s claim for freight was not left unpaid. However, considerable opposition and criticism were voiced against it. It was said to be unjustified that the provision was mandatory in an area where there was no need to protect a weaker party and, more generally, where freedom of contract should not be restricted, since the parties might have valid reasons to regulate by contract how the obligations of the shipper were to be dealt with. It was also said that the provision was too broadly worded in that subparagraph (b)(ii) covered “any amounts” payable to the carrier, irrespective of the extent to which a cesser clause had freed the shipper from its payment obligation. Moreover, by referring to any liability under chapter 7 (which covered a broad array of obligations of the shipper beyond the payment of freight), the provision was out of place in draft article 9 on freight. It was also said that it should be carefully studied whether the mandatory provision should extend to all those obligations.

189. The Working Group took note of the criticism of provision 9.3(b) and decided to postpone its decision on the matter until the issue, including the practical context in which the provision was to operate, was further studied.

190. Due to the absence of sufficient time, the Working Group did not complete its reading of draft article 9. It was agreed that the remaining paragraphs of draft article 9 and the remainder of the provisions of the draft instrument would be considered by the Working Group at its tenth session.

[See also paragraph 164, A/CN.9/552 (13th Session of WG III) under General Discussion, Chapter on Freight at p. 410]

*Carrier's retention of the goods [Deleted]**Article 44*

1. *[Notwithstanding any agreement to the contrary,] if and to the extent that under national law applicable to the contract of carriage the consignee is liable for the payments referred to below, the carrier is entitled to retain the goods until payment of*

(a) *freight, deadfreight, demurrage, damages for detention and all other reimbursable costs incurred by the carrier in relation to the goods,*

(b) *any damages due to the carrier under the contract of carriage,*

(c) *any contribution in general average due to the carrier relating to the goods has been effected, or adequate security for such payment has been provided.*

2. *If the payment as referred to in paragraph 1 of this article is not, or is not fully, effected, the carrier is entitled to sell the goods (according to the procedure, if any, as provided for in the applicable national law) and to satisfy the amounts payable to it (including the costs of such recourse) from the proceeds of such sale. Any balance remaining from the proceeds of such sale shall be made available to the consignee.*

[Last version before deletion: A/CN.9/WG.III/WP.32]

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

(b) Paragraph 9.5

115. Paragraph 9.5 was described as one of the essential provisions of the draft instrument. It was explained that the provision was intended to elaborate on the traditional principles applicable in maritime transport that goods should pay for the freight and that the carrier should be protected against the insolvency of its debtors up to the value of the transported goods. The view was also expressed, however, that attempting to legislate by way of uniform law in the field of the right of retention of the carrier might constitute an overly ambitious task. In the context of its preliminary discussion of the issue, the Working Group was invited to consider the following elements: (a) whether a provision regarding the right of retention was needed; (b) the conditions to be met by the carrier to exercise such a right of retention; (c) the nature of the debts of the consignee that could justify retention of the goods; (d) whether paragraph 9.5 should be formulated as a mandatory provision or be made subject to contrary agreement; and (e) the legal regime governing the right of the carrier to dispose of the goods.

116. Regarding the need for a provision along the lines of paragraph 9.5, doubts were expressed. It was pointed out that, in certain regions, the only right of retention that was known in maritime transport was the right of retention of the ship that could be exercised by naval works to ensure that a shipowner would pay for the costs associated with maintenance or repair of the vessel. It was also observed that no provision along the lines of paragraph 9.5 was found in existing transport conventions. The view was expressed that the provision should be restricted to payments for which the consignee was liable. If the provision would include also

payments for which the shipper was liable, that could contradict certain Incoterm practices under which the freight was included in the price for the goods. The prevailing view was that efforts should be pursued toward establishing a uniform regime for the right of retention. It was generally agreed that considerable changes would need to be introduced in paragraph 9.5.

117. A widely shared view was that, to the extent a provision along the lines of paragraph 9.5 should be retained, it should not be made conditional upon the consignee being liable for payment under applicable national law. In that connection, it was pointed out that the recognition of a right of retention might be appropriate in certain cases where the consignee was not liable for the freight, e.g., where the statement “freight collect” was contained in the transport document. It was also pointed out that establishing a right of retention might be appropriate not only where the consignee was the debtor but also in certain cases where another person, for example the shipper or the holder of the bill of lading, was indebted to the carrier. Furthermore, it was explained that the purpose for which a right of retention was established might be defeated if, prior to exercising that right, the carrier had to prove that the consignee was liable under domestic law. A question was raised as to whether paragraph 9.5 should create a right of retention or whether it should merely establish a security to complement a right of retention that might exist outside the draft instrument. In the latter case, the need would arise to determine the national law on the basis of which the existence of the right of retention should be assessed. It was emphasized that reference to applicable national law might raise difficult question of private international law. It was pointed out that various approaches might be taken by existing laws. For example, some laws were based on the rule that the carrier should be protected against insolvency of the consignee. Other laws might be based on a distinction whether a negotiable transport document had been issued, in which case the interest of the third party holder of the negotiable document should prevail over the interest of the carrier. It was generally felt that more discussion would be needed on that issue.

118. The view was expressed that establishing a right of retention might be regarded as affecting the balance of international transport law in favour of the carrier and that balance would need to be closely examined. Concern was expressed about establishing in the draft instrument a unilateral right of the carrier to retain goods on the basis of an alleged claim in the absence of any judicial intervention. In response, it was pointed out that the essential purpose of paragraph 9.5 was to establish at least the right of the carrier to obtain adequate security until payment of the freight had been made. In that connection, it was suggested that the words “adequate security” might need to be replaced by the words “adequate security acceptable to the carrier”. It was suggested that future consideration should be given to the possibility of ensuring that the interests of the carrier would receive adequate protection without affecting the position of any consignee acting in good faith.

119. In the context of that discussion, the view was expressed that paragraph 9.5 should make it clear that the right of retention would not necessarily imply that the goods would be retained on board the ship. Another view was that the right of retention of the goods should be expressly limited to those goods for which freight had not been paid, unless the goods retained could not be identified or separated from other goods.

120. With respect to the individual costs listed in subparagraphs 9.5(a)(i) to (iii) as grounds for exercise by the carrier of a right of retention of the goods, the view was expressed that the list was too extensive. Doubts were expressed about the exact meaning and limit of “other reimbursable costs” under subparagraph 9.5(a)(i). The view was expressed that it might be

essential to include a reference, not only to freight but also to associated costs, for example to deal with cases where damage had been caused by the transported goods. While it was acknowledged that those claims were not liquidated at the time when a right of retention would be exercised, it was pointed out that at least a security should be put up for those claims. However, strong support was expressed in favour of limiting the list of costs to freight, demurrage, and possibly damages for detention of the goods. A suggestion was made that subparagraph 9.5(a)(ii) should be deleted since it was insufficiently linked with the issue of freight. As to the reference to general average in subparagraph 9.5(a)(iii), it was stated that the obligation of payment could only be justified if a corresponding clause had been inserted in the contract of carriage or the transport document. It was also suggested that the issue of general average should not be linked with the issue of freight due by the consignee since the owner of the goods at the time of the general average might be different from the consignee. More generally, it was stated that, while payment of the freight might justify retention of the goods, the reimbursement of other costs should be left for commercial negotiation between the parties or for discussion in the context of judicial or arbitral proceedings in case of conflict between the carrier and the consignee or the shipper.

121. Regarding the question whether paragraph 9.5 should be formulated as a mandatory rule or not, a widely shared view was that the rule should be made subject to party autonomy. It was widely felt that mandatory rules would be unnecessarily rigid in respect of the right of retention of the goods, for which the carrier should be free to negotiate with its debtors.

122. With respect to the entitlement of the carrier to sell the goods under subparagraph 9.5(b), various views were expressed. One view was that the matter should not be dealt with through the establishment of a broad entitlement but should somehow involve judicial or other dispute settlement mechanisms to ensure that the right of retention was exercised in good faith and that retention of the goods had legal grounds. Another view was that, as a matter of drafting, the words “the consignee” at the end of subparagraph 9.5(b) should be replaced by the words “the person entitled to the goods” to ensure consistency with the final sentence of draft article 10.4.1(c). Yet another view, was that a cross-reference should be made in subparagraph 9.5(b) to article 10.4. With respect to the law applicable to the sale of the goods under subparagraph 9.5(b), the view was expressed that the draft instrument should contain an indication that it should be the *lex fori*, i.e., the law of applicable at the location where the goods were retained. Regarding the right of the carrier to “satisfy the amounts payable to it”, it was pointed out that such a rule went beyond traditional rules governing the right of retention in a number of countries, where the holder of such a right would merely be given priority over other creditors.

123. After discussion, the Working Group decided that paragraph 9.5 should be retained in the draft instrument for continuation of the discussion at a later stage. Due to the absence of sufficient time, the Working Group deferred its consideration of draft article 4 (see above, para. 27) and the remaining provisions of the draft instrument until its next session.

124. At the close of the session, the Working Group resumed its consultations with representatives from the transport industry, and with observers from various organizations involved in different modes of transport (for earlier discussion, see above, para. 28). Comments from a number of industry representatives are reproduced for information purposes as annexes I and II to this report, in the form in which they were received by the Secretariat.

[See also paragraph 164, A/CN.9/552 (13th Session of WG III) under General Discussion,
Chapter on Freight at p. 410]

CHAPTER 9. DELIVERY OF THE GOODS

General Discussion on the Chapter

[See also paragraphs 48-51, A/CN.9/510 (9th Session of WG III) under General Discussion, Chapter 7 at p. 283]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(a) General Remarks

63. The Working Group heard that draft article 10 consisted mainly of innovative material intended to set out what constituted delivery, and to deal with two problems that were pressing and frequent in daily practice. The first problem that was encountered frequently was that goods were not claimed by the consignee, and the second was that the consignee could demand delivery, but the negotiable transport document was not available to be surrendered to the carrier. It was noted that paragraph 10.1 stated that when the goods had arrived at their destination, the consignee had to accept delivery if the consignee had exercised any of its rights under the contract of carriage. It was stated that paragraph 10.2 was uncontroversial. Subparagraph 10.3.1 dealt with the situation where, if no negotiable document was available, the carrier had to deliver the goods to the consignee upon production of proper identification. It was explained that subparagraph 10.3.2 was potentially the most controversial aspect of this provision, since it dealt with the case of the negotiable transport document. Subparagraph 10.3.2(a)(i) set out the traditional practice where the holder of a negotiable instrument was entitled to claim delivery of the goods, at which point the carrier had to deliver the goods to the holder upon surrender of the negotiable instrument. It was noted that subparagraphs 10.3.2(c) and (d) were intended to deal with the non-production of the transport document or bill of lading at the destination. The Working Group heard that these draft provisions were an attempt to remedy a long-standing problem to which there was no simple solution, and that the draft provisions attempted to strike a fair balance between the rights of all of the parties involved.

64. It was suggested that paragraph 10.1 could be approved in principle, since it contained provisions that were comparable to other texts, such as those that impose a liability regime on a warehouse manager or a bailee for taking charge of the goods. A widely held view was that, while the various provisions in draft article 10 might need to be restructured and reordered in future versions of the draft instrument, the substance of the draft article was generally acceptable.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

General discussion

188. The Working Group was reminded that it had last considered draft chapter 10 at its eleventh session (see A/CN.9/526, paras. 62 to 99), and that it had last considered the period of responsibility of the carrier and draft article 14 (2) at its ninth session (see A/CN.9/510, paras. 39 to 40, and para. 43).

189. The Working Group heard that A/CN.9/WG.III/WP.57 had been prepared with a view to facilitating the discussions of the Working Group regarding the delivery of goods, the period of responsibility of the carrier, and issues in draft article 14 (2) concerning the period of responsibility. Informal consultations took place regarding those issues on the basis of that document.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Delivery to the consignee—Chapter 10 (continued)

79. The Working Group was reminded that its most recent consideration of draft chapter 10 on delivery to the consignee had commenced at its sixteenth session (see A/CN.9/591, paras. 188 to 239) but that it had been interrupted due to time constraints until the current session. It was also recalled that the most recent complete consideration of the topic by the Working Group took place during its eleventh session (see A/CN.9/526, paras. 62 to 99), and that a document containing information relating to delivery had been presented by the delegation of the Netherlands at the Working Group's sixteenth session (A/CN.9/WG.III/WP.57).

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

General comment

137. A concern was expressed with respect to chapter 9 as a whole. In general, the aim of the legal regime in chapter 9 to provide legal solutions to a number of thorny questions was applauded. However, it was thought that certain difficult questions remained, such as: when did the consignee have an obligation to accept delivery; what was the carrier's remedy if the consignee was in breach of that obligation; and what steps were necessary on the part of the carrier to ensure that the goods were delivered to the proper person.

138. It was suggested that the chapter created more problems than it solved and that adoption of the chapter could negatively affect ratification of the Convention. The Commission took note of those concerns.

Article 43. Obligation to accept delivery

When the goods have arrived at their destination, the consignee that demands delivery of the goods under the contract of carriage shall accept delivery of the goods at the time or within the time period and at the location agreed in the contract of carriage or, failing such agreement, at the time and location at which, having regard to the terms of the contract, the customs, usages or practices of the trade and the circumstances of the carriage, delivery could reasonably be expected.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]**(b) Paragraph 10.1**

65. Support was expressed for the principle that there be a provision in the draft instrument pursuant to which the consignee was obliged to take delivery at the time and place of delivery agreed in the contract of carriage, or in accordance with trade practice, customs or usages. The draft provision was praised for attempting to strike a balance between the interests of the shipper and of the carrier, and for providing a flexible solution to some of the problems associated with delivery. It was suggested that paragraph 10.1 could look to additional sanctions on the consignee in situations where the consignee was in breach of its obligation to accept delivery, such as the termination of the contract.

66. However, a note of caution was raised with respect to the balance struck between cargo interests and the carrier. It was suggested that paragraph 10.1 granted too broad a set of rights to the carrier, in that the carrier bore no responsibility for loss or damage to the goods unless it was caused by the carrier's intentional or reckless act or omission. In response, it was stated that paragraph 10.1 was intended to set out the basis for the carrier's liability for loss or damage to the cargo in the situation where the carrier was forced to act as a floating warehouse. Thus, it imposed a warehouseman's level of care. By contrast, paragraph 10.4 was drafted using permissive language, and was intended to provide the carrier with the entitlement to exercise certain rights, but those rights were circumscribed by certain conditions included in the article to protect the consignee.

67. A preference was expressed for the obligation to accept delivery not to be made dependent upon the exercise of any rights by the consignee, but rather that it be unconditional. Further, concern was raised with respect to the interaction between paragraphs 10.1 and 10.4, and it was recommended that the relationship between the draft provisions be clarified. A suggestion was made that paragraphs 10.1 and 10.4 could be merged. In order to reduce the confusion caused by the interplay of paragraphs 10.1 and 10.4, it was also suggested that the second sentence of paragraph 10.1 be deleted, and that paragraph 10.4 be left to stand on its own.

68. While general support was voiced for the principle embodied in paragraph 10.1, concerns were raised with respect to the concept of "agent". In some national legal regimes, the rights, obligations and responsibilities of agents have been clearly set out, and it was suggested that the potential confusion generated in this regard could be avoided by deletion of the concept of agent in this draft provision. However, the view was also expressed that the characterization

of the carrier or performing party as agent of the consignee was important in order for the carrier to exercise power over the goods, and to avoid liability, provided that no damage was caused and with an established limit on inexcusable fault.

69. It was also suggested that paragraph 10.1 should be considered in light of the law of the sale of goods, which did not contain an unconditional obligation to take delivery of the goods. The view was expressed, however, that the rule in this draft article was in accordance with the right of rejection pursuant to article 86 of the United Nations Convention on Contracts for the International Sale of Goods. It was cautioned that not all States were parties to that convention, and that the provisions of the convention were non-mandatory. It was suggested that this latter point was important since the obligation to accept delivery under paragraph 10.1 was a mandatory provision.

70. Concern was expressed that performing parties could become liable through the act or omission of the carrier pursuant to the second sentence of paragraph 10.1. It was suggested that this could be clarified with the addition of the phrase “or of the performing party” after the phrase “personal act or omission of the carrier”.

71. A risk of confusion was mentioned with respect to the relationship between draft article 10 and draft article 11 on right of control. It was suggested that this could be remedied by providing that the controlling party could replace the consignee only until the consignee exercised its rights under the contract, after which the right of control ceased to exist.

72. After discussion, the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and the suggestions made, and also to the need for consistency between the various language versions.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 46. Obligation to accept delivery

General discussion

209. The Working Group was reminded that it had last considered draft article 46 on the obligation to accept delivery at its eleventh session (see A/CN.9/526, paras. 65 to 72). The text of draft article 46 considered by the Working Group was as set out in annexes I and II of A/CN.9/WG.III/WP.56.

210. As a general comment, a question was raised regarding the consequences for breach of the consignee’s obligation to accept delivery under draft article 46. The view was expressed that such a breach should not automatically trigger an action for damages. In response, it was suggested that breach of the draft article 46 obligation to accept delivery fell into the category of general rights and liabilities of the shipper and the carrier that were not specifically addressed by the draft convention, and that the consequences of a breach would thus be left to national law. As a general matter, it was also observed that this draft article should be carefully coordinated with the provisions on right of control, since it was thought that the timing of the consignee’s obligation to accept delivery should accord with the transfer of the right of control. However, another view was expressed that the duty of the consignee to accept delivery should not depend on a transfer of rights, since it was a practical matter that should be regulated by the draft convention. Further, it was stated that while the content of draft article 46 was useful and

should be retained, care should be taken in including provisions regulating the post-delivery period as this was outside the scope of the convention and the contract of carriage.

First sentence: the duty of the consignee

211. There was general support for the view that the duty of the consignee to accept delivery should be conditional since it was thought that there must be an action or intention expressed on the part of the consignee to trigger its obligation to accept delivery. Some expressed the view that this was best accomplished by deleting the brackets around the text in the first sentence of draft article 46 and retaining the text. However, concern was raised that the requirement that the consignee “exercise its rights under the contract of carriage” was too broad and unclear, and it was suggested that the condition should reflect a consignee’s implied or actual acceptance to be the consignee. In response, it was said that the bracketed text was the appropriate condition to attach to the consignee’s obligation to accept delivery because it was acknowledged that the obligation should extend to those who have both explicitly and implicitly accepted to be the consignee, but it was thought that the notion of “acceptance” was too narrow a condition to cover what was intended. It was suggested that, for example, consistent with international sales law, if the consignee sampled the goods it would have exercised rights under the contract of carriage, and would have the obligation to accept delivery from the carrier. However, doubts were still expressed whether the text in square brackets was the best way to indicate the implied consent necessary to trigger the obligation of the consignee, and the view was also expressed that, while somewhat instructive, the qualifications in draft article 62(3) were better suited to define what was not implied consent rather than what was implied consent.

212. Other views were expressed that obligation of the consignee to accept delivery should be unconditional and that the bracketed text in the first sentence of draft article 46 should be deleted. It was thought that unless the text in brackets was deleted, the consignee could elect not to exercise any rights under the contract of carriage and thus could avoid the obligation to take delivery of the goods. It was suggested that this result would not be fair to a carrier that had completed the terms of the contract of carriage, and further, that there was a need to avoid an increase in the problem of unclaimed cargo.

213. In addition, it was noted that the reference in draft article 46 was to the consignee’s obligation to accept delivery of the goods at the time and location referred to in draft paragraph 11(4). However, it was observed that the current text did not address the situation whether the consignee also had an obligation to accept the goods when they arrived late.

214. A further suggestion made was that the consignee should be notified of the arrival of the goods at destination. The view was expressed that introducing notification of the consignee as a legal obligation was not advisable, since sending a notice of readiness was already a standard practice in the industry for the benefit of both the carrier and the consignee, and there did not appear to be any legal problem with respect to such notices. It was thought that a legal requirement in this regard could give rise to unnecessary bureaucracy and could present evidentiary difficulties. Further, it was noted that in current practice, tracking the location of goods electronically was broadly available.

Second sentence: standard of care of the carrier

215. It was observed that the second sentence of draft article 46 was intended to set out the standard of care and the liability of the carrier with respect to the goods left in its custody in case of a breach of the consignee's obligation to accept delivery. There was general support for the view that the second sentence of draft article 46 should be addressed in conjunction with draft article 51 regarding the carrier's rights when the goods were undeliverable and draft article 53 with respect to the carrier's liability for undeliverable goods, and the sentence should be possibly moved from draft article 46 to be combined with draft article 53.

216. There was general support for the view that the content of the second sentence on the standard of care should be retained. However, the view was expressed that the standard of care required of the carrier and the liability arising from breach of that standard were too low as set out in the second sentence of draft article 46, while other views were that the standard of care was acceptable. The view was also expressed that the carrier's standard of care in the second sentence arose outside of the scope of the contract of carriage and that in some jurisdictions this gave rise to the concept of "agency by necessity" which placed a standard of care of "reasonableness" on an agent, but that the standard of care expressed in the second sentence was higher than that duty. A further suggestion regarding the standard of care was that an intermediate standard that the carrier should be required to treat the goods as though they were its own, such as that existing in some national legal systems, should be adopted.

217. Other views were that the standard of care of the carrier contained in the second sentence was too low considering that the reasons for non-acceptance of delivery by the consignee could be varied and outside of its control. The suggestion was also made that if an appropriate standard of care could not be agreed upon, and if the sentence were deleted, that that might not be sufficient to leave the matter to national law, and it could be necessary to include an express provision stating that the standard of care was governed by applicable law.

218. In support of deleting draft article 46 in its entirety, the view was expressed that since the draft convention already contained adequate rules regarding the right of control and the rights of the carrier in such circumstances, it would be better to delete draft article 46 than to leave any uncertainty regarding whether a breach of the consignee's obligation to accept delivery would trigger damages. In response, it was said that the duty of the consignee to accept delivery of the goods was an important one that needed to be explicit, and there was support for the view that draft article 46 should thus be retained.

Conclusions reached by the Working Group regarding draft article 46:

219. After discussion, the Working Group decided that:

- The text of draft article 46 should be maintained, with any necessary drafting adjustments, particularly following the discussion of draft articles 51 and 53.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 44. Obligation to accept delivery**

15. The Working Group proceeded to consider draft article 44 as contained in A/CN.9/WG.III/WP.94. In that respect it was observed that, for the sake of clarity, the

Secretariat proposed to remove paragraph 2 from draft article 11, as contained in A/CN.9/WG.III/WP.81, and to move its content to the end of paragraph 1 of draft article 44, since it appeared that the rule regarding time and location of delivery would be best placed in draft article 44 in the chapter on delivery. Moreover, the Secretariat suggested that, as the obligation of unloading the goods pursuant to paragraph 2 of draft article 14 would be performed by the consignee, the corresponding provision should be moved from paragraph 2 of draft article 27 to a new paragraph 2 of article 44.

Concept of delivery

16. The view was expressed that the last sentence contained in paragraph 1 of draft article 44 dealt with actual delivery rather than the contractual time and place of delivery. For that reason, it was proposed that that sentence should be deleted and the following wording inspired by the current draft article 21 as contained in A/CN.9/WG.III/WP.81, should be added to the end of paragraph 1 after the words “time and location”: “at which, having regard to the terms of the contract, the customs, practices and usages of the trade and the circumstances of the journey, delivery could be reasonably expected.”

17. In support of a redrafting of paragraph 1, it was also stated that the reference, in that context to the time and location of delivery as being that “of the unloading of the goods from the final means of transport in which they are carried under the contract of carriage” might be read to suggest that the consignee could be obliged to accept delivery at any time or place when or where the goods might be finally unloaded. That, it was said, would be an unreasonable imposition on the consignee.

18. The proposal to redraft paragraph 1 received some support, but the Working Group agreed to defer a final decision on the proposed additions, so as to allow delegations more time to reflect further on their implications.

Choice between bracketed alternatives

19. The Working Group proceeded to consider the two bracketed texts contained in draft article 44 which referred to the obligation to accept delivery of the goods by the consignee that either “exercises any of its rights under” or “has actively involved itself in” the contract of carriage. It was suggested that both texts could be deleted given that the definition of consignee as contained in draft article 1 already clarified the consignee’s entitlement to delivery and that in context of the draft article, the consignee’s obligation to take delivery should be made unconditional. While there was some support for that suggestion, the Working Group was predominantly in favour of retaining some form of qualification in the draft article, and proceeded to consider the options available in the draft before it.

20. The view was expressed that both sets of square brackets contained unclear language and that neither of them offered sufficient guidance as to the circumstances under which a consignee should be obliged to accept delivery under the contract of carriage. It was suggested that it would be preferable to delete both bracketed texts and refer instead to a requirement that the consignee demanded delivery or something comparable. However, concerns were expressed that such a requirement might prove overly onerous for the carrier that could not discharge itself of the custody of the goods under the contract of carriage in situations where a consignee took some legally relevant actions without formally demanding delivery, for example, when the

consignee requested samples of the goods to determine whether or not to accept them pursuant to the underlying contract of sale.

21. Some support was expressed for the second bracketed text. It was suggested that the term “actively” should be deleted from the second bracketed text for the reason that passive behaviour might sometimes suffice to oblige the consignee to accept delivery of the goods. However, concern was expressed that the second bracketed text was too broad and ambiguous in that it did not indicate which level of “involvement” in the contract of carriage would suffice to obligate the consignee to take delivery of the goods. In the light of those concerns, the Working Group expressed a preference for the first bracketed text.

22. In considering the text in the first set of brackets, the Working Group heard expressions of concern that the reference to a consignee exercising “any” of its rights under the contract of carriage might be too broad. For example, should it be sufficient in order to trigger the provision that a consignee exercised a contractual right to obtain information on the whereabouts of goods during the voyage? It was suggested that such was not the case and that the exercise of a contractual right referred to matters such as exercising a right of control or asking the carrier to take samples of the cargo. To meet that concern, it was suggested that the words “any of” should be deleted from the first bracketed text. It was said that the intention of the article was that a consignee who wished to exercise its rights under the contract of sale, such as the right to reject the goods, should not be allowed to refuse to take delivery of the goods under the contract of carriage.

Conclusions reached by the Working Group regarding draft article 44:

23. After discussion, the Working Group agreed that the text of draft article 44 as contained in A/CN.9/WG.III/WP.94 was acceptable and that:

- The first bracketed text be included with the words “any of” being deleted; and
- The final wording of paragraph 1 of draft article 44 be revisited once delegations had an opportunity to reflect on the proposal to delete the last sentence thereof and redraft the final words of the first sentence.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 45. Obligation to accept delivery

145. The Working Group recalled its decision in relation to draft article 28(2) to entertain further discussion under draft article 45(2) regarding the necessary trigger for the consignee’s obligation to unload the goods pursuant to an agreement made by the parties to the contract of carriage under draft article 14(2) (see above, para. 91). In that context, two proposals were made: first, that, in keeping with the changes made to draft articles 14(2) and 28(2), the phrase “the parties” should be replaced with “the carrier and the shipper”, and secondly, that the phrase “and the consignee provides its consent” should be inserted before the phrase “the consignee shall do so properly and carefully.” Strong support was expressed for the first part of that proposal, and some support was expressed for the second part of the proposal. Some concern was expressed regarding what the result would be if the consignee did not consent, but it was suggested that the solution to that problem could be found in the carrier’s rights with respect to undelivered goods pursuant to draft article 51(2). Further, support for the two

proposals was urged, since the situation at issue in paragraph 2 was thought to be rather exceptional, and that requiring the consent of the consignee was thought to have a neutral effect in practice, while assuaging some of the broader concerns expressed in the Working Group with respect to agreements made pursuant to draft article 14(2).

146. It was observed that the requirement for the “consent” of the consignee might be too onerous, since, for example, if a provision in the bill of lading required the consignee to unload the goods at its own risk and expense, it would be unnecessary for the consignee to provide a separate consent. As such, it was suggested that any revision to paragraph 2 should instead focus on the agreement under draft article 14(2) “binding” the consignee, rather than requiring its “consent”. There was some support for that suggested approach.

147. However, strong concerns were raised regarding both the proposal to insert an element of “consent” into the draft provision, and to focus on “binding” the consignee. In particular, it was observed that in some jurisdictions, the contract of carriage was a three party contract, and the consignee was bound by its terms. It was further noted that any additional requirement for “consent” on the part of the consignee could have very serious consequences in respect of commercial practices or customs of a particular trade. For example, it was observed that in the bulk trades, a provision requiring the consent of the consignee regarding an obligation to unload the goods would constitute a marked change from existing practice. As a result, a strong preference was expressed for leaving the text of paragraph 2 as drafted in the text, or for the deletion of the paragraph altogether, leaving the matter of the consignee’s obligations to national law. Strong support was expressed for that perspective.

148. It was observed that paragraph 2 should be considered in two respects: first, with respect to any consent that should be required from the consignee prior to it being subject to the obligation to unload the goods pursuant to an agreement between the parties to the contract of carriage, and secondly, with respect to the standard of care that should be required of the consignee in unloading the goods. It was suggested that the focus of the draft provision should be on the standard of care rather than on whether the consignee had given its consent, and that the text of paragraph 2 should be adjusted in order to reflect that. It was suggested, in particular, that draft article 45(2) could be amended along the following lines: “When the consignee unloads the goods, it shall do so properly and carefully.” If that approach were taken, it was thought that it would be clear that the issue of whether or not the consignee had to consent to any obligation on it pursuant an agreement under draft article 14(2) would be subject to national law.

149. As a further clarification, it was noted that the Working Group should consider specifically whether the standard of care required of the consignee in unloading the goods would be with respect to the goods themselves, with respect to the goods of others, or with respect to the ship. If the standard of care was intended to be focused on the goods, it was observed that the consignee was likely the owner of the goods, and that it would seem illogical to set out a standard of care with respect to one’s own goods.

150. Given the strongly-held views expressed in the Working Group, an attempt to form consensus on the basis of the proposal that the paragraph should focus on the standard of care and not on whether the consignee had given its consent was not successful. There was agreement with the view expressed that setting out a standard of care in that limited sense was somewhat redundant, since all obligations undertaken pursuant to the contract of carriage ought

to be carried out properly and carefully. Rather than maintain the text of paragraph 2 as drafted, the Working Group decided to delete paragraph 2 of draft article 45 in order to make it abundantly clear that the matter of the consignee's obligation resulting from any agreement between the carrier and the shipper was left to national law.

151. Having decided to delete paragraph 2, the Working Group approved the substance of paragraph 1 of draft article 45 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 45. Obligation to accept delivery

139. Concerns in line with the general comment expressed in respect of chapter 9 were also raised with respect to draft article 45. While there was some support for that approach, the focus of concern in respect of the draft provision was the phrase “the consignee that exercises its rights”. It was suggested that that phrase was too vague in terms of setting an appropriate trigger for the assumption of obligations under the Convention. It was suggested that that uncertainty could be remedied by deleting the phrase at issue and substituting for it: “the consignee that demands delivery of the goods”. There was support in the Commission for that view.

140. In response to that position, it was observed that draft article 45 had been included in the draft Convention to deal with the specific problem of consignees that were aware that their goods had arrived but wished to avoid delivery of those goods by simply refusing to claim them. It was noted that carriers were regularly faced with that problem and that draft article 45 was intended as a legislative response to it. It was further explained that the phrase “exercises its rights” was intended to cover situations such as when the consignee wished to examine the goods or to take samples of them prior to taking delivery, or when the consignee became involved in the carriage. It was observed that the United Nations Convention on Contracts for the International Sale of Goods (the “United Nations Sales Convention”) required that buyers that wanted to reject the goods under the contract of sale take delivery of them from the carrier, but that the buyer would do so on behalf of the seller. It was suggested that draft article 45 was appropriate and in keeping with that approach. There was some support in the Commission for that view.

141. After discussion, the Commission decided to adopt the amendment suggested in paragraph 139 above. With that amendment, the Commission approved the substance of draft article 45 and referred it to the drafting group.

Article 44. Obligation to acknowledge receipt

On request of the carrier or the performing party that delivers the goods, the consignee shall acknowledge receipt of the goods from the carrier or the performing party in the manner that is customary at the place of delivery. The carrier may refuse delivery if the consignee refuses to acknowledge such receipt.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

73. The Working Group found the substance of paragraph 10.2 to be generally acceptable.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Draft article 47. Obligation to acknowledge receipt*****General discussion***

220. The Working Group was in agreement that article 47 as set out in annexes I and II of A/CN.9/WG.III/WP.56 should be adopted, subject to drafting improvements.

Additional considerations under draft article 47

221. The Working Group heard the view that the consequences of a failure to acknowledge receipt of the goods pursuant to draft article 47 should be made express in the draft instrument, since such a result could be seen as a failure of the carrier's draft article 13 obligation to deliver the goods pursuant to the contract of carriage. Another aspect of this issue expressed for the future consideration of the Working Group was said to be that the draft instrument should include a provision on the right of the carrier to retain the goods in cases when the consignee failed to fulfil its obligation to provide proper identification or for non-payment of freight, since the current system of resort to national law or the use of a retention clause in the contract of carriage was thought to be unsatisfactory. Support was expressed for that proposal.

Conclusions reached by the Working Group regarding draft article 47:

222. After discussion, the Working Group decided that:

- Draft article 47 should be adopted, subject to drafting improvements; and
- Consideration should be given to drafting text as proposed in paragraph 221 above.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 45. Obligation to acknowledge receipt**

24. The Working Group was in agreement that the text in draft article 45 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 46. Obligation to acknowledge receipt**

152. The Working Group approved the substance of draft article 46 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 46. Obligation to acknowledge receipt

142. The Commission approved the substance of draft article 46 and referred it to the drafting group.

Article 45. Delivery when no negotiable transport document or negotiable electronic transport record is issued

When neither a negotiable transport document nor a negotiable electronic transport record has been issued:

(a) The carrier shall deliver the goods to the consignee at the time and location referred to in article 43. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier;

(b) If the name and address of the consignee are not referred to in the contract particulars, the controlling party shall prior to or upon the arrival of the goods at the place of destination advise the carrier of such name and address;

(c) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(d) The carrier that delivers the goods upon instruction of the controlling party, the shipper or the documentary shipper pursuant to subparagraph (c) of this article is discharged from its obligations to deliver the goods under the contract of carriage.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(d) Paragraph 10.3

(i) Subparagraph 10.3.1

74. The Working Group was reminded that subparagraph 10.3.1 was intended to govern the situation where no negotiable transport document or electronic record had been issued. It was suggested that provisions were drafted in an even-handed fashion, where subparagraph 10.3.1(i) stated that the controlling party had to put the carrier in a position to be able to make delivery by providing it with the consignee's name, and subparagraph 10.3.1(ii) provided the corollary that the carrier had to deliver the goods according to the agreement in the contract of carriage upon the production of proper identification by the consignee.

75. It was suggested that this draft provision was confusing, since it could be read to imply that the carrier did not know the identity of the consignee until the end of the carriage. However, except where the controlling party would change the consignee during the course of the carriage, it was more likely that the carrier would know the identity of the consignee from the outset. It was explained that subparagraph 10.3.1 was intended to set out the general obligation of the controlling party to put the carrier in a position where delivery could be effected. The suggestion was made that the Working Group should consider redrafting subparagraph 8.2.1 to include the name and address of the consignee in the contract particulars that must be put into the transport document.

76. A question was raised regarding what consequences would flow from the situation where the carrier did not follow the rule set out in subparagraph 10.3.1(ii). It was suggested that this matter should be left to national law, and that subparagraph 10.3.1(ii) should be revised by referring to the carrier's right to refuse delivery without the production of proper identification, but that this should not be made an obligation of the carrier.

77. The Working Group found the principles embodied in subparagraph 10.3.1 to be generally acceptable. The Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 48. Delivery when no negotiable transport document or negotiable electronic transport record is issued

General discussion

223. The Working Group was reminded that it had last considered draft article 48 at its eleventh session (see A/CN.9/526, paras. 74 to 77). The Working Group considered the text of this provision as found in annexes I and II of A/CN.9/WG.III/WP.56.

224. The Working Group was reminded that draft article 48 was intended to govern delivery when no negotiable transport document or electronic record had been issued.

Draft paragraph 48(a)

225. It was indicated that draft paragraph 48(a) aimed at having the controlling party provide the carrier with the consignee's name and address if they were not provided in the contract particulars so as to enable the carrier to make delivery. There was agreement with the suggestion that the text should be adjusted to accommodate the operation of some domestic regulations requiring the controlling party to provide the information earlier than the time foreseen in the draft convention. It was further indicated that the word "thereof" should be

substituted with the words “name and address of consignee” to improve the clarity of the text. The view was also expressed that draft paragraph 48(a) should be deleted as the substance of the draft provision was thought to have been dealt with in draft article 59.

Draft paragraph 48(b)

226. It was noted that draft paragraph 48(b) had three variants. A large number of delegations expressed support for the retention in the draft convention of variant C of the draft provision. It was indicated that variant C did not qualify the identification of the consignee as a prerequisite for the delivery of goods, thus avoiding the undesirable consequence that delivery of the goods by the carrier to the right consignee without proper identification would be held invalid. It was added that variant C would accurately reflect the notion that the identification of the consignee was a right of the carrier and not an obligation. It was further indicated that variant C would also achieve the desirable result to leave matters related to forgery of documents to national law. However, some support was also expressed in favour of variant A of draft paragraph 48(b), as it was indicated that that variant better expressed the duty of the carrier to identify the consignee. The view was also expressed that draft paragraph 48(b) should be deleted and that the substance of the draft provision should be dealt with in draft article 47 by adding to that article reference to identification of the consignee.

227. It was suggested that the reference to the time and location of the delivery mentioned in draft article 11(4) in variant C of draft paragraph 48(b) should be substituted with a reference to the time and location of the delivery agreed in the contract of carriage, since it was thought that draft article 11(4) dealt mainly with the definition of the period of responsibility of the carrier. However, it was also observed that such a change could create problems in practice, since contracts of carriage seldom stated the time of delivery, and it was suggested that the matter required further consideration, or, alternatively, that all references to the time of delivery in the draft instrument should be reconsidered.

228. It was indicated that the matter of straight bills of lading, which could also arise in conjunction with draft paragraph 48(b), would be the topic of a future proposal. A preliminary view was expressed that straight bills of lading would best be dealt with at a general level in the draft chapter on documents of transport of the draft convention.

Draft paragraph 48(c)

229. It was observed that draft paragraph 48(a) did not provide for the consequences of the failure of the controlling party to provide the name and address of the consignee, but it was added that the specification of such consequences would be better placed in draft paragraph 48(c) by inserting the following text at the beginning of the paragraph, “If the name and address of the consignee are not known to the carrier or”. It was further suggested that draft paragraph 48(c) should contain a reference to the notice from the carrier to the consignee, through the insertion of the phrase “after having received notice” after the phrase in the text “if the consignee”.

Conclusions reached by the Working Group regarding draft article 48:

230. After discussion, the Working Group decided that:

- Suggestions made for drafting improvements to paragraphs (a) and (b) should be considered;

- Variant C of draft paragraph 48(b) should be retained in the draft convention; and
- The words “If the consignee” at the beginning of draft paragraph 48(c) of the draft convention should be substituted by the words “If the name or the address of the consignee are not known to the carrier or if the consignee, after having received notice,”.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 46. Delivery when no negotiable transport document or negotiable electronic transport record is issued

25. It was recalled that draft article 46 had last been considered at the sixteenth session of the Working Group (see A/CN.9/591, paras. 223 to 230). The Working Group proceeded to consider the text in draft article 46 as contained in A/CN.9/WG.III/WP.81. A question was raised as to whether the reference to “after having received a notice of arrival” in paragraph (c) of draft article 46 could imply that notice should always be given to the consignee. It was said that such an interpretation would be inconsistent with draft article 50(3), which allowed notice to be given to someone other than the consignee. It was proposed that paragraph (c) be redrafted so as to be consistent with draft article 50(3).

26. Some support was expressed for the deletion of the words “after having received a notice of arrival” from paragraph (c) of draft article 46. It was noted that those words could place a heavy burden on a carrier, particularly in the context of container shipping where there could be a significant number of consignees. It was also suggested that the words were unnecessary given that paragraph 50(3) already dealt with the circumstance where a carrier might wish to treat goods as undeliverable. If those words were retained, a suggestion was made to amend the wording to refer instead to a consignee “after having given notice of arrival” to take account of the possibility that a carrier could not be expected to know when a consignee had received a notice of arrival. However, support was expressed for retention of the text without amendment. It was said that draft article 46 dealt with the obligations of the carrier once the goods arrived at the place of destination and that it could therefore be distinguished from draft article 50(3) which dealt with the situation where goods could be considered as undeliverable.

27. A suggestion was made to clarify that the obligation in paragraph (c) of draft article 46 of the controlling party or the shipper to give instructions in respect of delivery of the goods should be subject to the same terms that applied under article 54, for example, that the instructions be reasonable and not interfere with the normal operations of the carrier.

Conclusions reached by the Working Group regarding draft article 46:

28. After discussion, the Working Group agreed that the text of draft article 46 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued

153. The Working Group approved the substance of draft article 47 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued

143. A concern was expressed that draft article 47 protected the carrier only when it had followed the required procedure set out in the provision, but that the carrier was not protected when it had not followed that procedure. Further, the issue was raised that if the shipper was no longer the controlling party, it was probably because it had already transferred all of its rights in the goods to the controlling party, including the right to instruct on delivery. The Commission took note of those concerns.

144. The Commission approved the substance of draft article 47 and referred it to the drafting group. (For subsequent discussion and the conclusions on this draft article, see paras. 166-168 below.)

[* * *]

Consequential changes to draft article 47 (Delivery when no negotiable transport document or negotiable electronic transport record is issued); draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued); and draft article 50 (Goods remaining undelivered)

166. Having decided to replace draft article 49 with the new text (see paras. 152 and 165 above), the Commission agreed that consequential changes needed to be made to draft articles 47 and 48 in order to align them with the new text. The following revised texts were proposed for the relevant provisions:

Article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued

“(c) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier

is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;”

Article 48. Delivery when a non-negotiable transport document that requires surrender is issued

“(b) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, or (iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;”.

167. It was further noted that the words “the holder” should be inserted after the words “the controlling party” in draft article 50, subparagraph 1 (b).

168. The Commission approved the proposed revisions to draft articles 47, 48 and 50 and referred them to the drafting group.

Article 46. Delivery when a non-negotiable transport document that requires surrender is issued

When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The carrier shall deliver the goods at the time and location referred to in article 43 to the consignee upon the consignee properly identifying itself on the request of the carrier and surrender of the non-negotiable document. The carrier may refuse delivery if the person claiming to be the consignee fails to properly identify itself on the request of the carrier, and shall refuse delivery if the non-negotiable document is not surrendered. If more than one original of the non-negotiable document has been issued, the surrender of one original will suffice and the other originals cease to have any effect or validity;

(b) Without prejudice to article 48, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the non-negotiable transport document has been surrendered to it.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Proposal on bills of lading consigned to a named person

208. The Working Group was reminded that a proposal had been made in A/CN.9/WG.III/WP.68 for the inclusion in the draft convention of provisions on bills of lading consigned to a named person. It was stated that while the entire scheme of the draft convention was based solely on negotiable and non-negotiable transport documents and electronic transport records, in practice, another type of transport document was used whose characteristics fell somewhere between those two categories: the bill of lading consigned to a named person. It was noted that this document was in common use in some legal systems, although it went by different names depending on the jurisdiction and that it was subject to different rules, sometimes even within the same jurisdiction. Further, although it was thought that the legal framework established in the draft convention made the inclusion of the bill of lading consigned to a named person superfluous, it was thought that some provision should be made for their treatment in the draft convention, since commercial practice could not be

expected to change immediately upon the entering into force of any new regime. The Working Group agreed to limit its consideration of this proposal at its current session to the two main issues of whether to include such provisions in the draft convention, and how to define bills of lading consigned to a named person, leaving other issues for future discussion. Should bills of lading consigned to a named person be included?

209. The view was expressed that if the framework of the draft convention was thought to be inclusive of all necessary types of documents, allowing for this unusual intermediate document with uncertain characteristics could be seen as encouraging its use, and that it would be better to put an end to such anomalies. As such, a preference was expressed that specific provision should not be made in the draft convention for bills of lading consigned to a named person, and that they should instead be subjected to the general scheme of negotiable or non-negotiable documents.

210. However, the opposite view was also expressed that bills of lading consigned to a named person should be included in the draft convention, since subjecting them to at least some uniform rules in this fashion could have the welcome result of decreasing the uncertainty of law with respect to their use. Some views were expressed that although bills of lading consigned to a named person were not used in their specific jurisdictions, it was recognized that this intermediate form of document was in use elsewhere, and that including provisions with respect to them in the text of the draft convention could assist in making the draft convention more effective and more efficient in those jurisdictions. Support was expressed for this view based on the commercial practicality of including such documents if they were in use, and assuming that their inclusion would provide additional commercial certainty.

Conclusions reached by the Working Group regarding the inclusion of bills of lading consigned to a named person:

211. After discussion, the Working Group decided that:

- Provisions on bills of lading consigned to a named person should be included in the draft convention.

Definition of bills of lading consigned to a named person

212. It was proposed in paragraph 12 of A/CN.9/WG.III/WP.68 that the bill of lading consigned to a named person should be defined as “a non-negotiable transport document that indicates that it must be surrendered in order to obtain delivery of the goods”. It was explained that the intention of the proposal was to treat such bills of lading as non-negotiable documents within the ambit of the draft convention, and that the document should carry with it the requirement that it must be shown or surrendered to the carrier when the possessor of the document wanted to exercise any right under the contract of carriage evidenced by the document, or the so-called “presentation rule”. The final necessary element of the definition was thought to be that the “presentation rule” should be stated on the document itself in order to indicate the element of negotiability of the document. It was thought that there was an appropriate combination of elements in the definition to allow it to fit with current commercial practice, in which parties could agree on the requirement of presentation of a non-negotiable document, and that standard form bills of lading consigned to a named person typically contained a statement of the “presentation rule”.

“indicates”

213. It was explained that the word “indicates” had been used in the definition rather than a more specific word such as “stated” in order to provide greater flexibility and to allow various documents to be interpreted as falling within the definition. While there was some support for the text of the definition as presented, some concern was expressed that the word “indicates” was too flexible and broad, and that it would allow documents that had not been intended as bills of lading consigned to a named person to nonetheless be treated as such. A proposal was made to replace the word “indicates” with a more precise word, such as “specifies”.

214. Another suggestion was made to clarify the definition by inserting the phrase “under the law governing the document” after the word “indicates”, similar to the definition of “negotiable transport document” in draft paragraph 1(o). Given the possibility of unclear text appearing on a document such as “the carrier can require the surrender of this document upon delivery of the goods”, it was thought that it was important that the definition should be interpreted according to the applicable law governing the document. Some hesitation was expressed that the insertion of a phrase with respect to the applicable law would unduly restrict the definition and thus the interpretation of which documents would fall within that category, particularly since judicial treatment of bills of lading consigned to a named person was not uniform. In response, it was suggested that the flexibility inherent in the word “indicates” would remain, but that insertion of a phrase on the applicable law would provide some necessary structure for the exercise of that discretion.

Conclusions reached by the Working Group regarding the definition of bills of lading consigned to a named person:

215. After discussion, the Working Group decided that:

- The definition of bills of lading consigned to a named person was not entirely satisfactory, as the word “indicates” was too flexible; and
- The Secretariat should prepare alternative definitions that avoided suggesting that a particular phrase must be found in the transport document in order for it to be a bill of lading consigned to a named person and that took into account the possible need for a reference to the law governing the transport document.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 47. Delivery when a non-negotiable transport document that requires surrender is issued**

29. The Working Group was reminded that draft article 47 was inserted in A/CN.9/WG.III/WP.81 following a decision of the Working Group at its seventeenth session to insert into the text of the draft convention a provision concerning delivery of the goods when a non-negotiable transport document that required surrender had been issued (see A/CN.9/594, paras. 208 to 215). The Working Group was further reminded that draft article 47 appeared in A/CN.9/WG.III/WP.81 in square brackets, and that its text was based on that of proposed article 48 bis as set out in A/CN.9/WG.III/WP.68 (see para. 15).

General discussion

30. While it was acknowledged that non-negotiable transport documents that required surrender were not known in all jurisdictions, the Working Group was of the general view that draft article 47 was useful in cases where such documents existed. The Working Group decided that draft article 47 should be retained and the square brackets around the provision deleted.

“[provides] [indicates] [specifies]”

31. The Working Group next considered the three alternatives presented in the chapeau of draft article 47: whether such a non-negotiable transport document should “[provide]”, “[indicate]” or “[specify]” that it must be surrendered. It was observed that in some jurisdictions, the simple title “bill of lading” meant that surrender of the document was required upon delivery of the goods, and that if the intention of draft article 47 was to preserve existing law regarding these types of documents, the preferred text would be “indicates according to the law applicable to the document”. However, it was further suggested that if the Working Group did not agree with that proposal, the word “indicates” should be chosen, since, although being slightly vague, that term would at least preserve current practice with respect to such documents. There was support for the view that current practice should be preserved, but it was suggested that the word “indicates” would be preferable, since reference to the applicable law might be clear in legal terms, but it would be difficult for the carrier to know at the time of delivery whether or not the document in issue fulfilled the requirements of the applicable law. There was a preference in the Working Group for the retention of the term “indicates”, as among the three alternatives, and for the deletion of the other options, in order to retain current practice with respect to non-negotiable transport documents that required surrender.

32. However, it was observed in response that the draft convention classified all transport documents according to whether they were negotiable or non-negotiable, and that reference to documents as “bills of lading”, along with whatever legal consequences that label might entail in terms of national law, would resort to a taxonomy that was contrary to that used in the draft convention. It was further suggested that, while it had been decided by the Working Group to accommodate the current practice regarding non-negotiable transport documents that required surrender, there was no uniformity in national law regarding the treatment of such documents. Under the circumstances, an implicit referral to considerations of national law would allow too much scope for interpretation to fit with the categorization of documents in the draft convention. It was suggested that to preserve a uniform classification system in the draft convention, it should be clear that the wording of such a document must itself suffice to determine its character, and that, at a minimum, the term “indicates” should be deleted as lacking clarity and as potentially importing uncertainty into the otherwise clear categorization in the draft convention. In addition, it was observed that the draft convention aimed to establish a clear, predictable system, and that the assumption that the parties had agreed to a non-negotiable transport document that required surrender, which would be unusual in some jurisdictions, should require an indication of a conscious decision. Thus, the draft convention should require a more rigorous standard than that denoted by the word “indicates”. There was support for the view that, for the purposes of consistency and certainty, the word “indicates” should be avoided in this context.

33. Support was also expressed in the Working Group for the term “provides”, and some support was expressed for the term “specifies”. In addition, there was some discussion

regarding whether the different language versions of the three alternatives might suggest a term that was preferable to the three options set out in the text. However, no clear consensus emerged regarding which of the three alternatives should be selected. The least amount of support was expressed for the term “specifies”, and the Working Group decided that that option should be deleted from the draft convention, but that the other alternatives should be retained for future consideration. It was further observed that, in any event, the text of draft article 42(b)(ii) should be aligned with whichever term was ultimately chosen by the Working Group.

Notice of arrival

34. It was observed that while a notice of arrival was required in subparagraph (c) of draft article 46, no notice of arrival was required by draft article 47. The Working Group agreed that, in the interests of consistency, a notice of arrival should also be required in subparagraph (b) of draft article 47.

Conclusions reached by the Working Group regarding draft article 47:

35. The Working Group was in agreement that:
- The text of draft article 47 should be retained and the square brackets around it deleted;
 - The alternatives “[provides]” and “[indicates]” should be retained in the chapeau in square brackets for future consideration, while the third alternative, “[specifies]” should be deleted;
 - The requirement for a notice of arrival should be added to subparagraph (b); and
 - Care should be taken to align the text of draft article 42(b)(ii) depending on which term was ultimately chosen by the Working Group.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 48. Delivery when a non-negotiable transport document that requires surrender is issued

154. The Working Group was reminded that alternative text remained in the chapeau of draft article 48 in square brackets, “[provides] [indicates]”, and that a decision should be made as to the preferred term to be retained in the text. It was recalled that the Working Group had last considered the issue of which term to use at its 20th session, when it had a lengthy discussion regarding the merits of each alternative (see A/CN.9/642, paras. 31 to 33). Mindful of that discussion, the view was reiterated that the provision had been inserted in the text to preserve existing law regarding a particular type of document, and that in some jurisdictions, the applicable law provided that the simple title “bill of lading” meant that surrender of the document was required upon delivery of the goods. Thus, it was suggested, the only acceptable term to preserve that body of existing law was the term “indicates”.

155. In response, the Working Group was reminded that the particular type of document for which draft article 48 was created was still intended to fall within the existing taxonomy of documents in the draft convention, and that to preserve the clarity of that categorization, the word “indicates” should be avoided as potentially importing uncertainty into the system. As such, a preference was expressed that the word “provides” be chosen instead. There were

strongly held views in support of each of those positions, with a slight preference expressed for the term “indicates”.

156. Subject to the deletion of the alternative “[provides]” and the deletion of the square brackets surrounding the word “indicates”, the Working Group approved the substance of draft article 48 and referred it to the drafting group. Further, it was observed that in the interests of consistency, the word “indicates” should be retained in the other provisions in the text in which the two alternatives were present, in particular, in draft articles 43(b)(ii), 49 and 54(2).

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 48. Delivery when a non-negotiable transport document that requires surrender is issued

145. The Commission approved the substance of draft article 48 and referred it to the drafting group. (For subsequent discussion and the conclusions on this draft article, see paras. 166-168 below.)

[* * *]

Consequential changes to draft article 47 (Delivery when no negotiable transport document or negotiable electronic transport record is issued); draft article 48 (Delivery when a non-negotiable transport document that requires surrender is issued); and draft article 50 (Goods remaining undelivered)

166. Having decided to replace draft article 49 with the new text (see paras. 152 and 165 above), the Commission agreed that consequential changes needed to be made to draft articles 47 and 48 in order to align them with the new text. The following revised texts were proposed for the relevant provisions:

Article 47. Delivery when no negotiable transport document or negotiable electronic transport record is issued

“(c) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee, or (iii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, the carrier may so advise the controlling party and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the controlling party, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;”

Article 48. Delivery when a non-negotiable transport document that requires surrender is issued

“(b) Without prejudice to article 50, paragraph 1, if the goods are not deliverable because (i) the consignee, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier is, after reasonable effort, unable to locate the consignee in order to request delivery instructions, or (iii) the carrier refuses delivery because the person claiming to be the consignee does not properly identify itself as the consignee or does not surrender the document, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;”.

167. It was further noted that the words “the holder” should be inserted after the words “the controlling party” in draft article 50, subparagraph 1 (b).

168. The Commission approved the proposed revisions to draft articles 47, 48 and 50 and referred them to the drafting group.

Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued [Deleted]

[Article 49. Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued

When the electronic equivalent of a non-negotiable transport document has been issued that [provides] [indicates] that it shall be surrendered in order to obtain delivery of the goods:

[(a) The carrier shall deliver the goods at the time and location referred to in article 45, paragraph 1 to the person named in the electronic record as the consignee and that has exclusive control of the electronic record. Upon such delivery the electronic record ceases to have any effect or validity. The carrier may refuse delivery if the person claiming to be the consignee does not properly identify itself as the consignee on the request of the carrier, and shall refuse delivery if the person claiming to be the consignee is unable to demonstrate in accordance with the procedures referred to in article 9, paragraph 1, that it has exclusive control of the electronic record.]

(b) If the consignee, after having received a notice of arrival, does not claim delivery of the goods from the carrier after their arrival at the place of destination or the carrier refuses delivery in accordance with subparagraph (a) of this article, the carrier shall so advise the shipper, and the shipper shall give instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier shall so advise the documentary shipper, and the documentary shipper shall give instructions in respect of the delivery of the goods.

(c) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper pursuant to subparagraph (b) of this article is discharged from its obligation to deliver the goods under the contract of carriage, irrespective of whether the person to which the goods are delivered is able to demonstrate in accordance with the procedures referred to in article 9, paragraph 1, that it has exclusive control of the electronic record.]

[Last version before deletion: A/CN.9/WG.III/WP.101]

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 48. Delivery when a non-negotiable electronic transport record that requires surrender is issued

36. The Working Group was reminded that draft article 48 was inserted in A/CN.9/WG.III/WP.81 following a decision of the Working Group at its seventeenth session to insert into the text of the draft convention a provision concerning delivery of the goods when a non-negotiable electronic transport record that required surrender had been issued (see A/CN.9/594, paras. 208 to 215). The Working Group was further reminded that draft article 48 appeared in A/CN.9/WG.III/WP.81 in square brackets, and that its text was based on that of proposed article 48 ter as set out in A/CN.9/WG.III/WP.68 (see para. 16).

37. It was observed that the term “non-negotiable electronic transport record” was somewhat illogical in light of the difficulty of requiring “surrender” of an electronic record, and

it was suggested that the term “the electronic equivalent of a non-negotiable transport document” could be used in its stead. While some support was expressed for that suggestion, it was observed that it would be equally illogical to require surrender of the electronic equivalent of a non-negotiable transport document. It was also noted that this provision could have unintended consequences in terms of using the same approach as that taken in draft article 49 for negotiable electronic transport records, thus possibly affording a non-negotiable electronic transport record similar treatment to that given a negotiable electronic transport record.

38. Other concerns were raised regarding the treatment of the consignee and the use of the term “exclusive control” in subparagraph (a) of draft article 48. While the view was expressed that a consignee must have control over the goods, and thus must have control over the transport document or record, concerns were expressed regarding whether the standard of “exclusive control” was appropriate in draft article 48, since it was used in other contexts in respect of negotiable electronic transport records, as, for example, in draft article 1(12)(b) definition of “holder”.

Necessity of retaining draft article 48

39. A question was raised regarding whether, in light of current industry practice, it was necessary to have a provision such as draft article 48 at all. It was suggested that draft article 48 could be deleted, and that, if some reference to the electronic equivalent of such documents was thought necessary by the Working Group, such an addition could be made through drafting adjustments to draft article 47.

Notice of arrival

40. It was also observed that while a notice of arrival was required in subparagraph (c) of draft article 46, no notice of arrival was required by draft article 48. The Working Group agreed that, in the interests of consistency, a notice of arrival should also be required in subparagraph (b) of draft article 48.

Conclusions reached by the Working Group regarding draft article 48:

41. The Working Group was in agreement that:

- Further consideration should be given to the title of the article;
- The text of draft article 48 should be retained in square brackets;
- Subparagraph (a) of draft article 48 should be placed in square brackets for further consideration by the Working Group; and
- The requirement for a notice of arrival should be added to subparagraph (b).

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 49. Delivery when the electronic equivalent of a non-negotiable transport document that requires surrender is issued

157. It was proposed that draft article 49 should be deleted, since unlike the document provided for in draft article 48, there was no existing practice of using the electronic equivalent of a non-negotiable transport document that required surrender that required support in the text

of the draft convention. In light of that absence, the Working Group agreed to delete draft article 49 and requested the drafting group to make consequential amendments to the draft convention, in particular, to draft article 9 and 43(b)(ii).

Article 47. Delivery when a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document or a negotiable electronic transport record has been issued:

(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 43 to the holder:

(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), upon the holder properly identifying itself; or

(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

(b) The carrier shall refuse delivery if the requirements of subparagraph (a) (i) or (a) (ii) of this paragraph are not met;

(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

2. Without prejudice to article 48, paragraph 1, if the negotiable transport document or the negotiable electronic transport record expressly states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rules apply:

(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not, at the time or within the time period referred to in article 43, claim delivery of the goods from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a) (i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph 2 (a) of this article is discharged from its

obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph 2 (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph 2 (b) of this article, but pursuant to contractual or other arrangements made before such delivery acquires rights against the carrier under the contract of carriage, other than the right to claim delivery of the goods;

(e) Notwithstanding subparagraphs 2 (b) and 2 (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder, acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(ii) Subparagraph 10.3.2

78. The Working Group was reminded that subparagraph 10.3.2 considered delivery in the case of issued negotiable transport documents, and that subparagraph 10.3.2(a)(i) corresponded to the current practice, wherein the holder of the negotiable document had the right to claim delivery of the goods upon their arrival at the place of destination, and upon surrender of the negotiable document, the carrier had the obligation to deliver the goods. It was emphasized that subparagraph 10.3.2(a)(ii), which referred to negotiable electronic records, mirrored subparagraph 10.3.2(a)(i) regarding negotiable documentary records, but that the holder of a negotiable electronic record had to demonstrate in accordance with paragraph 2.4 that it was the holder. It was noted that paragraph 2.4 was fundamental to the operation of the electronic system set out in the draft instrument. It was reiterated to the Working Group that in the event the holder of the negotiable instrument did not claim delivery, subparagraph 10.3.2(b) provided a mechanism for the carrier to put the controlling party, and failing it, the shipper, in a position to give the carrier instructions with respect to the delivery of the goods. The Working Group was reminded that subparagraph 10.3.2(c) discharged the carrier from the obligation to deliver the goods under the contract of carriage only, and not from its other obligations. It was noted that subparagraph 10.3.2(d) reduced the holder's rights in certain circumstances, but that the risk remained with the carrier if the transfer of the negotiable instrument took place before the delivery. It was pointed out that subparagraph 10.3.2 was intended to preserve some of the risk

on the part of the carrier, and to provide an even-handed solution to the problems associated with the failure of the holder of a negotiable transport document to claim delivery.

79. General support was expressed for principle embodied in subparagraph 10.3.2 as a whole. Approval was expressed for the draft provision's goal of solving an important and practical problem with respect to the delivery of cargo that has greatly troubled the shipping world for many years, both on the carrier and cargo sides of the issue. The Working Group welcomed a convention-based solution to the problem. It was noted that insurance cover for the carrier was excluded by international group clubs when the carrier delivered cargo without surrender of the transport document, but it was acknowledged that it was often difficult for the consignee to obtain the negotiable transport document prior to delivery of the goods. Support was expressed for providing protection to a carrier in such circumstances when the carrier had acted properly and prudently. It was generally agreed that this draft provision provided a good basis from which to further refine the text.

80. However, a note of caution was raised that the Working Group would have to carefully examine the balance of the different rights and obligations, and their consequences, amongst the parties, in order to strike the right level and reach a workable solution.

81. The Working Group found the substance of subparagraphs 10.3.2(a)(i) and (ii) to be generally acceptable.

82. The suggestion was made with respect to subparagraph 10.3.2(b), that the carrier should have the obligation of accepting the negotiable transport document, and that if the holder of the document did not claim delivery of the goods, then the carrier should have the obligation of notifying the controlling party. Support was expressed for the suggestion that the principle expressed in subparagraph 10.3.2(b) should also apply in cases where no negotiable instrument had been issued. Further, it was suggested that this subparagraph of the draft article should set out the consequences for the carrier when it failed to notify the controlling party, or the shipper, or the deemed shipper pursuant to paragraph 7.7. However, it was noted that if the carrier was not able to locate the consignee for delivery, then subparagraph 10.3.2(e) became operational, and the carrier became entitled to exercise its rights under paragraph 10.4.

83. It was suggested that it was unclear how subparagraphs 10.3.2(c) and (d) worked together, since the holder in good faith in the latter provision acquired some legal protection, but the holder's legal position was unclear. It was requested that the drafting in this regard be clarified.

84. Concerns were expressed with respect to subparagraph 10.3.2(d). It was suggested that this subparagraph should be revised to provide greater protection for the third party who became a holder of the negotiable transport document after delivery was made. However, it was explained that the draft article was based on two pillars: the contract of carriage between the carrier and the shipper pursuant to which the carrier agreed to deliver goods to a certain person, and the general principle that the carrier had to refer to its contractual counterpart for instructions, and that the shipper had to enable the carrier to perform its part of the contract. In response to a question regarding why subparagraph 10.3.2 was limited to negotiable transport documents, unlike conventions such as the CMR that considered this issue with respect to non-negotiable documents, it was noted that the real problem arose where there was a negotiable transport document, since in principle, the arrival of the goods at their destination exhausted the bill of lading.

85. Further concerns were expressed with respect to the effect that this provision might have on the principle found in some national legal regimes that the burden of proof in cases of a good faith holder did not lie with the party claiming good faith, but rather with the party attempting to prove otherwise. It was stated in response to this concern that subparagraph 10.3.2 was not intended to govern the burden of proof, which would be dependent upon the circumstances, and that the draft article was intended only to grant certain protections to an innocent third party holder when there was no knowledge of delivery. Additional concerns suggested that the rule in this subparagraph could weaken the bill of lading as a document of title, and the suggestion was made that a way to solve this problem might be to develop a system for electronic bills of lading that were more easily and more quickly transferred.

86. It was explained that the regime that subparagraph 10.3.2 was attempting to establish was an effort to reform the whole system of negotiable transport documents, since, it was suggested, it was an area that was in urgent need of repair. It was further suggested that the whole system was being undermined by the current trade practice whereby bills of lading were often not available upon delivery, and industry had filled the gap with its own documentary solutions, such as with letters of indemnity. It was suggested that these practices had weakened the bill of lading, and that this provision was attempting to restore the integrity and strength of the bill of lading system. It was also stated that the problem of bills of lading being unavailable upon delivery was not a result of the speed with which a bill of lading travelled, but rather it was a function of the fact that voyages are often much shorter than time period required for the holding of bills of lading by financial institutions.

87. The Working Group heard that the “contractual or other arrangements” referred to in subparagraph 10.3.2(d) referred not to letters of indemnity, but principally to contracts of sale, and particularly to those situations in which there was a series of buyers and sellers and the bill of lading could not travel quickly enough through the entire series in order to be there at the time of delivery. The goal of this draft article was to protect the buyer in the series who received the bill of lading after the goods had been delivered, so that the buyer could acquire certain contractual rights under the bill of lading, even though delivery could not be obtained. It was noted that this provision was inspired by a similar provision in the 1992 Carriage of Goods by Sea Act in the United Kingdom. The second situation that subparagraph 10.3.2(d) was intended to cover was the situation where there is a bona fide acquirer of a bill of lading.

88. Other concerns expressed with respect to subparagraph 10.3.2(d) were that the rights of the holder who was in possession of the negotiable transport document after delivery had been effected should be more precisely established. Further, concern was expressed with respect to the lack of certainty of the phrase “could not reasonably have had knowledge of such delivery”.

89. The view was expressed that subparagraph 10.3.2(e) should be aligned with subparagraph 10.3.2(b), by adding to it, after the opening phrase, “If the controlling party or shipper does not give the carrier adequate instructions as to the delivery of the goods”, the phrase, “or in cases when the controlling party or the shipper cannot be found”. Support was expressed for this suggestion, and it was agreed that it would appear in square brackets in the next version of the draft instrument prepared by the Secretariat.

90. The prevailing view in the Working Group was that subparagraph 10.3.2 represented an important and welcome advancement in establishing the balance of interests among parties in the situation where the holder of a negotiable transport document failed to claim delivery of the

goods. It was decided that the Working Group would resume a detailed discussion of this draft article in the future, and the Secretariat was requested to prepare a redraft of the provision, taking into account the concerns expressed.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 49. Delivery when negotiable transport document or negotiable electronic transport record is issued

General discussion

231. The Working Group was reminded that it had last considered draft article 49 at its eleventh session (see A/CN.9/526, paras. 78 to 90). The Working Group considered the text of this provision as found in annexes I and II of A/CN.9/WG.III/WP.56.

232. It was explained that draft article 49 aimed at reforming the system of negotiable transport documents in maritime carriage, and, especially, at eliminating the problems resulting from goods that arrived at the place of destination prior to the arrival of the bill of lading. In practice, certain techniques had been developed to deal with that problem, such as delivering the goods against the issuance of a letter of indemnity, but it was thought that these solutions remained unsatisfactory. It was suggested that the draft provision would restore the original function of the bill of lading and bring relief for the problems associated with “stale” bills of lading.

233. It was further indicated that the draft provision would have a significant impact on current banking practices, particularly by reducing the value of bills of lading in the hands of intermediary banks, and by seriously affecting the current system of documentary credit. In light of this impact on the banking industry, the view was expressed that perhaps certain modifications should be made to draft article 49 to limit its scope, such as limiting its application only to bills of lading that contained an express statement to that effect. While caution was still expressed with respect to the actual operation of draft article 49, it was observed that the changes it would bring were thought to be welcome in some sectors of the banking industry, which were also in search of clear and predictable rules in this regard, and that positive comments with respect to the proposed new regime had been received from other banking interests. There was general support in favour of the consideration of the draft article 49 regime as a basis for discussion.

Draft paragraph 49(a)

234. It was indicated that draft paragraph 49(a) provided that the holder of a negotiable transport document or a negotiable electronic transport record was entitled to claim delivery of the goods upon surrender of that document or record. It was observed that draft paragraph 49(a) could have an impact on the right of stoppage in transit and that the interaction between the two needed further reflection. In response, it was indicated that the right of stoppage was a remedy available under the contract of sale, but that in practice its exercise required control of the bill of lading, and that this prevented any conflict between draft paragraph 49(a) and the right of stoppage. In response, it was suggested that the draft convention should clarify that its provisions did not affect domestic property and bankruptcy laws.

235. A drafting suggestion was made to change the phrase “is entitled” in draft paragraph 49(a) to “is required” in order to conform with the consignee’s obligation to accept delivery pursuant to draft article 46.

Draft paragraph 49(b)

236. It was indicated that draft paragraph 49(b) dealt with cases in which the cargo had arrived at destination but the holder of the negotiable transport document or negotiable electronic transport record did not claim delivery of it. It was explained that in such a case, the carrier had an obligation to advise the controlling party of the failure of the holder to claim delivery, but when the controlling party could not be identified, the carrier was entitled to ask instructions of the shipper in respect of the delivery of the goods.

237. It was suggested that the draft provision should better specify the level of diligence required of the carrier in seeking identification of the controlling party, and that the draft provision should be amended to include situations in which a person who was not the holder claimed delivery of the goods. Alternatively, it was suggested that draft paragraphs 49(b) and (c) could be deleted, and the carrier could be referred to the remedies for undeliverable goods that it had under draft article 51. Under this proposal, it was suggested that the entitlement of the holder to the goods would remain unchanged and that the holder would be entitled to the proceeds of the sale of the goods pursuant to draft article 51. However, it was observed that the remedies of draft article 51 have been available in current practice for some time, and yet the problems outlined with respect to bills of lading had not been solved.

238. In response to an inquiry, it was observed that the requirement for the carrier to advise the controlling party of the non-appearance of the holder was considered to be an obligation of the carrier. Further, the view was expressed that, in light of trade practices, this obligation of the carrier to advise the controlling party was not thought to be onerous. In addition, it was suggested that it should be made clearer that draft paragraph 49(b) concerned the situation when the cargo had arrived but there was no interest in claiming it, while draft paragraph 49(d) concerned the situation when delivery was possible but there was no bill of lading, and while draft article 51 concerned a third situation when no one would claim delivery and the carrier could dispose of the cargo.

Conclusions reached by the Working Group regarding draft paragraphs 49(a) and (b):

239. After discussion, the Working Group decided that:

- The text of draft paragraph 49(a) should be maintained, pending the consideration of the Working Group of the remainder of the draft article;
- The text of draft paragraph 49(b) should be maintained for further consideration of the Working Group in light of the observations expressed above; and
- The discussion of draft paragraphs 49(c), (d) and (e) would be taken up during the Working Group’s next consideration of draft chapter 10.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]***Draft paragraph 49(c)***

80. The Working Group resumed its deliberations on draft chapter 10 commencing with draft paragraph 49(c), continuing on from its deliberations at its sixteenth session (see A/CN.9/591, para. 239). It was indicated that draft paragraph 49(c) aimed at addressing a specific systemic problem faced by carriers where they were pressured to deliver the goods to the consignee without presentation of the negotiable transport document or negotiable electronic transport record. It was noted that this practice was fairly common in certain trades, not only in those cases when a negotiable transport document was not available for presentation due to delays, for instance, in the credit system, but also in cases where the nature of the bill of lading was so misused that no bill of lading could be available in the port of discharge, as was common in the oil trade. In such cases, draft paragraph 49(c) was intended to provide comfort to the carrier by discharging it from its obligation to deliver the goods to the holder.

81. Some concerns were raised regarding the operation of draft paragraph 49(c), since it would run counter to the long-standing principle of requiring the presentation of the bill of lading to obtain receipt of the goods. A further problem was said to be that since the bill of lading would continue to be in circulation, a holder could later appear and ask for delivery of the goods. Some concern was also expressed regarding the consistency of the regime in the draft convention, since under the draft chapter on right of control, the controlling party under the draft convention was required to produce the negotiable document to the carrier in order to exercise its right of control and give instructions to the carrier, so that the carrier would always be aware that the controlling party was also the holder of the negotiable document.

82. In response, it was pointed out that the regime was intended to prevent abuses of the bill of lading system, for example, those relating to the deliberate non-production of documents of title in order to use them as promissory notes without a maturity date, and that the controlling party's production of the bill of lading in order to provide the instructions to the carrier did not necessarily entail surrender of the bill of lading to obtain delivery of the goods. In response to a query regarding whether the FOB seller would be adequately protected, it was said that in the case of an FOB sale, the FOB seller would be protected, because it would also be the holder of the negotiable document or electronic transport record, and therefore it would also be the controlling party that would give delivery instructions to the carrier.

83. There was some support in the Working Group for the deletion of draft paragraph 49(c). However, the existence of the problem of abuse of the bill of lading system was noted in the Working Group, and there was approval for efforts to find a solution for that problem that would provide some comfort to the carrier. While it was acknowledged that full consideration of draft paragraph 49(c) would depend upon the Working Group's consideration of the connected provisions in draft paragraphs (d) and (e), support was expressed for draft paragraph 49(c).

Conclusions reached by the Working Group regarding draft paragraph 49(c):

84. After discussion, the Working Group decided that:

- The text of draft paragraph 49(c) as contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group's future deliberations.

Variant A, comprising draft paragraph 49(d); and Variant B, comprising draft paragraphs 49(d) and (e)

85. It was indicated that both variants of draft paragraph 49(d) were meant to indicate that the holder of the negotiable transport document or negotiable electronic transport record did not retain the right to delivery of the goods after delivery had actually taken place. It was suggested that clarification in the draft might be sought on this point.

86. The view was expressed that Variants A and B of draft paragraph 49(d) differed considerably, as the text in square brackets in Variant A excluded those cases of delivery of goods without presentation of documents foreseen under draft paragraph 49(c) from its scope of application, while Variant B explicitly referred to such cases. Therefore, a preference was expressed for Variant B, as it provided additional safeguards for those cases falling under draft paragraph 49(c). A concern was raised that Variant B could be too narrow, since it might be interpreted to apply only to delivery pursuant to draft paragraph 49(c), and could thus limit the protection of holders in good faith not included in the scope of draft paragraph 49(c).

87. Reference was also made to protection of the holder in those cases in which multiple originals of bills of lading were issued. It was noted that in such cases, commercial practice entitled the holder of one of the originals to delivery of the goods, and that this was the situation covered by draft paragraph 49(a). It was suggested that a requirement that the bill of lading should state on its face the number of multiple originals issued should be inserted in draft paragraph 49(d) or, alternatively, in draft chapter 9 on transport documents and electronic transport records of the draft convention, as suggested in paragraph 14 of A/CN.9/WG.III/WP.62, and it was suggested that consideration of the topic be deferred until the consideration of chapter 9 (see paras. 227, 230 and 233 below).

88. In response to a query, it was indicated that the reference to “contractual or other arrangement other than the contract of carriage” in draft article 49(d) was meant to provide protection to all good faith holders of negotiable documents. It was further specified that, in the case of banks under letter of credit transactions, the protection under draft paragraph 49(d) would extend not only to those cases when the bank had already confirmed the letter and was therefore obliged to accept the negotiable document, but also to those cases when the intermediary bank had only been nominated and therefore did not yet have such an obligation.

Conclusions reached by the Working Group regarding draft paragraph 49(d):

89. After discussion, the Working Group decided that:

- The text of draft paragraphs 49(d) and (e), i.e. Variant B, as contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group’s future deliberations; and that
- The Secretariat should consider drafting modification of Variant B, taking into account the above discussion.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued

42. The Working Group was reminded that its most recent consideration of draft article 49 on delivery when a negotiable transport document or negotiable electronic transport record has been issued was at its sixteenth and seventeenth sessions (see A/CN.9/591, paras. 231 to 239, and A/CN.9/594, paras. 80 to 89). The Working Group was advised that consequential drafting changes to subparagraphs (d) and (g) were suggested, as described in paragraphs 4 to 6 of A/CN.9/WG.III/WP.94, and the Working Group proceeded to consider the slightly revised text of draft article 49 as contained in A/CN.9/WG.III/WP.94.

Subparagraph (a)

43. A suggestion was made that the Working Group may wish to consider whether an addition should be made to subparagraph (a) to indicate the period within which the consignee was obliged to accept delivery. It was observed that this might be a particular problem in cases of delay in delivery of the goods. In response to a question regarding the purpose of subparagraph (a)(i) when the definition of “holder” in draft article 1(12) already referred to a document that was “duly endorsed”, it was explained that subparagraph (a)(i) referred to so-called “order” documents that allowed for the endorsement of the document on to other persons, and that there should be a requirement in such cases for the holder to show that it was the person to whom the document had ultimately been endorsed. Finally, it was suggested that the phrase “as appropriate” in the chapeau of subparagraph (a) might be unnecessary.

Subparagraph (b)

44. It was proposed that the phrase “the carrier shall refuse delivery” in subparagraph (b) should be adjusted to read “the carrier may refuse delivery”, since there could be occasions on which the carrier might decide not to deliver even though the requirements of subparagraph (a) had been met, for example, in the case of other contractual relationships that the carrier might have. In response, it was noted that the term “shall” had been inserted to clarify and to reinforce the position of the carrier in refusing delivery of the goods in cases where the requirements of subparagraph (a) had not been met, and that the term “may” would dilute that result. The Working Group did not adopt the proposed change.

Subparagraph (c)

45. The Working Group was reminded that it had agreed at its nineteenth session to include in draft article 40 an additional paragraph providing that the legal effect of the carrier’s failure to include in the contract particulars the number of original negotiable transport documents when more than one was issued was that the negotiable transport document would be deemed to have stated that only one original had been issued (see A/CN.9/621, para. 296). In light of that agreement, it was proposed that in order to avoid confusion with that principle, the opening phrase of subparagraph (c) should be adjusted to read, “If the negotiable transport document states that more than one original ...” and should then continue on with the remainder of the subparagraph.

46. However, the Working Group was reminded that the practice of issuing multiple originals of the negotiable transport document was considered to be ill-advised, and had been

cautioned against. It was suggested that rather than include further reference to that practice in the draft convention, thereby possibly encouraging or condoning the practice, any mention of it should be deleted. There was some support for that approach. An alternative was suggested, such that if the Working Group was of the view that the provisions concerning the practice should be maintained, then draft article 36 should be adjusted to indicate that the shipper was entitled to ask for multiple originals of the negotiable transport document.

47. In reference to its previous agreement to add an additional paragraph in draft article 40 concerning the legal effect of the carrier's failure to include the number of original bills of lading in the contract particulars, the Working Group was invited to consider the policy underlying such a decision. In particular, it was noted that a failure to include the number of originals in the contract particulars was the fault of the carrier, yet a provision that, in such cases, would deem that only one original had been issued would be to the advantage of the carrier and would be contrary to cargo interests. Further, such a provision would require the reconsideration of certain other provisions of the draft convention, such as the requirement to produce all originals in order to demonstrate the right of control under draft article 53(2)(b).

48. In light of these concerns, the Working Group considered four possible options regarding the proposed addition to subparagraph (c) and its decision at its nineteenth session regarding the legal effect of the carrier's failure to include the number of original negotiable transport documents in the contract particulars: (a) To confirm the decision taken at its nineteenth session and to include the proposed text in subparagraph (c); (b) To retain subparagraph (c) as drafted and to reverse the decision taken at its nineteenth session; (c) To include the proposed text in subparagraph (c) to exclude its application in those cases where numbers of originals are not stated on the negotiable transport document, but to reverse the decision taken at its nineteenth session; or (d) To delete all references in the draft convention to the use of multiple originals of the negotiable transport document.

49. There was some support in the Working Group for the first option listed in paragraph 48 above. It was noted that there was no sanction in the draft convention for a failure to include the other contract particulars required pursuant to draft article 37, and that the proposed inclusion in draft article 40 of such a provision in the case of a failure to provide the number of originals of the negotiable transport document would be unique in that regard.

50. However, the Working Group strongly supported the third option set out in paragraph 48 above, to include the text proposed with respect to subparagraph (c), but to reverse the decision taken at its nineteenth session to include a sanction for failing to include the number of multiple originals of the negotiable transport document in the contract particulars.

Conclusions reached by the Working Group regarding draft article 49, subparagraphs (a), (b) and (c):

51. The Working Group was in agreement that:

- The text of subparagraph (a) should remain in the text as drafted;
- The text of subparagraph (b) should remain in the text as drafted;
- The text of subparagraph (c) should be adjusted by changing its opening phrase to, "If the negotiable transport document states that more than one original ..."; and

- It reversed the decision it took during its nineteenth session (see A/CN.9/621, para. 296) and decided not to include an additional paragraph in draft article 40 concerning the legal effect of the carrier's failure to include the number of original bills of lading in the contract particulars.

Subparagraphs (d), (e), (f) and (g)

52. It was observed that the scheme set out in subparagraphs (d), (e), (f) and (g) of draft article 49 was intended to address the current problem of delivery of the goods without presentation of the negotiable transport document or electronic transport record. It was noted that, as discussed in previous sessions, the problem was a structural one arising from the requirements of the underlying sales contract and the length of modern voyages, and that it was frequently encountered in certain trades, such as in the oil industry. It was said that the entire scheme of subparagraphs (d), (e), (f) and (g) was based on the modern ability of the carrier to communicate with the holder regardless of the location of either, and that the onus was thus on the carrier to search for the controlling party or the shipper in order to obtain delivery instructions.

53. There was some support for the view that the establishment of such a system undermined the traditional bill of lading system by institutionalizing the undesirable practice of delivery without presentation of the negotiable transport document or electronic transport record. However, a contrary view was expressed that rather than undermining the bill of lading system, the approach in the provisions in issue was intended to restore to as great an extent as possible the value and the integrity of the traditional bill of lading system.

54. It was generally recognized that the system established by subparagraphs (d), (e), (f) and (g) of draft article 49 intended to protect in such cases both the carrier and the third party acquirer of the negotiable transport document or electronic transport record. There was some support in the Working Group for the text of subparagraphs (d), (e), (f) and (g) of draft article 49 as it appeared in A/CN.9/WG.III/WP.94. However, there were also various proposals to shorten the draft article or amend its subparagraphs, which the Working Group proceeded to consider.

Proposed deletion

55. In support of a proposal to delete subparagraphs (d), (e), (f) and (g) of draft article 49, it was observed that subparagraphs (d), (e) and (f) read together allowed the carrier, in certain circumstances, to deliver the goods to a person other than the holder of a negotiable transport document or electronic transport record. It was suggested that that possibility, while perhaps not ideal, fulfilled a significant practical need in modern shipping. Support was expressed for the system established by those three subparagraphs, but it was noted that an equally pressing concern was the protection of third party holders of a negotiable transport document or electronic transport record who acted in good faith, such as those protected through the operation of subparagraph (g) of draft article 49. It was suggested that a conflict was created between subparagraphs (d), (e) and (f) on one hand, and subparagraph (g) on the other, not only in terms of the interests protected, but in the actual wording of the provisions as well.

56. As a consequence, it was suggested that subparagraphs (d), (e), (f) and (g) of draft article 49 should be deleted in their entirety, and that the matter of delivery of the goods without presentation of the negotiable transport document or electronic transport record should

be left entirely to national law (see A/CN.9/WG.III/WP.99). There was some support in the Working Group for that suggestion.

Deletion of subparagraph (g) and addition to subparagraph (f)

57. Another proposal in respect of subparagraphs (f) and (g) of draft article 49 was made, such that subparagraph (g) would be deleted, and the phrase “or compensation for the failure to deliver the goods” would be added after the phrase “other than the right to claim delivery of the goods” in subparagraph (f) (see A/CN.9/WG.III/WP.87). The rationale given for the addition to subparagraph (f) was that the proposed text would protect carriers from claims for losses or damages for failure to deliver the goods. Further, the deletion of subparagraph (g) was intended to protect carriers from becoming liable in possible cases of so-called “second delivery”, such that the third party holder in good faith that became a holder after delivery acquired all of the rights incorporated in the negotiable transport document or electronic transport record, including the right to claim delivery. Some support was expressed for that proposal, although it was observed that the simple elimination of subparagraph (g) might not be sufficient to eliminate the exposure of the carrier, since it could still be held liable as a result of delivering according to the instructions received from the controlling party or the shipper under subparagraphs (d) and (e).

Additions to subparagraph (g) and draft article 50(2)

58. An additional proposal was made to the Working Group that aimed at protecting carriers from potential exposure to liability in the case of so-called “second deliveries” demanded by good faith acquirers of negotiable transport documents or electronic transport records (see A/CN.9/WG.III/WP.95). It was observed that the current practice of carriers faced with demands for delivery despite the absence of the negotiable transport document or electronic transport record was for carriers to demand from consignees a letter of indemnity often accompanied by a bank guarantee. It was noted that that procedure was a nuisance for the carrier, and an expensive one for the consignee, particularly since the bank guarantee must often be for a large sum. Although it was thought that the system established in draft article 49 for dealing with situations of non-presentation was a positive development, reluctance was expressed to expose the carrier, who was without blame, to potential liability in the face of third party holders.

59. The solution proposed for that problem was twofold:

- To add the following as a second sentence to subparagraph (g) of draft article 49:

When the contract particulars state the expected time of arrival of the goods, or include a statement on how to obtain information about whether or not delivery of the goods has taken place, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.

- And to add the following new subparagraph (f) to draft article 50(2):

No security as reasonably required by the carrier is provided for the purpose of protecting the carrier against the risk that it must deliver the goods to a person other than to whom it is instructed to deliver them under article 49, paragraph (d).

60. Support was expressed in the Working Group for that proposal.

Refinement to the proposal concerning subparagraph (g) and draft article 50(2)

61. While the proposal outlined above in paragraph 59 was thought to be a positive step in terms of solving the problem of non-presentation while protecting the carrier and the third party, it was suggested that it should be refined in two ways. First, since the instructions that the carrier would seek from the controlling party or the shipper in accordance with subparagraphs (d) and (e) would give rise to the potential liability of the carrier under subparagraphs (f) and (g), it was thought that a specific right for the carrier to take a recourse action against the controlling party or the shipper should be included in draft article 49. Secondly, it was felt that once such a right to a recourse action was established on behalf of the carrier, it could be combined in draft article 49 with an obligation on the consignee to establish reasonable security with the carrier. Finally, it was thought that the inclusion of provisions on indemnity and security in draft article 49 would be better-placed than in draft article 50, and that it would obviate the need for a new subparagraph (f) in draft article 50(2) as set out in paragraph 59 above.

62. The Working Group expressed support for the proposal set out in paragraphs 59 above as refined by the above suggestion.

An additional proposal

63. An additional proposal was made to the Working Group that the problem with which it was grappling might be dealt with by a means similar to that employed in the case of draft article 47 non-negotiable documents requiring surrender. In particular, it was suggested that the operation of subparagraphs (d), (e), (f) and (g) could be limited to those situations where a negotiable transport document or electronic transport record had been issued that stated on the document or electronic record itself that the goods to which it related could be delivered without presentation of the negotiable transport document or electronic transport record. It was thought that such an approach would give sufficient warning to the holder that, in some cases, delivery could be made to another person. A mechanism proposed for the implementation of that suggestion was that a phrase could be inserted prior to subparagraphs (d), (e), (f) and (g) along the following lines: “If a negotiable transport document or electronic transport record that states on its face that the goods may be delivered without presentation of the document or electronic record, the following rules apply:”.

64. Some interest was expressed in exploring the suggestion, although caution was advised in embracing an additional document or electronic record that did not strictly meet the negotiable and non-negotiable categorization of the draft convention, and that might create a secondary category of lesser-valued negotiable documents and electronic records. However, to facilitate future discussions, the Working Group agreed to include the substance of the proposal in a footnote to the text of the draft convention, in order to allow delegations to consider its implications.

Further drafting suggestions to subparagraph (d)

65. It was observed that, pursuant to subparagraphs (d) and (e), it was not clear whether the carrier may refuse to execute the instructions of the controlling party or the shipper. It was suggested that the carrier’s requirement to execute those instructions should be subject to the same requirements as set out in draft article 54:

- That such instructions could reasonably be executed according to their terms; and

- That there would be no interference with the normal operations of the carrier.

66. It was also suggested that the text of the draft convention should be reviewed to ensure consistency in the usage of the terms “controlling party” and “holder”. There was support for that suggestion.

Conclusions reached by the Working Group regarding draft article 49, subparagraphs (d), (e), (f) and (g):

67. After discussion, the Working Group agreed:

- The text of subparagraphs (d), (e), (f) and (g) of draft article 49 should be retained;
- The proposal set out in paragraph 59 above and in A/CN.9/WG.III/WP.95 should be implemented into the text of the draft convention, but for its suggestion to add subparagraph (f) to draft article 50(2);
- The refinement to the above proposal set out in paragraph 61 above should be implemented into the text of the draft convention by the Secretariat; and
- The proposal outlined in paragraphs 63 to 64 above should appear as a footnote to the text in the draft convention.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 50. Delivery when a negotiable transport document or negotiable electronic transport record is issued

158. The view was expressed that the opening phrase “without prejudice to article 45” in paragraph (a) of draft article 50 was unnecessary and should be deleted as potentially misleading, as there was another reference to draft article 45 at the end of paragraph (a). In response, it was noted that the first reference helped readers understand the relationship between draft article 45, which stated the obligation of the consignee, and draft article 50, which stated the right of the holder. However, after discussion, the Working Group agreed to delete that phrase from draft article 50(a).

159. A proposal was made to delete all reference to “the controlling party” in paragraphs (d) and (e), because those paragraphs would not make sense in the following situations: (i) when one or more original negotiable transport documents were issued and one person held all the originals, the holder would be the same person as the controlling party; and (ii) when more than one original were issued and several persons held each of them, there would be no controlling party, because there would be no one holding all the originals. Although some support was expressed for that proposal, the Working Group agreed to defer deliberation of it until draft article 54 was under consideration, which had a more direct bearing on the meaning of “controlling party” in paragraph 14 of draft article 1.

160. In light of the Working Group’s decision to amend the definitions of “issuance” and “transfer” in draft article 1(22) (see above, paras. 128 to 130), it was suggested that the phrase “and that has exclusive control of that negotiable electronic transport record” in paragraph 11(b) of the definition of the “holder” was no longer necessary, as the new definitions of

“issuance” and “transfer” prepared by the drafting group both included the concept of exclusive control. The Working Group approved that suggestion.

161. With regard to the term “holder” used in draft article 50, the Working Group approved the substance of the definition of that term provided in paragraph 11 of draft article 1, subject to the above amendment, and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 49. Delivery when a negotiable transport document or negotiable electronic transport record is issued

146. It was generally acknowledged that the problems faced by carriers when cargo owners appeared at the place of destination without the requisite documentation, or failed to appear at all, represented real and practical problems for carriers. However, concerns were expressed in the Commission regarding whether the text of draft article 49 was the most appropriate way to solve those problems. In particular, the view was expressed that draft article 49 undermined the function of a negotiable transport document as a document of title by allowing carriers to seek alternative delivery instructions from the shipper or the documentary shipper and thus removing the requirement to deliver on the presentation of a bill of lading. Further concern was expressed that subparagraph (d) would increase the risk of fraud and have a negative impact on banks and others that relied on the security offered by negotiable transport documents. One delegation emphasized that discussions with banks had indicated that draft article 49 would result in banks having additional risks to manage.

147. It was also suggested that the indemnity in subparagraph (f) could be problematic for cargo insurers, for example, in a CIF (cost, insurance and freight) shipment, where insurance was arranged by the seller and the policy was assigned to the buyer when the risk of shipment transferred. It was suggested that if the seller unwittingly provided an indemnity to the carrier by providing alternative delivery instructions, this could have an impact on any recovery action that an insurer might have had against the carrier. That, it was said, would result in the loss of one avenue of redress for cargo claimants seeking recovery for misdelivery. A further complication was said to be that the combined effect of subparagraphs (d)-(f) was that a carrier that obtained alternate delivery instructions from a shipper would be relieved of liability to the holder, but that if the shipper had given an indemnity to the carrier, the shipper would have indemnified a party that had no liability.

148. As a response to some of the criticism expressed, various examples were given of how the new system envisioned under draft article 49 would reduce the current widespread possibility of fraud. For example, current practices subject to fraud were said to involve the issuance of multiple originals of the bill of lading, forgery of bills of lading and the continued circulation and sale of bills of lading even following delivery. The regime established by draft article 49 was aimed at reducing or eliminating many of those abuses. Further, it was emphasized that that regime set up a system aimed at removing risk for bankers by restoring the integrity of the bill of lading system, and that discussions with banks and commodities traders had indicated that, while they might be forced to adjust some of their practices, they considered

the new regime to present less risk for them. In addition, it was noted that the current system of obtaining letters of indemnity, possibly coupled with bank guarantees, was both a costly and a slow procedure for consignees.

149. It was noted that the serious problems which draft article 49 was attempting to solve were the problems not just of carriers but of the maritime transportation industry as a whole. It was further observed that the industry had grappled with the problems for some time without success, and that a legislative solution was the only viable option. While it was recognized that the approach taken in draft article 49 might not be optimal in every respect, broadly acceptable adjustments to the approach might still be possible. The Commission was urged to take the opportunity to adopt a provision such as draft article 49, in order to provide a legislative solution to restore the integrity of the function of negotiable transport documents in the draft Convention.

150. Some support was expressed for the concerns regarding the problems with respect to the anticipated operation of draft article 49 outlined in paragraphs 146 and 147 above, but views differed on how best to address those problems. While some delegations favoured deletion of the provision as a whole, others favoured only the deletion of subparagraphs (d)-(f) or of subparagraphs (e) and (f), while still others were in favour of considering possible clarification of those problematic subparagraphs. Some delegations supported the text of draft article 49 as drafted, without any amendment. However, there was widespread acknowledgement that the problems addressed by draft article 49 were real and pressing.

151. The Commission agreed to consider any improved text that might be presented.

152. The Commission resumed its deliberations on the draft article after it had completed its review of the draft Convention. In the meantime, extensive consultations had been informally conducted with the participation of a large number of delegations with a view to formulating alternative language for the draft article that addressed the various concerns expressed earlier (see paras. 146 and 147 above). The Commission was informed of the difficulty that had been faced in attempting to find a compromise solution in the light of the extent of disagreement concerning the draft article, as many had expressed the wish to delete subparagraphs (d)-(h), while many others had insisted on retaining the draft article in its entirety. Nevertheless, as a result of those informal consultations, the following new version of the draft article was submitted for consideration by the Commission:

“1. When a negotiable transport document or a negotiable electronic transport record has been issued:

“(a) The holder of the negotiable transport document or negotiable electronic transport record is entitled to claim delivery of the goods from the carrier after they have arrived at the place of destination, in which event the carrier shall deliver the goods at the time and location referred to in article 45 to the holder:

“(i) Upon surrender of the negotiable transport document and, if the holder is one of the persons referred to in article 1, subparagraph 10 (a)(i), upon the holder properly identifying itself; or

“(ii) Upon demonstration by the holder, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder of the negotiable electronic transport record;

“(b) The carrier shall refuse delivery if the conditions of subparagraph (a)(i) or (a)(ii) are not met;

“(c) If more than one original of the negotiable transport document has been issued, and the number of originals is stated in that document, the surrender of one original will suffice and the other originals cease to have any effect or validity. When a negotiable electronic transport record has been used, such electronic transport record ceases to have any effect or validity upon delivery to the holder in accordance with the procedures required by article 9, paragraph 1.

“2. If the negotiable transport document or the negotiable electronic transport record states that the goods may be delivered without the surrender of the transport document or the electronic transport record, the following rule applies:

“(a) If the goods are not deliverable because (i) the holder, after having received a notice of arrival, does not claim delivery of the goods at the time or within the time referred to in article 45 from the carrier after their arrival at the place of destination, (ii) the carrier refuses delivery because the person claiming to be a holder does not properly identify itself as one of the persons referred to in article 1, subparagraph 10 (a)(i), or (iii) the carrier is, after reasonable effort, unable to locate the holder in order to request delivery instructions, the carrier may so advise the shipper and request instructions in respect of the delivery of the goods. If, after reasonable effort, the carrier is unable to locate the shipper, the carrier may so advise the documentary shipper and request instructions in respect of the delivery of the goods;

“(b) The carrier that delivers the goods upon instruction of the shipper or the documentary shipper in accordance with subparagraph (2) (a) of this article is discharged from its obligation to deliver the goods under the contract of carriage to the holder, irrespective of whether the negotiable transport document has been surrendered to it, or the person claiming delivery under a negotiable electronic transport record has demonstrated, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder;

“(c) The person giving instructions under subparagraph 2 (a) of this article shall indemnify the carrier against loss arising from its being held liable to the holder under subparagraph (2) (e) of this article. The carrier may refuse to follow those instructions if the person fails to provide adequate security as the carrier may reasonably request;

“(d) A person that becomes a holder of the negotiable transport document or the negotiable electronic transport record after the carrier has delivered the goods pursuant to subparagraph (2) (b) of this article, but pursuant to contractual or other arrangements made before such delivery, acquires rights against the carrier under the contract of carriage other than the right to claim delivery of the goods;

“(e) Notwithstanding subparagraphs (2) (b) and (2) (d) of this article, a holder that becomes a holder after such delivery, and that did not have and could not reasonably have had knowledge of such delivery at the time it became a holder,

acquires the rights incorporated in the negotiable transport document or negotiable electronic transport record. When the contract particulars state the expected time of arrival of the goods, or indicate how to obtain information as to whether the goods have been delivered, it is presumed that the holder at the time that it became a holder had or could reasonably have had knowledge of the delivery of the goods.”

153. It was explained that besides a few minor corrections to the original text, such as inserting in subparagraph 1 (a)(i) the proper cross reference to draft article 1, subparagraph 10 (a)(i), the proposed new text contained a number of substantive changes to the original text. The wording of subparagraph 2 (a), it was pointed out, was different from subparagraph 2 (d) of the original text in essentially two respects. First, while the original text obliged the carrier to advise that the goods had not been claimed and imposed on the controlling party or the shipper the obligation to give instructions in respect of the delivery of the goods, the new text allowed the carrier to seek instructions but imposed no obligation on the shipper to provide them. That change was proposed in order to address the concern that the shipper might not always be able to give appropriate instructions to the carrier under those circumstances. Secondly, it was explained that the previous text required notice to be given to the holder, and in the absence of notice – be it because the holder could not be found or because the location of the holder was not known to the carrier – the remainder of the provision did not apply. In contrast, the proposed new provisions would still apply in such situations, which were found to be typical and to warrant a solution in the draft article.

154. In addition to those changes, it was further explained, the proposed new text differed from the original text in another important aspect. Paragraph 2 of the proposed text now subjected the rules on delivery of goods set forth in its subparagraphs (a) and (b) to the existence, in the negotiable transport document or negotiable electronic transport record, of a statement to the effect that the goods could be delivered without the surrender of the transport document or the electronic transport record. This addition, it was pointed out, represented the most contentious point in the entire proposed new draft article. The original text, it was explained, had received strong criticism based on concern about the negative impact that rules allowing delivery of goods without the surrender of negotiable transport documents might have on common trade and banking practices, as well as from the viewpoint of the legal doctrine of documents of title. The proposed revised text was intended to address such concern by requiring a clear warning for all parties potentially affected, in the form of an appropriate statement in the negotiable transport document, that the carrier was authorized to deliver the goods even without the surrender of the transport document, provided that the carrier followed the procedures set forth in the draft article. The proposed rules, it was pointed out, were meant to operate in the form of a contractual “opt-in” system: in order for the carrier to be discharged of its obligation to deliver by delivering the goods under instructions received from the shipper even without the surrender of the negotiable transport document, the parties must have agreed to allow the carrier to deliver the goods in such a fashion under the circumstances described in the draft article. It was observed that, if the Commission agreed to replace draft article 49 with the proposed new text, consequential changes would be needed in draft articles 47, 48 and 50.

155. In commenting on the proposed new text for draft article 49, a number of the concerns that had been raised in regard to the original text of draft article 49 were reiterated, as were a number of the views expressed by those who supported the original text of the provision. There

was some support for the view that the new text of draft article 49 did not solve the problems previously identified.

156. By way of specific comment on the proposed new text, some delegations that had expressed strong objections to the original text of the draft provision and had requested its deletion repeated that preference in respect of the proposed new text. At the same time, some delegations that had strongly supported the original text of draft article 49 reiterated that support, but expressed the view that the proposed new text could be an acceptable alternative.

157. Although views concerning the original text of the provision remained sharply divided, there was general support in the Commission for the proposed new text of draft article 49 as representing a compromise approach that could achieve broader acceptance. Supporters of the original text of draft article 49 expressed the view that while the provisions of paragraph 2 of the revised text were no longer mandatory, as they had been in the original version, they were nonetheless an improvement over the current state of affairs.

158. In addition, while there was general support for the “opt-in” approach taken in the revised text as being less troubling for those with lingering concerns regarding the content of paragraph 2, some preference was still expressed for an “opt-out” or “default” approach to be taken in paragraph 2 of the new text. In that regard, it was thought that the “opt-out” approach would be less likely simply to preserve the status quo. Further, concern was expressed that in some jurisdictions a transport document containing a statement that the goods may be delivered without surrender of the transport document would not be considered a negotiable document at all. However, there was support for the view that the difference between an “opt-in” and an “opt-out” approach was probably not of great significance, as the three major parties involved in the commodities trade to which paragraph 2 would be most relevant (i.e. carriers, commodity traders and banks) would dictate whether or not paragraph 2 was actually used. It was observed that that decision would be made for commercial reasons, and would not likely rest on whether the provision was an “opt-in” or an “opt-out” one. It was generally thought that, regardless of the particular approach, the proposed new text of draft article 49 would provide the parties involved in the commodities trade, which was said to be highly subject to abuse in terms of delivery without presentation of the negotiable document or record, with the means to eliminate abuses of the bill of lading and its attendant problems.

159. In further support of the revised text, it was observed that the current situation was not satisfactory, as the treatment of bills of lading that included a statement that there could be delivery without their surrender varied depending on the jurisdiction. In some jurisdictions, only the statement was held to be invalid but, in others, it was held to be valid and carriers could simply deliver without surrender without following any particular rules at all. Further, there was a danger that such statements could appear in bills of lading, as at least one major carrier had previously introduced, and then withdrawn, such a statement in its documents. In the face of such uncertainty, the revised text of draft article 49 was an improvement and could be seen as a type of guarantee that some sort of procedure would be followed, even when goods were allowed to be delivered without surrender of the negotiable document or record.

160. There were some suggestions for adjustments to the proposed new text of draft article 49. It was suggested that as the provision would be most relevant in the commodities trade, which primarily incorporated into the transport document by reference the terms and conditions in the charterparty, the phrase “indicates either expressly or through incorporation by reference

to the charterparty” should be included in the chapeau of paragraph 2 rather than the word “states”. There was some support for that suggestion.

161. However, objections were also voiced to allowing the delivery of goods without surrender of transport documents by mere incorporation by reference to the terms of a charterparty. There was support for the suggestion that if the possibility contemplated in paragraph 2 were to be widened any further, it would be preferable to delete the paragraph altogether. An alternative proposal was made that the word “expressly” should be included before the word “states”. There was support for that approach, particularly among those who had supported deletion of all or part of the original text of draft article 49.

162. A question was raised whether it might be desirable to adjust the title of draft article 49 to reflect the fact that the negotiable transport document or electronic transport record might, in some cases, not require surrender. In response, it was said that it would be preferable to keep the title as drafted, as the general rule under draft article 49 would still require surrender of the negotiable document or record, and that paragraph 2 was meant to be an exception to that general rule. There was support for that view.

163. In response to a question whether the “contractual arrangement” referred to in paragraph 2 (d) could be a verbal agreement, it was noted that the term referred to a sales contract or a letter of credit, which would typically be in writing, but that since draft article 49 was not included in the draft article 3 list of provisions with a writing requirement, it was possible that it could be a verbal agreement.

164. A concern was raised with respect to whether the interrelationship between the new paragraph 2 and draft article 50 was sufficiently clear. In order to remedy that concern, the Commission agreed to insert the phrase “without prejudice to article 50, paragraph 1” at the start of paragraph 2.

165. Subject to the insertion of the words “without prejudice to article 50, paragraph 1” in the beginning of paragraph 2 and of the word “expressly” before the word “states” in that same sentence, the Commission approved the substance of the new draft article 49 and referred it to the drafting group.

Article 48. Goods remaining undelivered

1. For the purposes of this article, goods shall be deemed to have remained undelivered only if, after their arrival at the place of destination:

(a) The consignee does not accept delivery of the goods pursuant to this chapter at the time and location referred to in article 43;

(b) The controlling party, the holder, the shipper or the documentary shipper cannot be found or does not give the carrier adequate instructions pursuant to articles 45, 46 and 47;

(c) The carrier is entitled or required to refuse delivery pursuant to articles 44, 45, 46 and 47;

(d) The carrier is not allowed to deliver the goods to the consignee pursuant to the law or regulations of the place at which delivery is requested; or

- (e) The goods are otherwise undeliverable by the carrier.
2. Without prejudice to any other rights that the carrier may have against the shipper, controlling party or consignee, if the goods have remained undelivered, the carrier may, at the risk and expense of the person entitled to the goods, take such action in respect of the goods as circumstances may reasonably require, including:
- (a) To store the goods at any suitable place;
- (b) To unpack the goods if they are packed in containers or vehicles, or to act otherwise in respect of the goods, including by moving them; and
- (c) To cause the goods to be sold or destroyed in accordance with the practices or pursuant to the law or regulations of the place where the goods are located at the time.
3. The carrier may exercise the rights under paragraph 2 of this article only after it has given reasonable notice of the intended action under paragraph 2 of this article to the person stated in the contract particulars as the person, if any, to be notified of the arrival of the goods at the place of destination, and to one of the following persons in the order indicated, if known to the carrier: the consignee, the controlling party or the shipper.
4. If the goods are sold pursuant to subparagraph 2 (c) of this article, the carrier shall hold the proceeds of the sale for the benefit of the person entitled to the goods, subject to the deduction of any costs incurred by the carrier and any other amounts that are due to the carrier in connection with the carriage of those goods.
5. The carrier shall not be liable for loss of or damage to goods that occurs during the time that they remain undelivered pursuant to this article unless the claimant proves that such loss or damage resulted from the failure by the carrier to take steps that would have been reasonable in the circumstances to preserve the goods and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(e) Paragraph 10.4

91. The Working Group heard that subparagraph 10.4.1 stated the general principle setting out the entitlement of the carrier to exercise certain rights and remedies in situations of failure of delivery involving negotiable and non-negotiable transport documents, and concerning consignees who had or had not exercised any rights pursuant to the contract of carriage. It was noted that subparagraph 10.4.1(b) entitled the carrier to store, unpack or sell the goods at the risk and account of the person entitled to them, and subparagraph 10.4.1(c) entitled the carrier to deduct the costs incurred with respect to the goods, or payable to the carrier under subparagraph 9.5(a). It was explained that subparagraph 10.4.2 provided a safeguard to the consignee in requiring the carrier to give notice to the consignee, controlling party or shipper prior to exercising its rights, and that subparagraph 10.4.3 made the carrier liable for loss of or damage to the goods sustained intentionally or recklessly by the carrier.

92. While there was general support for subparagraph 10.4.1, concern was expressed with respect to the phrase “no express or implied contract has been concluded between the carrier or

the performing party and the consignee that succeeds to the contract of carriage”. It was suggested that this phrase was confusing, since it could be seen to concern a contract for warehousing if it is one that “succeeds to the contract of carriage”, and the notion of “express or implied” was also said to be difficult to understand.

93. General approval was also expressed for the policy reflected in subparagraph 10.4.2, with the proviso that it was unclear why only notice was necessary and why the carrier did not have to wait for a response or reaction from the person receiving the notice before exercising its rights.

94. Concern with respect to the use of the term “agent” in subparagraph 10.4.3 was again echoed, and it was noted that the third line of this draft article should read “loss of or damage to these goods”. An additional note of caution was again raised with respect to the wording of the draft article that could be seen to suggest that the act or omission of the carrier could result in the liability of the performing party. Support was expressed for the suggestion that this latter point could be clarified with the addition of the phrase “or of the performing party” after the phrase “personal act or omission of the carrier”. Support was also expressed for the suggestion that the word “personal” should be deleted from this draft provision in order to broaden its scope.

95. In response to a question regarding the placement of the square brackets in subparagraph 10.4.3, it was explained that the square brackets were in the correct position, since the contents of the brackets were intended to define the carrier’s liability, but the Working Group had to decide at what level to determine that liability before the brackets could be removed. Some support was received for the suggestion that the square brackets should be removed from this draft provision.

96. It was noted that subparagraphs 10.4.3 and 10.4.1 had similarities in their content, and it was suggested that their language should be adjusted to reflect those similarities. There was some support for this suggestion.

97. It was suggested that when the carrier exercised its rights under subparagraph 10.4.1, it could result in costs in addition to those arising from loss or damage, such as, for example, expenses arising from warehousing or sale. In addition, it was noted that the value of the goods might not in some cases cover the costs incurred. The suggestion was made that subparagraph 10.4.3 should include the idea that when exercising its rights in subparagraph 10.4.1, “the carrier or performing party may cause costs and risks, and that these shall be borne by the person entitled to the goods”.

98. The suggestion was made that the reference in subparagraph 10.4.1(c)(ii) to the deduction by the carrier from the proceeds of the sale, the amount necessary to reimburse the carrier pursuant to subparagraph 9.5(a) should be placed in square brackets in light of the fact that subparagraph 9.5(a) had not yet been agreed upon by the Working Group. It was noted that in the conclusions reached with respect to subparagraph 9.5(a), the Working Group had not decided to place that provision in square brackets (A/CN.9/525, para.123), and that it would be inappropriate to do so in subparagraph 10.4.1(c)(ii).

99. The Working Group expressed its general approval with paragraph 10.4, and requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]**Draft article 50. Failure to give adequate instructions**

90. It was indicated that draft article 50 was meant to provide the carrier with a safeguard for those cases, not rare in practice, when it could not perform the delivery of the goods due to inadequate instructions from the controlling party or the shipper under draft articles 48 and 49, or to an inability to locate the controlling party or the shipper. It was suggested that the qualification “adequate” to the word “instructions” could give rise to problems of interpretation and that it could possibly be clarified, for example, by specifying that the instructions should be sufficient to allow for delivery of the goods.

91. It was suggested that the reference to draft articles 52 and 53 in draft article 50 should be deleted, while the reference to draft article 51 should be retained since only that provision set out the rights that the carrier could exercise. In response, the view was expressed that draft articles 52 and 53 were relevant for the operation of draft article 50. In particular, it was explained that draft article 52 was meant to provide for those cases in which the transport document incorporated an obligation to give notice of arrival at destination, possibly to a party different from the controlling party, and such notice had not been given.

92. It was suggested that reference to the consignee should be added in the draft provision since after the arrival of the goods at the destination the identity of the controlling party and of the consignee might not coincide.

Conclusions reached by the Working Group regarding draft article 50:

93. After discussion, the Working Group decided that:

- The Secretariat should consider drafting modifications of draft article 50 based on the concerns raised in the above discussion.

Draft article 51. When goods are undeliverable

94. It was indicated that draft article 51 was intended to provide rights and remedies to the carrier in those cases in which the carrier had tried to deliver goods but was unable to do so, either through the failure of the consignee to accept delivery or because of an inability to deliver the goods to the consignee due to applicable law or regulation.

95. It was suggested that the text of draft article 51 should be expressly linked to draft article 50, so as to avoid the impression that draft article 50 provided the rights indicated to the carrier independently of any failure on the part of the controlling party or the shipper to provide adequate instructions for delivery. Some concerns were raised regarding the relationship between several of the provisions in the chapter on delivery, and there was support for the view that the relationship between draft articles 46, 50, 51 and 53, in particular, should be clarified. The view was also expressed that adjusting the order of certain provisions, such as moving the draft article 52 notice provision in front of draft article 51, or possibly merging it with portions of draft article 51, could assist in clarifying the intended operation of the provisions.

Draft paragraph 51(1)

96. It was observed with respect to draft paragraph 51(1)(a) that two types of contractual arrangements could be made in connection with the custody of undeliverable goods: a successive contract to store the goods or an agreement by the shipper and carrier not to apply the draft article 51 remedies and to make other arrangements. The view was expressed that the text in square brackets in draft paragraph 51(1)(a) was not necessary for the creation of a successive contract and that it should be deleted. Further, it was proposed that the other arrangements entered into by the shipper and the carrier could be accommodated by the insertion at an appropriate place in the provision of the phrase “unless otherwise agreed in the contract of carriage”. There was support for these proposals, and it was observed that care should be taken with the placement of the phrase “unless otherwise agreed in the contract of carriage” in draft paragraph 51(1), so as not to create unintended results, such as the modification of draft paragraph 51(2) through its reference to draft paragraph 51(1).

Draft paragraph 51(2)

97. It was suggested that in order to further clarify draft paragraph 51(2)(b), the reference “to act otherwise in respect of the goods” should be qualified to include destruction of goods. There was support in the Working Group for this modification, since often carriers needed to act quickly to destroy goods left in their custody when those goods were perishable or had become dangerous. A question was raised regarding whether this right to destroy the goods was intended to be conditional or unconditional. In addition, it was suggested that a provision on the destruction of the goods should be made subject to the supervision of the local authorities, in similar fashion to text regarding the sale of the goods pursuant to draft paragraph 51(2)(c).

98. Concern was raised regarding the phrase “in the opinion of the carrier” in draft paragraph 51(2)(b), particularly if the paragraph was intended to include the destruction of goods as suggested. It was thought that this phrase should be deleted since it made the test too subjective by relying on the opinion of the carrier, but that the remainder of the phrase “as the circumstances reasonably may require” was appropriate and should be kept. While some concern was expressed that deletion of the phrase “in the opinion of the carrier” could be too restrictive to the carrier in situations where it was necessary to make quick decisions, it was thought that the remaining reasonableness test was sufficiently flexible to be properly applied in such circumstances. A further proposal was made to apply the “reasonable circumstances” condition to paragraphs (a) and (c) of draft paragraph 51(2) as well as to paragraph (b). The view was expressed that in determining the appropriate test for this provision, the context should be kept in mind, in that it did not concern disposal of the goods during the contract of carriage, but rather it gave the carrier the rights necessary to deal with the goods left in its custody after it had completed its obligations under the contract of carriage.

Conclusions reached by the Working Group regarding draft paragraphs 51(1) and (2):

99. After discussion, the Working Group decided that:

- The text in square brackets in draft paragraph 51(1)(a) should be deleted;
- The phrase “unless otherwise agreed in the contract of carriage” should be inserted at a suitable place into the text of draft paragraph 51(1)(a);

- A provision on the destruction of goods should be added to draft paragraph 51(2)(b), and consideration should be given to requiring such disposal to be in the presence of local authorities;
- The phrase “in the opinion of the carrier” in draft paragraph 51(2)(b) should be deleted;
- The title of the draft article should be adjusted to better reflect its content;
- The order of the provisions in the draft chapter on delivery and their interrelationship should be examined for possible clarification and adjustment, particularly in the case of the placement of draft article 52;
- The Secretariat should be requested to consider and prepare the necessary modifications to the text, in light of the above discussion.

Draft paragraph 51(3)

100. Some concern was expressed with respect to the second portion of the text in draft paragraph 51(3), since it was thought that the phrase “subject to the deduction of any costs incurred in respect of the goods and any other amounts that are due to the carrier” could be interpreted to include amounts owed to the carrier with respect to other shipments of goods. There was support in the Working Group for the view that that was not the intention of the provision, and it was suggested that moving the phrase “in respect of the goods” to the end of the sentence could clarify the text. A question was raised regarding this clarification, and it was suggested that the carrier should have a right to deduct any amounts owed to it from previous carriages from the proceeds of the sale. However, this approach was not accepted, and there was support for the view that the provision should cover those amounts for which the carrier would have a lien against the particular goods in question, and where the debt was unrelated to the goods, the draft convention should make no provision, thereby leaving the matter of set-off to national law.

Conclusions reached by the Working Group regarding draft paragraph 51(3):

101. After discussion, the Working Group decided that:

- There was support for this provision and the Secretariat should be requested to consider modifications to the text to achieve clarification, as indicated in the above discussion; and
- Consideration could be given to the use of the term “unclaimed goods” rather than “undeliverable goods”.

Draft article 52. Notice of arrival at destination**Draft article 52**

102. The view was expressed that the current text of the draft article was too restrictive in that it only dealt with notice of arrival of the goods at destination. In practice, however, carriers were often faced with the urgent need for taking protective or other measures in respect of cargo that had not arrived at destination, for instance as a result of a casualty. The draft article, it was suggested, should be widened to cover those situations as well.

103. In response, it was stated that the draft article was intended to be limited to situations where the goods had arrived at destination. The carrier’s general duty of care of the cargo, for example, was stated in draft article 14, while the carrier’s remedies in respect of goods that

might become a danger to cargo were already dealt with in draft article 15 and the carrier's right to obtain instructions from the controlling party was covered by draft article 59. Taken together, those provisions already afforded the carrier the authority needed to act under extraordinary circumstances. It was nevertheless recognized that the interplay between those various provisions might need to be more clearly expressed in a future version of the draft convention.

104. Questions were raised as to whether the carrier should give a specific notice to the appropriate person that it would exercise any of the rights mentioned in draft paragraph 51(2). In response, it was noted that the purpose of draft article 52 was merely to make the exercise of any rights by the carrier under draft paragraph 51(2), conditional upon giving reasonable notice to the appropriate person of the arrival of the goods at destination. That is, a carrier could not, for instance, cause unclaimed goods to be sold if it had not notified the appropriate person of the arrival of the goods at destination. Nothing in the draft article required a second notice with specific reference to the measures envisaged by the carrier in respect of the unclaimed goods as a condition for the operation of draft paragraph 51(2).

105. It was generally agreed that the carrier should not avail itself of draft paragraph 51(2), if it had failed to give notice of arrival of the goods to the appropriate person. The suggestion was made, in that connection, that the draft convention should expressly require, as a general obligation of the carrier, to make such notice, possibly in a provision to be placed earlier in the text. The Working Group was however reminded of its earlier deliberations in respect of draft article 46, when it had been decided that no general requirement to provide notice of arrival of goods should be made by the draft convention (see A/CN.9/591, para. 214). In addition, it was suggested that the provision should be clarified regarding which order the parties named therein were to be notified.

Conclusions reached by the Working Group regarding draft article 52:

106. After discussion, the Working Group decided that:

- The substance of the draft article should be retained, but it should be clarified in which order the parties named therein were to be notified; and
- The appropriate placement of the draft article might need to be reconsidered.

Draft article 53. Carrier's liability for undeliverable goods

Possible consolidation with draft article 46

107. It was noted that both draft article 53 and the second sentence of draft article 46 referred to the liability of the carrier in cases of goods left in the custody of the carrier after their arrival at destination. It was further indicated that, even if the scope of draft article 51, to which draft article 53 referred, was broader than that of draft article 46, the liability of the carrier in draft articles 46 and 53 was of a similar nature. It was therefore proposed that draft article 53 and the second sentence of draft article 46 could be consolidated into a single provision. There was support for this proposal in the Working Group, although it was noted that the liability for the goods would shift at slightly different times pursuant to draft article 46 and to draft article 53.

Standard of liability

108. A large number of delegations expressed dissatisfaction with the low standard of liability of the carrier as set out in draft article 53, which required intentional or reckless

behaviour to hold the carrier liable for loss of undeliverable goods. At the same time, it was generally felt that the standard of liability should not be as high as that under draft article 17 of the draft convention, on the general liability of the carrier for loss of or damage to the goods during its period of responsibility, since under draft article 53, the carrier was left with the custody of the goods due to the default of the consignee in failing to accept delivery. There was strong support in the Working Group for the view that the standard of liability of the carrier should be somewhere between that of draft article 17 and that of the current text in draft article 53.

109. A number of different views were expressed regarding how the standard of liability of the carrier in the case of a consolidated draft article 46 and draft article 53 should be articulated in the draft convention in order to be interpreted in a similar fashion in all legal systems. Specific proposals in this regard were made as follows:

(a) Gross negligence or “faute grave”; but this concept was thought to be unknown in some jurisdictions;

(b) Reasonable care in the circumstances; but that standard was considered by some to be reminiscent of the standard of due diligence, which was thought to be too high, and it was said that this standard coupled with a fault basis would increase the liability of the carrier in some jurisdictions to a level on a par with draft article 17;

(c) Handling the goods as though they were one’s own, or taking care of the goods without gross negligence, although this standard was not widely known; and

(d) Adopting the standard of liability of draft article 17 based on fault, but with an ordinary rather than a reversed burden of proof.

110. While some support was expressed for each of the possibilities listed in the paragraph above, it was thought that no single suggestion had emerged in the course of the discussion which would be capable of a standard interpretation in various legal systems. However, it was felt that there was sufficient agreement in the Working Group on the standard of liability for the carrier in these circumstances that draft text could be prepared for the consideration of the Working Group.

111. The view was also expressed that a different standard of care for the goods might be required depending upon whether the carrier had kept the undeliverable goods in its custody or had given those goods over to the custody of a third party. It was suggested that, in the first case, the carrier should continue to be liable subject to a stricter standard, while in the second case the carrier should be liable only for fault in the choice of the custodian. However, some doubts were expressed whether there should be any distinction between these two situations, since the carrier’s responsibility for the care of the goods was probably not capable of delegation to another party.

Burden of proof

112. The issue of the burden of proof of the loss of or damage to the goods under the consolidated article was also considered, and it was suggested that the consignee should bear the burden of proof given the carrier’s position of being left in the custody of the goods due to the consignee’s failure to accept delivery at the conclusion of the contract of carriage. There was support for that view.

Conclusions reached by the Working Group regarding draft article 53:

113. After discussion, the Working Group decided that:

- The text of draft article 53 should be consolidated with the second sentence of draft article 46;
- The standard of care should be higher than that currently expressed in draft article 53, but lower than that expressed in draft article 17, and should be capable of similar interpretation in all legal systems; and
- The Secretariat should prepare a new draft of the draft provision based on the above discussions, as a basis for the Working Group's future deliberations.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 50. Goods remaining undelivered**

68. The Working Group was reminded that former draft article 50, set out in A/CN.9/WG.III/WP.56, had been deleted and its substance incorporated into draft article 50 in A/CN.9/WG.III/WP.81, in light of the Working Group's deliberations at the 17th session (A/CN.9/594, paras. 90-93).

Paragraphs 1 and 2

69. It was suggested that the right of the carrier to cause the goods to be sold under subparagraph (c) had the potential to cause significant damage to cargo interests. For that reason, there was some support for a proposal to add a time requirement of sixty days before a carrier could exercise its rights to sell the goods except in case of perishable goods, or where the goods were otherwise unsuitable for preservation.

70. There was general agreement within the Working Group as to the importance of safeguards to ensure that any measures involving disposal of the goods that the carrier might take pursuant to the draft article were carried out properly. However, it was pointed out that subparagraph 1(c) already made express reference to the requirements of domestic law. Those requirements could not be fully reproduced in the draft convention, and the Working Group was cautioned against including one particular safeguard, such as a time bar, without including other safeguards contained in some national laws. The Working Group agreed not to introduce a specific time limit into subparagraph 1(c).

71. The question was asked as to whether the carrier should be free to decide when the circumstances warranted the destruction of the goods or whether such action should only be authorized in specific circumstances to be mentioned in the draft convention. In response, it was noted that draft paragraph 1 already subjected the actions of the carrier to a test of reasonableness and that it would be preferable to leave the possible consequences of unreasonable measures by the carrier entirely to national law rather than attempt to encompass all imaginable circumstances where destruction of the goods might be warranted.

72. A proposal was made to delete the words "unless otherwise agreed and" from paragraph 1 for the reason that it opened the potential for abuse, and small shippers would rarely have an opportunity to enter into a contrary agreement with carriers. It was suggested that it was more

important to expressly state the situation in which a carrier might sell or destroy the goods. The contrary view was, as an instrument concerned with commercial relations, rather than consumer protection, the draft convention should respect freedom of contract on the matter. Nevertheless, after having considered those views, the Working Group agreed to delete the words “unless otherwise agreed and” in the draft paragraph.

73. The Working Group accepted a proposal to reverse the order of paragraphs 1 and 2, so as to place the definition on when goods could be deemed to be undeliverable, before the operative provision.

74. It was noted that the term “undelivered” was used in paragraph 1, whereas the term “undeliverable” was used in paragraph 2. It was suggested that the text should be reviewed to determine whether the same term should be used in both paragraphs.

Conclusions reached by the Working Group regarding paragraphs 1 and 2 of draft article 50:

75. The Working Group was in agreement that the text of draft article 50 should be retained subject to the following:

- The order of paragraphs 1 and 2 be reversed;
- The words “unless otherwise agreed and” be deleted from the chapeau of paragraph 1; and
- The Secretariat should examine the use of the term “undelivered” in paragraph 1 as compared to “undeliverable” in paragraph 2, to determine whether one term should be used in both cases.

Paragraphs 3 to 5

76. A proposal was made to include “the notify party” before the consignee in the list of persons to be notified of the arrival of the goods at the place of destination. That proposal did not receive support.

77. There was strong support for a proposal to include a requirement of 14 days in relation to the advance notice to be given under paragraph 3, instead of merely requiring a reasonable advance notice. However, very strong objections were raised against that proposal. It was pointed out that the inclusion of a fixed time period which might be appropriate to longer sea legs but less appropriate in short sea legs, some of which might be covered within a few days only. It was also said that requiring the carrier to retain undelivered goods for 14 days prior to disposing of them might generate considerable cost and even cause a congestion of stored goods in port terminals.

78. In the context of that discussion, it was noted that it was not clear whether draft paragraph 3 envisaged a notice following the arrival of the goods or a notice anticipating their arrival at the place of destination. It was explained that, in the context in which it was placed, the notice in paragraph 3 should logically refer to the notice that the goods had arrived as distinct from an advance notice which was sent prior to the arrival of the goods. It was suggested that the nature of the notice intended to be covered could be further clarified.

79. It was suggested that paragraph 5 should be amended to more clearly delimit the carrier’s liability and ensure that the carrier would not be under a continuing liability where destruction or sale of the goods was not open to the carrier. It was suggested that the carrier

should be relieved of continuing liability for damage to the goods or other loss or damage which was a consequence of the goods not being received by the consignee, provided the goods were handed over to a suitable terminal authority, public authority or other independent person or authority that took care of the goods. That proposal did not receive support.

80. It was suggested that the words “and that the carrier knew or ought to have known that the loss or damage to the goods would result from its failure to take such steps” be deleted. There was not sufficient support for that proposal, as it was felt that the provision applied where the cargo interest had defaulted on its obligations and therefore an overly onerous burden should not be placed on the carrier in such circumstances.

Conclusions reached by the Working Group regarding paragraphs 3 to 5 of draft article 50:

81. The Working Group was in agreement that the text of paragraphs 3 to 5 of draft article 50 should be retained subject to clarifying that the notice referred to in paragraph 3 was to notice that the goods had arrived at destination.

Paragraph 4

82. It was suggested that a time limit should be specified in paragraph 4 with respect to the period during which the carrier should keep the proceeds.

83. The Working Group was in agreement that the paragraph should be retained and that the matter of the time limit should be determined by national law.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 51. Goods remaining undelivered

162. A question was raised to the meaning and purpose of the phrase “otherwise undeliverable” in paragraph 1(e) of draft article 51. It was suggested in response that that subparagraph could be deleted entirely, since subparagraphs 1(a) to (d) sufficiently covered all of the possible circumstances in which goods could remain undelivered, and that there could be potential for abuse by the carrier if subparagraph 1(e) were retained.

163. However, it was pointed out that subparagraph 1(e) was useful, as it would apply to situations, for instance, where weather conditions caused the goods to be undeliverable. It was also noted that there might be additional situations where paragraphs 1(a) to (d) would not be applicable, for example if the consignee simply did not claim delivery, and that an open clause such as paragraph 1(e) would be helpful. In support of that view, it was pointed out that the term “undeliverable” would likely be interpreted narrowly in any event. Broad support was expressed to retain subparagraph 1(e) of draft article 51.

164. A suggestion was made that it would be preferable to require a specific period of time to pass before the carrier could destroy the goods pursuant to paragraph 2(b) of draft article 51. Although there was sympathy for that suggestion, it was noted that the “reasonable notice” requirement in paragraph 3 of draft article 51 was sufficient to address any concern regarding abuse of that right.

Conclusions reached by the Working Group regarding draft article 51

165. The Working Group approved the substance of draft article 51 subject to the deletion of reference to draft article 49 in paragraph 1(b) and (c) and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 50. Goods remaining undelivered**

169. The view was expressed that the remedies set out in draft article 50 were only available to a carrier facing undelivered goods after it had attempted to deliver the goods in keeping with the procedure set out in draft article 49. However, there was support in the Commission for the alternative view that the use of the disjunctive “or” in listing the various bases on which goods would be deemed to have remained undelivered clearly indicated that an entitlement or an obligation to refuse delivery under draft article 49 constituted only one of several reasons for which goods could be deemed to have remained undelivered. A proposal was made to make that latter intention clear through the addition of a phrase along the lines of “without regard to the provisions of articles 47, 48 or 49” after the phrase “the carrier may exercise the rights under paragraph 2 of this article” in paragraph 3, but such an addition was not found to be necessary.

170. It was noted that in some jurisdictions, the applicable law required local authorities to destroy the goods rather than allowing the carrier itself to destroy them. In order to accommodate those jurisdictions, a proposal was made to insert into subparagraph 2 (b) a requirement along the lines of that for the sale of goods pursuant to subparagraph 2 (c) that the destruction of the goods be carried out in accordance with the law or regulations of the place where the goods were located at the time. There was support for that proposal and for the principle that the carrier should abide by the local laws and regulations, provided that those requirements were not so broadly interpreted as to unduly restrict the carrier’s ability to destroy the goods when that was necessary.

171. Some drafting suggestions were made to improve the provision. It was observed that depending on the outcome of the discussions relating to draft article 49, a consequential change might be required to add the word “holder” to subparagraph 1 (b). It was also suggested that the logic of draft article 50 might be improved by deleting subparagraph 1 (b) as being repetitious of other subparagraphs or that the order of subparagraphs (b) and (c) of paragraph 2 should be changed, since destruction was the more drastic remedy of the two. The Commission took note of those suggestions.

172. With the addition of a requirement in draft article 50, subparagraph 2 (b), along the lines of that of draft article 52, subparagraph 2 (c), that the destruction of the goods by the carrier be carried out in accordance with the law or regulations of the place where the goods were located at the time, the Commission approved the substance of draft article 50 and referred it to the drafting group. (For consequential changes to this draft article, see also paras. 166-168 above.)

[See also paragraphs 166-168, A/63/17 (41st Session of UNCITRAL) under article 45 at p. 435]

Article 49. Retention of goods

Nothing in this Convention affects a right of the carrier or a performing party that may exist pursuant to the contract of carriage or the applicable law to retain the goods to secure the payment of sums due.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]**Right of retention**

114. The Working Group was reminded that the introduction of a provision regulating the right of the carrier to retain the cargo in certain cases had been suggested at its sixteenth session during the discussion of chapter 10 of the draft convention on delivery to the consignee (see A/CN.9/591, paras. 221 and 222). It was further recalled that a proposal on the carrier's right of retention of the goods had been presented for the consideration of the Working Group at its current session (A/CN.9/WG.III/WP.63).

115. It was indicated that, while substantive provisions on the right of retention could be considered by the Working Group as part of the more complete set of issues to be set aside for possible future work, the carrier's absolute obligation to deliver the goods pursuant to draft article 13 of the draft convention could be interpreted as preventing the application by the carrier of a right of retention arising from other applicable law. It was therefore proposed that a provision specifying the non-interference of the draft convention with the right of retention in other applicable law should be inserted in the draft convention. It was further suggested that such a new provision should be drafted along the lines of the text contained in A/CN.9/594 paragraph 14 of A/CN.9/WG.III/WP.63, bearing in mind the similar approach taken in draft article 87 of the draft convention, relating to provisions on general average. There was support in the Working Group for this proposal, including a suggestion that the Secretariat should consider the most appropriate location for the new provision, as well as make drafting adjustments to the text to ensure consistency with the existing provisions of the draft convention, with particular regard to the reference to the maritime performing party in paragraph 14 of A/CN.9/WG.III/WP.63.

116. However, caution was urged against excessive recourse to provisions clarifying the intention of the draft convention to preserve applicable law in relation to matters not specifically regulated, since it was thought that a failure to identify all such instances in the draft convention could lead to the interpretation that in the instances not specifically mentioned, the draft convention did intend to interfere with the applicable law.

Conclusions reached by the Working Group:

117. After discussion, the Working Group decided that:

- The Secretariat should draft a new provision on right of retention based on the above discussions, and, in particular, on the text contained in paragraph 14 of A/CN.9/WG.III/WP.63, for appropriate placement in the draft convention. Liability of

the carrier and the shipper for a breach of obligation under the draft convention not expressly dealt with

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 51. Retention of goods

84. The Working Group was reminded that it had agreed to include a provision that dealt with the retention of goods in the draft instrument at its seventeenth session (see A/CN.9/594, paras. 114-117).

Conclusions reached by the Working Group regarding draft article 51:

85. The Working Group agreed that the text of draft article 51 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 52. Retention of goods

166. A proposal was made to include the “shipper” in draft article 52 between “the carrier” and “a performing party”, because there were instances when the shipper might want a right of retention, such as when faced with the draft article 28 obligation to deliver the goods to a carrier, when the ship was in particularly bad condition. In order to address that concern, a more neutral proposal was made to delete the reference to the “the carrier or performing party” and simply refer to “a right that may exist pursuant to the contract of carriage ...”. Although some support was expressed for that proposal, doubts were expressed regarding the need to grant the shipper a right of retention, and that, in any event, the inclusion of the shipper in draft article 52 would be misplaced since the provision was located in chapter 9 on delivery.

167. After discussion, the Working Group approved the substance of draft article 52 and referred it to the drafting group.

Proposed General Provision on Liability for Misdelivery

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Liability of the carrier and the shipper for a breach of obligation under the draft convention not expressly dealt with

118. The Working Group was informed that, in connection with informal consultations that took place in connection with the topic of delivery to the consignee, the question was raised whether the draft convention should contain a general provision on the liability of the carrier and the shipper for a breach of obligation under the draft convention not expressly dealt with in the draft convention (see A/CN.9/WG.III/WP.57, paras. 49 to 52).

119. It was suggested that such general provision might be useful to address certain instances such as, for example, cases of misdelivery. However, it was also indicated that, while the adoption of such a provision might in principle have some merit, its drafting might prove to be excessively complex and time-consuming, and that the final text could add to the overall burden of the draft convention. It was further suggested that the matter should be left to domestic law, and that certain specific matters, such as, for instance, those relating to limitation of liability for misdelivery, might be better addressed in the chapter on limitation of liability in the draft convention.

Conclusions reached by the Working Group:

120. After discussion, the Working Group decided that:

- A general provision on the liability of the carrier and the shipper not expressly dealt with in the draft convention should not be inserted in the draft convention.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 51. Retention of goods

173. The Commission approved the substance of draft article 51 and referred it to the drafting group.

CHAPTER 10.

RIGHTS OF THE CONTROLLING PARTY

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

5. Right of control (draft article 11)

55. The draft provision regarding the right of control was generally considered a welcome addition to traditional maritime transport instruments. The Working Group did not engage in a detailed discussion of the provisions of draft article 11 but expressed its confidence that the draft article would constitute a good basis for continuation of the discussion at a future session.

56. Among preliminary observations that were made to the text of draft article 11, a concern was expressed regarding the excessive complexity of the provision, particularly if it were to apply to door-to-door transport. While it was generally expected that the provision could be clarified and simplified in both structure and contents at a further stage, it was pointed out that establishing basic rules on the right of control was essential in particular to the development of electronic communications. It was suggested that regulating the right of control should be consistent with the “right to dispose of the goods” or the right to modify the contract as regulated by other transport conventions such as the CMR. Concerns were expressed in relation to the provision of a possibility to make a variation of the contract including, for example, a change of the place of delivery. The view was expressed that this provision imposed a greater burden on the carrier than existed under current regimes, and that the right should be restricted to the holder of a transport document in the case of a negotiable transport document. It was stated that with regard to a non-negotiable document, the right should be confined to changing the name of the consignee as provided for under the CMI Uniform Rules for Sea Waybills. As to the operation of the provision, a question was raised regarding the meaning of the words “the controlling party shall indemnify the carrier” in draft article 11.3(b). It was pointed out that the notion of indemnity inappropriately suggested that the controlling party might be exposed to liability. That notion should be replaced by that of “remuneration”, which was more in line with the rightful exercise of its right of control by the controlling party. Another question was raised as to the possible consequences of failure by the carrier to comply with the new instructions received from the controlling party. It was suggested that, in the continuation of the discussion, the Working Group would need to decide whether such consequences should be regulated by the draft instrument or left to applicable domestic law.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

3. Draft article 11 (Right of control)

(a) General remarks

101. While it was generally felt that a provision regarding the right of control would constitute a welcome addition to traditional maritime transport instruments, the views and concerns expressed in respect of draft article 11 at the ninth session of the Working Group were reiterated (see A/CN.9/510, paras. 55-56). It was pointed out that, when revising draft article

11, particular attention should be given to avoiding inconsistencies among the various language versions.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Right of control

211. The Working Group heard a brief report on the informal intersessional consultations held on the issue of the right of control in the draft instrument (draft articles 53 to 58 in A/CN.9/WG.III/WP.32) as an introduction to the Working Group's consideration of those provisions at its next session. It was explained that the Working Group would have to consider a number of different issues. It was indicated that different views had emerged with respect to the nature and the extent of the right of the controlling party to give instructions to the carrier. It was suggested that the draft text did not provide sufficient distinction between the right of the controlling party to give instructions to the carrier and the right to amend the contract of carriage. It was further suggested that the definition of controlling party and of how to designate another entity as a controlling party required further reflection, and it was generally felt that the carrier should be notified of any change in the controlling party. It was observed that other matters open for discussion included the time of cessation of the right of control, the formal requirements for giving instructions in the case of non-negotiable transport documents and non-negotiable electronic transport records, and the obligation of the carrier to follow the instructions of the controlling party, as well as the carrier's liability in this respect.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Chapter 11 – Rights of the Controlling Party

86. It was suggested that the heading of the chapter should be replaced with "Right of Control", because the current heading did not fully reflect the essence of the chapter.

87. The Working Group agreed to consider the heading after completing the discussions on the draft articles in this chapter.

Article 50. Exercise and extent of right of control

1. The right of control may be exercised only by the controlling party and is limited to:
 - (a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;
 - (b) The right to obtain delivery of the goods at a scheduled port of call or, in respect of inland carriage, any place en route; and
 - (c) The right to replace the consignee by any other person including the controlling party.
2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(b) Paragraph 11.1***

102. As a matter of drafting, a concern was expressed that subparagraph (i) was unclear as to the exact meaning of the words “give or modify instructions ... that do not constitute a variation of the contract”. It was pointed out that those words might be read as contradicting themselves. While it was acknowledged that clearer drafting might be needed, it was stated in response that a clear distinction should be made in substance between what was referred to as a minor or “normal” modification of instructions given in respect of the goods, for example, regarding the temperature at which those goods should be stored, and a more substantive variation of the contract of carriage.

103. With respect to subparagraph (iv), it was suggested that the provision should be deleted to preserve the unilateral nature of any instruction that might be given to the carrier by the controlling party, as opposed to any modification regarding the terms of the contract of carriage, which would require the mutual agreement of the parties to that contract. In response, it was stated that, while subparagraph (iv) was not directly related to the exercise of the right of control, it served a particularly useful purpose in the definition of the right of control in that it made it clear that the controlling party should be regarded as the counterpart of the carrier during the voyage. It was stated that, although a variation of the contract of carriage would normally be negotiated between the parties to that contract, the contractual shipper might not always be the best person for the carrier to contact where an urgent decision had to be made in respect of the goods. In such a case where urgent dialogue should take place between the carrier and the person most interested in the goods, with the possible consequence that certain terms of the contract of carriage would need to be modified, it was suggested that the controlling party would be the best person for the carrier to contact.

104. After discussion, the Working Group found the substance of paragraph 11.1 to be generally acceptable. The Secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]**Draft article 54. Definition of right of control*****Draft article 54. General comments***

10. The Working Group considered the text of draft article 54 as contained in A/CN.9/WG.III/WP.50/Rev.1, paragraph 7, and in A/CN.9/WG.III/WP.56. It was indicated that draft article 54 of A/CN.9/WG.III/WP.56 did not clearly distinguish between the right of the controlling party to give unilateral instructions, on the one hand, and the right of the controlling party to agree with the carrier on a variation of the contract of carriage, on the other hand. The Working Group was also reminded that draft paragraph 54(b), providing that the controlling party could demand delivery of the goods before their arrival at the place of destination, had been the object of discussion in the past. In particular, it was indicated that according to some, such a demand would always amount to a variation of the contract of carriage and would therefore require the parties' agreement. Others, however, held the view that such a right was unilateral in nature and should be retained as essential, for instance, in cases when no negotiable transport record was issued and the seller or credit institutions must enforce a pledge on the goods.

11. General support was expressed for the approach adopted in A/CN.9/WG.III/WP.56, in which provisions of right of control which may be exercised unilaterally by the controlling party were dealt with in draft article 54, while provisions requiring a variation to the contract of carriage and therefore the agreement of the carrier were dealt with separately in draft article 55.

12. Support was expressed to retain the bracketed word "means" and to delete the bracketed word "is" in the chapeau of draft article 54.

Controlling party as the exclusive person that may exercise the right of control

13. It was observed that the opening phrase of draft article 55, "the controlling party is the exclusive person that may exercise the right of control" was a general proposition regarding the right of control that should apply equally to draft article 54. The view was expressed that this phrase should be moved from draft article 55 to the chapeau of draft article 54, but other views were expressed that care should be taken in drafting to ensure that the statement of the general rule also applied to draft article 55 variations to the contract of carriage. There was general agreement that adjustments should be made to draft articles 54 and 55 to ensure the general application of the rule that the controlling party was the exclusive person that could exercise the right of control. In addition, it was suggested that a separate provision applying to both draft articles 54 and 55 could be considered.

Draft paragraph 54(b). Delivery at intermediate port or place en route

14. The view was expressed that the request for delivery of goods at an intermediate port or place en route would always amount to a variation of the original terms of the contract of carriage and would entail a significant burden for the carrier as it would almost always interfere with the normal operations of the carrier and the right as such would conflict with the safeguards provided for in draft article 57. It was, therefore, suggested that draft paragraph 54(b) should be deleted. However, the prevailing view in the Working Group was in favour of retaining the principle expressed in draft paragraph 54(b), since it was deemed important to

provide the controlling party with an effective manner to exercise the right of control, particularly in the face of a potentially insolvent buyer.

15. Support was expressed for retaining the second set of bracketed text in draft paragraph 54(b) and for deleting the first set of bracketed text. It was stated that the controlling party should only have the right to request the carrier to deliver goods at intermediate ports or places en route. It was suggested that allowing the controlling party to request delivery at different ports or places would impose an unreasonable burden of deviation on the carrier with potentially serious economic consequences. In that connection, it was suggested that the reference to “an intermediate port or place en route” was not sufficient to protect the carrier against possible deviations arising from requests of the controlling party and that the draft provision should be further refined to clarify that the controlling party could request early delivery only at a scheduled port of call on that voyage. Further concerns were expressed regarding the possibility that the controlling party’s request for delivery at a port or place other than originally foreseen would entail additional charges for the carrier such as, for example, those relating to discharging a container stowed at the bottom of the vessel, and that in any case, the carrier should be reimbursed for any additional cost arising from such early delivery. However, it was also indicated that those concerns could be addressed by draft article 57, and, in particular, those provisions relating to non-interference with normal operations of the carrier, and with reimbursement of additional costs.

Conclusions reached by the Working Group regarding draft article 54:

16. After discussion, the Working Group decided that:

- The text of draft article 54 contained in A/CN.9/WG.III/WP.56 should be retained as a basis for the Working Group’s future deliberations;
- The brackets around the word “means” and the bracketed word “is” should be deleted in the chapeau of draft article 54;
- The principle according to which the controlling party was the exclusive person that may exercise the right of control should be inserted in the chapeau of draft article 54;
- The brackets around the second set of bracketed text and the first set of bracketed text should be deleted in draft article 54(b);
- Words such as “at a scheduled port of call” should replace the words “at an intermediate port” in draft article 54(b); and that
- The Secretariat should prepare a new version of draft article 54 taking into account the above deliberations.

[* * *]

Reconsideration of draft paragraph 56(1)(d) and proposed compromise approach

68. Having reached the conclusion of its consideration of Chapter 11 on Right of Control, the Working Group reverted as agreed to its consideration of draft paragraph 56(1)(d) concerning the termination of the right of control or its transfer to the consignee (see para. 36 above). With particular emphasis on the strongly held opposing views expressed in this regard in the Working Group, the following compromise approach to draft paragraph 56(1)(d) was suggested:

(a) The duration of the right of control should be extended slightly from the text in A/CN.9/WG.III/WP.56 to terminate upon actual delivery of the goods, in keeping with the proposed text in paragraph 15 of A/CN.9/WG.III/WP.50/Rev.1;

(b) Draft article 56(1)(d) should be added to the list of non-mandatory provisions in draft article 60, enabling parties to agree to shorten the duration of the right of control; and

(c) Variant B of draft paragraph 57(1)(c) should be amended slightly to include the delivery process in the provision allowing for non-execution of instructions by the carrier where there was interference with its normal operations.

69. By way of explanation to questions raised regarding the intended operation of this compromise approach, it was clarified that the default rule for the termination of the right of control upon actual delivery would be expressed in draft paragraph 56(1)(d), but that the duration of the right of control could be varied by the agreement of the parties through the use of draft article 60. It was further explained that the reference to the delivery process in Variant B of draft paragraph 57(1)(c) was intended as an additional protection against unduly burdening the carrier by allowing it to decline to execute instructions received from the controlling party once the carrier had begun the delivery process.

70. While some delegations expressed a preference to see the text of the compromise prior to endorsing it, there was strong support for the compromise approach in general. The view was reiterated by some that the duration of the right of control was already set out in the chapeau of draft article 54, and that a text in draft paragraph 56(1)(d) setting out when the right of control terminated was not necessary. However, it was observed that including the provision as a non-mandatory one in draft article 60 would require that there be specific text setting out the termination of the right of control. Other views were expressed that specific reference in Variant B of draft paragraph 57(1)(c) to the delivery process was unnecessary since the concept was already included in the normal operations of the carrier. As a drafting matter, it was observed that in preparing the required drafting modifications to implement the proposed compromise, the question of possible overlap regarding the notation of variations to the contract of carriage on the transport document or electronic transport record resulting from the interplay of draft paragraph 55(2) and draft article 60 would also have to be considered.

Conclusions reached by the Working Group regarding draft paragraph 56(1)(d):

71. After discussion, the Working Group decided that:

- The Secretariat should be requested to draft text implementing the compromise approach set out in paragraph 68 above, with due care to the specific drafting issues raised in that connection.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 52. Exercise and extent of right of control

88. The Working Group was reminded that draft article 52 was revised text after the provision was last considered by the Working Group at its seventeenth session (see A/CN.9/594, paras. 10-16).

89. The Working Group agreed that the text of draft article 52 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

168. The Working Group approved the substance of draft article 53 and referred it to the drafting group.

169. With regard to the term “right of control”, the Working Group approved the substance of the definition, subject to correcting the reference to “chapter 11” to “chapter 10” provided for in paragraph 13 of draft article 1 and referred it to the drafting group.

170. With regard to the term “controlling party”, the Working Group approved the substance of the definition provided for in paragraph 14 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Chapter 10. Rights of the controlling party****Draft article 52. Exercise and extent of right of control**

175. A question was raised regarding how a controlling party could exercise its right of control with respect to the matters set out in paragraph 1 when such details were not set out in the contract of carriage. Several examples were given in response, such as the situation where the controlling party was a seller who discovered that the buyer was bankrupt and the seller wanted to deliver the goods to another buyer, or the simple situation where a seller requested a change of temperature of the container on the ship. It was emphasized that there were safeguards written into the draft Convention to protect against potential abuses.

176. The Commission approved the substance of draft article 52 and referred it to the drafting group.

Article 51. Identity of the controlling party and transfer of the right of control

1. Except in the cases referred to in paragraphs 2, 3 and 4 of this article:

(a) The shipper is the controlling party unless the shipper, when the contract of carriage is concluded, designates the consignee, the documentary shipper or another person as the controlling party;

(b) The controlling party is entitled to transfer the right of control to another person. The transfer becomes effective with respect to the carrier upon its notification of the transfer by the transferor, and the transferee becomes the controlling party; and

(c) The controlling party shall properly identify itself when it exercises the right of control.

2. When a non-negotiable transport document has been issued that indicates that it shall be surrendered in order to obtain delivery of the goods:

(a) The shipper is the controlling party and may transfer the right of control to the consignee named in the transport document by transferring the document to that person without endorsement. If more than one original of the document was issued, all originals shall be transferred in order to effect a transfer of the right of control; and

(b) In order to exercise its right of control, the controlling party shall produce the document and properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

3. When a negotiable transport document is issued:

(a) The holder or, if more than one original of the negotiable transport document is issued, the holder of all originals is the controlling party;

(b) The holder may transfer the right of control by transferring the negotiable transport document to another person in accordance with article 57. If more than one original of that document was issued, all originals shall be transferred to that person in order to effect a transfer of the right of control; and

(c) In order to exercise the right of control, the holder shall produce the negotiable transport document to the carrier, and if the holder is one of the persons referred to in article 1, subparagraph 10 (a) (i), the holder shall properly identify itself. If more than one original of the document was issued, all originals shall be produced, failing which the right of control cannot be exercised.

4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party;

(b) The holder may transfer the right of control to another person by transferring the negotiable electronic transport record in accordance with the procedures referred to in article 9, paragraph 1; and

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(c) Paragraph 11.2

(i) Subparagraph 11.2(a)

105. With respect to subparagraph 11.2(a)(i), a question was raised as to the reasons why the consent of the consignee was required to designate a controlling party other than the shipper. It was observed that the consignee was not a party to the contract of carriage. It was also observed that if the contract provided for the shipper to be the controlling party, subparagraph (ii) conferred to him the power to unilaterally transfer his right of control to another person. In response, a view was expressed that the designation of the controlling party took place at a very

early stage in the carriage process or even before the conclusion of the contract of carriage. At that stage, designating the controlling party might be an important point for the purposes of the underlying sale transaction that took place between the shipper and the consignee. For that reason, it was considered appropriate under that view to involve the consignee in the designation of the controlling party.

106. With respect to the duration of the right of control, it was observed that, under paragraph 11.2, the controlling party remained in control of the goods until their final delivery (see A/CN.9/WG.III/WP.21, para. 188). A question was raised as to the reasons why the draft instrument departed from the CMI Uniform Rules for Sea Waybills in that, under the draft instrument, there was no automatic transfer of the right of control from the shipper to the consignee as soon as the goods had arrived at their place of delivery. It was suggested in that context that the draft instrument might create a difficult situation for the carrier if the right of control could be transferred or otherwise exercised after the goods had arrived at their place of delivery. It was thus proposed that the draft instrument should be made fully consistent with the CMI Uniform Rules for Sea Waybills. The Working Group took note of that proposal. It was explained in response that, if there were such automatic transfer, the most common shipper's instruction to the carrier, namely not to deliver the goods before it had received the confirmation from the shipper that payment of the goods had been effected, could be frustrated. For that reason, the duration of the right of control under the draft instrument had been extended until the goods had been actually delivered. More generally, it was pointed out that subparagraph 11.2(a) dealt with the situation where no negotiable document had been issued, a situation where flexibility in the transfer of the right of control was essential.

107. With respect to subparagraph 11.2(a)(ii), concern was expressed that, under existing law in certain countries, the transfer of the right of control could not be completed by a mere notice given by the transferee to the carrier. It was suggested that only notification from the transferor should be acceptable as a means of informing the carrier of such a transfer. In that connection, a more general question was raised regarding the relationship between paragraph 11.2 and paragraph 12.3. It was suggested that the issue of the transfer of the right of control should be made subject to applicable domestic law. While the Working Group took note of that suggestion, it was generally felt that no reference to domestic law should be made in draft article 11. It was agreed that various options might need to be discussed further as to which parties should notify the carrier of a transfer of the right of control.

108. After discussion, the Working Group found the substance of subparagraph 11.2(a) to be generally acceptable. The Secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

(ii) Subparagraph 11.2(b)

109. A concern was raised that the reference to the “holder” of the bill of lading might be unduly restrictive and the person to whom the bill of lading was endorsed should also be listed under subparagraph 11.2(b). In response, it was explained that the definition of “holder” under paragraph 1.12 sufficiently took care of that issue.

110. With respect to subparagraph 11.2(b)(iii), the view was expressed that the draft provision did not sufficiently address the consequences of the situation where the holder failed to produce all copies of the negotiable document to the carrier. It was suggested that the draft instrument should provide that, in such a case, the carrier should be free to refuse to follow the

instructions given by the controlling party. It was also suggested that a similar indication should be given under subparagraph 11.2(c)(ii). The Working Group was generally of the opinion that, should not all copies of the bill of lading be produced by the controlling party, the right of control could not be exercised. It was further suggested that an exception should be made to the rule under which the controlling party should produce all the copies of the bill of lading to address the situation where one copy of the bill of lading was already in the hands of the carrier. The Working Group generally agreed with that suggestion.

111. After discussion, subject to the above-mentioned views and suggestions, the Working Group found the substance of subparagraph 11.2(b) to be generally acceptable. The Secretariat was requested to bear the above discussion in mind when preparing a revised draft of the provision for continuation of the discussion at a future session.

(iii) Subparagraph 11.2(c)

112. The Working Group deferred consideration of subparagraph 11.2(c) until it had come to a more precise understanding of the manner in which the issues of electronic commerce would be addressed in the draft instrument.

(iv) Subparagraph 11.2(d)

113. The Working Group found the substance of subparagraph 11.2(d) to be generally acceptable.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 56. Applicable rules based on transport document or electronic transport record issued

Title

23. The Working Group agreed that the title of draft article 56 was too cumbersome and should be modified to more accurately and succinctly reflect the contents of the draft provision. One suggestion made in this regard was that the title could be “Controlling parties”.

Draft paragraph 56(1)(a)—alternative bracketed text

24. A concern was expressed that draft paragraph 56(1)(a) might not adequately protect the interests of the FOB seller of the goods when the shipper was the controlling party and the FOB seller was only the consignor, and not the shipper. It was suggested that this concern was adequately addressed under the second alternative bracketed text in draft paragraph 1(a), since the shipper would have to advise the carrier that the FOB seller was the controlling party, and, additionally, since the shipper would likely be obliged to do so under the contract of sale. The view was also expressed that the question raised would be considered in connection with the chapter on transport documents, since it concerned which documents or records the consignor would be entitled to receive once it had delivered the cargo to the carrier, in order to protect itself in the face of potentially insolvent buyers.

25. There was support for the view in the Working Group that the second alternative bracketed text in draft paragraph 1(a), “[designates the consignee or another person as the

controlling party]”, was preferable to the first bracketed text, since it was clearer and more simply drafted.

26. The Working Group heard other suggestions for the clarification of the text. It was proposed that draft paragraph 1(a) should specify that the “contract of carriage”, rather than the “shipper” should designate the controlling party. In response, it was noted that this suggested change would probably have the same result as the current text, since the shipper would likely make such a designation in the contract of carriage. It was also suggested that draft paragraphs 1(a) and (b) should take into account that under Rule 6 of the Comité Maritime International’s Uniform Rules for Sea Waybills, the shipper may transfer the right of control to the consignee, and that the exercise of this option must be noted on the sea waybill or similar document. However, some doubt was expressed regarding this suggestion, since it was thought that the question of the identity of the controlling party was relevant only as between the carrier and the cargo interests, and that if third parties, such as banks, were interested, the parties could advise them accordingly.

Draft paragraph 56(1)(b)—alternative bracketed text

27. There was general agreement in the Working Group that inclusion of the text in the first set of square brackets in draft paragraph 56(1)(b) was inadequate, since it would render the provision too uncertain for the carrier if it were to allow either the transferor or the transferee to notify the carrier of a transfer of the right of control. While there was some support for the inclusion of the text in the second set of square brackets of draft paragraph 56(1)(b) as accommodating those jurisdictions where the transferee was allowed to notify the carrier of the transfer of the right of control, doubts were also expressed regarding whether this approach would be sufficiently clear. It was noted that it would be more easily verified by the carrier if notification of a transfer of the right of control were made by the transferor, who would typically be known to the carrier. A preference was expressed in the Working Group for the deletion of both sets of bracketed alternative text, since allowing the transferee to notify the carrier did not seem to adequately protect all of the relevant interests, nor did it provide sufficient clarity.

28. The suggestion was also made that draft paragraph 56(1)(b) should express the consequences of a failure to notify the carrier of the transfer of the right of control by stating that the transfer was not effective until the carrier had been notified by the transferor.

Paragraph 11 of A/CN.9/WG.III/WP.50/Rev.1

29. The suggestion was made that draft paragraphs 56(1)(a) and (b) could be replaced by the text that appeared in paragraph 11 of A/CN.9/WG.III/WP.50/Rev.1. While there was some support for that suggestion, some doubts were raised whether the text in A/CN.9/WG.III/WP.50/Rev.1 would adequately cover the situation where the controlling party had to transfer the right of control, particularly in the situation where there were no documents at all. Some support was also expressed for the view that the text in A/CN.9/WG.III/WP.50/Rev.1 could replace draft paragraph 56(1)(a), but that view did not receive sufficient support in the Working Group.

Draft paragraph 56(1)(c)—“in accordance with article 54”

30. There was general agreement in the Working Group that the phrase “in accordance with article 54” was superfluous, and could be deleted.

Conclusions reached by the Working Group regarding draft paragraphs 56(1)(a), (b) and (c):

31. After discussion, the Working Group decided that:

- The Secretariat should be requested to adjust the title of draft article 56;
- The second alternative bracketed text in draft paragraph 56(1)(a) was preferable, but the Secretariat should be requested to make the appropriate drafting modifications bearing in mind the views expressed in the Working Group;
- The alternative text appearing in brackets in draft paragraph 56(1)(b) should be deleted in its entirety, and the Secretariat should be requested to consider whether the transfer of the right of control should only be effective upon notification of the carrier; and
- The phrase “in accordance with article 54” in draft paragraph 56(1)(c) should be deleted.

Draft paragraph 56(1)(d)—termination or transfer of the right of control

32. The view was expressed that draft paragraph 56(1)(d) dealing with the termination of the right of control or, alternatively, its transfer to the consignee, was unnecessary and could be deleted, in light of the fact that the chapeau of draft article 54 limited the controlling party's entitlement to exercise the right of control to the period of responsibility as set out in draft paragraph 11(1). However, some doubt was expressed regarding whether deletion of the paragraph was appropriate given the particular problems that could flow from the timing of the termination of the right of control.

33. It was observed that the Working Group had before it three possible approaches to the termination of the right of control or its transfer to the consignee, each of which entailed different consequences. One approach, reflected in the first set of square brackets in draft paragraph 56(1)(d), was that the right of control terminated when the goods arrived at destination and the consignee requested delivery. A second approach was that reflected in the second set of square brackets in draft paragraph 56(1)(d), where the right of control was transferred to the consignee when the goods arrived at destination and the consignee requested delivery. It was observed that these two approaches were in keeping with the tradition in many civil law countries, and that these approaches were consistent with several international transport conventions, but that certain practical problems had arisen with respect to them. A third approach was said to be that reflected in the text in paragraph 15 of A/CN.9/WG.III/WP.50/Rev.1, where the right of control terminated when the goods had been delivered.

34. The view was expressed that the timing of the termination of the right of control was the key to deciding the optimum approach to take in the draft convention. It was suggested that if the right of control was not transferred to the consignee or terminated until the last possible moment, such as until actual delivery, it could cause the carrier undue hardship, since the carrier might have already begun the process of delivery and it could be very burdensome to receive last minute instructions from the controlling party regarding changes in delivery once that process had already begun. However, another view was expressed that the right of control should not be terminated or transferred too early, since the most common instruction given by a controlling party to a carrier was an instruction not to deliver the goods until the carrier had confirmed with the seller or controlling party that it had been paid. Strong preferences were expressed in the Working Group for each of these approaches.

35. Several possible solutions were suggested for the resolution of this issue:

(a) The termination of the right of control under draft paragraph 1(d) could be treated as a non-mandatory right of control provision subject to draft article 60, although some doubts were raised regarding whether this would provide an adequate solution to the problem;

(b) Since draft article 57 set out certain limitations with respect to the carrier's obligation to execute instructions that it received from the controlling party, it was thought that following its consideration of draft article 57, the Working Group might be better placed to reconsider its approach to the termination of the right of control. Further, if draft article 57 provided sufficient protection for the carrier in its obligation to execute instructions from the controlling party, draft paragraph 1(d) would be less important and could possibly be deleted.

Conclusions reached by the Working Group regarding draft paragraph 56(1)(d):

36. After discussion, the Working Group decided that:

- Draft paragraph 56(1)(d) should be retained in square brackets for further consideration once the Working Group had considered draft article 57 (see below, paras. 68 to 71).

Draft paragraphs 56(2)(a) and (b)

37. It was suggested that draft paragraph 56(2)(b) could be deleted as redundant since it was evident that under draft paragraph 56(2)(a) the holder of the transport document was also the controlling party and that, since the transferee of the transport document would also become holder, the right of control would pass accordingly. A suggestion was also made that the second sentence in draft paragraph 56(2)(b) could be moved to draft article 61, which contained rules on transfer of rights when a negotiable transport document had been issued.

Draft paragraph 56(2)(c)—text in square brackets

38. It was suggested that the bracketed text in draft paragraph 56(2)(c) should be deleted. The view was expressed that the provision was redundant since no party could request others to produce documents that the requesting party already held. There was support in the Working Group for this view.

Draft paragraph 56(2)(c). “if the carrier so requires”

39. It was suggested that the words “if the carrier so requires” should be deleted from draft paragraph 56(2)(c). The view was expressed that, when a negotiable transport document had been issued, the carrier should accept instructions issued pursuant to the right of control only from the holder of that document. In this respect, it was added that, it was the carrier's option to verify that the holder could produce the necessary documents to confirm its identity as the controlling party, and that the carrier would bear any risk arising from a failure to exercise this option. However, it was also indicated that the provision must also affirm that an otherwise valid exercise of the right of control remained valid even if the carrier did not request production of document by the holder.

Conclusions reached by the Working Group regarding draft paragraph 56(2):

40. After discussion, the Working Group decided that:

- The text of draft paragraph 56(2) as contained in A/CN.9/WG.III/WP.56, after deletion of the words “if the carrier so requires” and of the bracketed text in draft paragraph 56(2)(c), should be retained as a basis for the Working Group’s future deliberations;
- The Secretariat should prepare a new version of draft paragraph 56(2) taking into account the above deliberations, including the possible drafting suggestion of combining the contents of draft paragraphs (a) and (b).

Draft paragraph 56 (3)

41. In light of its deliberations on draft paragraph 56(2)(c), the Working Group decided that the text of draft paragraph 56(3) as contained in A/CN.9/WG.III/WP.56, after deletion of the words “if the carrier so requires” in draft paragraph 56(3)(b), should be retained as a basis for the Working Group’s future deliberations.

Draft paragraph 56(4)

42. In response to a query on the purpose of draft paragraph 56(4), it was explained that the draft provision aimed at creating a parallelism with draft paragraph 62(1), according to which any holder that was not the shipper and that did not exercise any right under the contract of carriage, did not assume any liability under the contract of carriage solely by reason of being a holder. Accordingly, it was thought that no liability under this provision should be imposed on a transferor of the right of control pursuant to its position as controlling party if the transferor did not exercise its right of control. However, it was also observed that this approach did not fit comfortably with that taken in draft article 34 in the chapter on shipper’s obligations, where the holder of the transport document or electronic transport record that was identified as the “shipper” in the contract particulars was subject to the responsibilities and liabilities imposed on the shipper under that chapter, and that therefore the interaction of that draft provision with draft paragraph 56(4) should be clarified.

43. It was suggested that the word “liabilities” in draft paragraph 56(4) should be replaced by the term “obligations” since only the obligations should be transferred along with the transfer of the right of control, while any liabilities arising from the exercise of that right of control would always remain with the party that had incurred them. However, it was noted that the word “liability” was the proper term to be used in draft paragraph 56(4) given its precise meaning in draft article 34 of the draft convention, to which draft paragraph 56(4) referred. Furthermore, it was indicated that the proposed amendment could render the draft provision redundant since draft article 62 already provided that obligations would pass with the transfer of the document.

44. Several additional drafting suggestions were made regarding the treatment of draft paragraph 56(4), including deletion of the entire provision and a rephrasing of it in a positive sense to say which aspects of the right of control were transferred, rather than in its current negative sense. The view was also expressed that the Working Group’s consideration of draft paragraph 62(1) could assist it in coming to a decision regarding draft paragraph 56(4).

Conclusions reached by the Working Group regarding draft paragraph 56(4):

45. After discussion, the Working Group decided that:

- The text of draft paragraph 56(4) should be placed in square brackets pending its possible modification by the Secretariat or its deletion, following further consideration of the issues raised and consideration of the text in draft paragraph 62(1).

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 53. Identity of the controlling party and transfer of the right of control

Paragraph 1(b)

90. The Working Group proceeded to consider the text in draft article 53 as contained in A/CN.9/WG.III/WP.81. A concern was expressed that paragraph 1(b) of draft article 53 did not specify the party to whom notification should be given. It was noted that the word “its” in paragraph 1(b) already indicated that the carrier was the party to be given notification.

Paragraph 2 “[provides] [indicates] [specifies]”

91. The Working Group next considered the three alternatives presented in the chapeau of paragraph 2 of draft article 53. There was broad consensus that the approach decided upon by the Working Group with regard to the alternatives in the chapeau of draft article 47 should also be applied in this draft article to maintain consistency in the draft convention.

Paragraph 3

92. It was suggested that, for reasons of consistency, the approach adopted in subparagraph (c) of draft article 49 regarding the issuance of multiple originals of negotiable transport documents should also be reflected in subparagraphs 3(b) and 3(c) of draft article 53. It was suggested that the operation of subparagraphs 3(b) and 3(c) of draft article 53, too, should be limited to cases where the negotiable transport document expressly stated that more than one original had been issued. In response to that suggestion, it was observed that the two provisions in question had different purposes. Under draft article 49, subparagraph (c), if more than one original of the negotiable transport document has been issued, the carrier who delivered the goods to the holder of one original transport document would be discharged from liability vis-à-vis the possible holders of the other transport document. In the context of paragraph 3 of draft article 53, however, the transfer of the right of control to a third party might adversely affect the rights of the holder of the remaining transport documents, as the holders who acquired rights in good faith were generally protected under the draft convention. The Working Group was therefore urged to carefully consider the desirability of aligning entirely draft article 49, subparagraph (c), with paragraph 3 of draft article 53.

Paragraph 5

93. A proposal was made to delete the words “in accordance with the Convention” from paragraph 5 of draft article 53, as those words suggested that the right of control would not cease, despite the fact that the goods had actually been delivered, if for whatever reason, the actual delivery was not strictly in conformity with the contract of carriage. The continuation of a right of control despite actual delivery was said to be an anomalous situation, and inconsistent with paragraph 2 of draft article 52, which limited the duration of the right of control for “the entire period of responsibility of the carrier”. There was support for that proposal, as well as for

an alternative proposal to delete the paragraph 5 in its entirety, since it was said to be redundant in the light of paragraph 2 of draft article 52.

94. In response to those proposals, it was pointed out that in practice there might be situations where the rights of a controlling party needed to be preserved even after delivery had actually taken place. The carrier might deliver the goods against a letter of indemnity, for instance, because the person claiming delivery could not surrender the negotiable transport document. Such a delivery was not provided for in the draft convention, and the legitimate holder of the transport document should not be deprived of the right of control in such a case, since that might affect the remedies available to it. The Working Group was urged to carefully consider those possible situations before agreeing to delete either the words “in accordance with the Convention” or paragraph 5 of draft article 53 in its entirety.

Paragraph 6

95. The Working Group was reminded that paragraph 6 of draft article 53 was slightly revised following the decision of the Working Group when it last considered the provision at its seventeenth session (see A/CN.9/594, paras. 42-45). After discussion on the interplay between paragraph 6 of draft article 53 and draft article 60, as well as the entire chapter 12, it was agreed to postpone discussion on paragraph 6 until draft article 60 and chapter 12 were examined (see paragraphs 122 to 124 below).

Conclusions reached by the Working Group regarding draft article 53:

96. The Working Group was in agreement that:

- The text of paragraph 1 of draft article 53 as contained in A/CN.9/WG.III/WP.81 was acceptable;
- The alternatives “[provides]” and “[indicates]” should be retained in the chapeau in square brackets for future consideration, while the third alternative, “[specifies]”, should be deleted;
- The Secretariat should review the text of paragraphs 3(b) and (c) of draft article 53 with subparagraph (c) of draft article 49 and consider the desirability of aligning those provisions and the extent to which that should be done;
- The text of paragraph 5 of draft article 53 should be put into square brackets until it can be verified that deletion of this paragraph does not harm the substance of the draft instrument. In addition, it should be examined whether deletion of only the last words “in accordance with this Convention” of paragraph 5 would be feasible.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 54. Identity of the controlling party and transfer of the right of control

171. A question that had been deferred for discussion under draft article 54 (see above, para. 159) was reiterated regarding whether the reference to the “controlling party” could be deleted in draft articles 50(d) and (e), since, in the case of a negotiable transport document or electronic transport record, the holder and the controlling party were the same person. In response, it was

noted that simply deleting that term would alter the meaning of the provisions because it would omit

the current practice requiring the notification of the holder of the arrival of the goods, even if the holder did not appear to take delivery. It was thought that that change would not be desirable.

172. Subject to retaining the word “indicates” in paragraph 2 and deleting the alternative “provides”, the Working Group approved the substance of draft article 54 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 53. Identity of the controlling party and transfer of the right of control

177. A correction was proposed to the text of draft article 53, paragraph 1. It was observed that when paragraph 2 of draft article 53 had been inserted in a previous version of the draft Convention, the consequential changes that ought to have been made to paragraph 1 had been overlooked. To remedy that situation, it was proposed that the chapeau of paragraph 1 be deleted and replaced with the words: “Except in the cases referred to in paragraphs 2, 3 and 4 of this article.” Further, it was observed that the reference in subparagraph 3 (c) should be corrected to read “article 1, subparagraph 10 (a)(i)” rather than “article 1, subparagraph 11 (a)(i).” The Commission agreed with those corrections.

178. Subject to the agreed corrections to paragraph 1, the Commission approved the substance of draft article 53 and referred it to the drafting group.

Article 52. Carrier's execution of instructions

1. Subject to paragraphs 2 and 3 of this article, the carrier shall execute the instructions referred to in article 50 if:
 - (a) The person giving such instructions is entitled to exercise the right of control;
 - (b) The instructions can reasonably be executed according to their terms at the moment that they reach the carrier; and
 - (c) The instructions will not interfere with the normal operations of the carrier, including its delivery practices.
2. In any event, the controlling party shall reimburse the carrier for any reasonable additional expense that the carrier may incur and shall indemnify the carrier against loss or damage that the carrier may suffer as a result of diligently executing any instruction pursuant to this article, including compensation that the carrier may become liable to pay for loss of or damage to other goods being carried.
3. The carrier is entitled to obtain security from the controlling party for the amount of additional expense, loss or damage that the carrier reasonably expects will arise in connection with the execution of an instruction pursuant to this article. The carrier may refuse to carry out the instructions if no such security is provided.
4. The carrier's liability for loss of or damage to the goods or for delay in delivery resulting from its failure to comply with the instructions of the controlling party in breach of its obligation pursuant to paragraph 1 of this article shall be subject to articles 17 to 23, and the amount of the compensation payable by the carrier shall be subject to articles 59 to 61.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(d) Paragraph 11.3

(i) Subparagraph 11.3(a)

114. A question was raised regarding the relationship between subparagraph 11.3(a)(iii) and subparagraph 11.1(ii). It was stated that, under subparagraph 11.1(ii), the exercise of the right of control would inevitably involve "additional expenses". However, such expenses resulting from delivery of the goods before their arrival at the place of destination might range from acceptable minor expenses to less acceptable expenses from the perspective of the carrier, for example, if the instructions received from the controlling party resulted in a change in the port of destination of the vessel. To avoid a contradiction between those two provisions, it was suggested that either the carrier should be under no obligation to execute the instruction received under subparagraph 11.1(ii) or that subparagraph 11.3(a)(iii) should limit the obligation of the carrier to execute to cases where the instruction would not cause "significant" additional expenses.

115. A contrary view was expressed that the issue of "additional expenses" should not be dealt with under subparagraph 11.3(a). It was pointed out that the matter was sufficiently

covered by subparagraph 11.3(c). Broad support was expressed for the deletion of subparagraph 11.3(a)(iii).

116. A more general question was raised regarding the nature of the obligation incurred by the carrier under paragraph 11.3. As to whether the carrier should be under an obligation to perform (“obligation de résultat”) or under a less stringent obligation to undertake its best efforts to execute the instructions received from the controlling party (“obligation de moyens”), the view was expressed that the former, more stringent obligation, should be preferred. However, it was stated by the proponents of that view that the carrier should not bear the consequences of failure to perform if it could demonstrate that it had undertaken reasonable efforts to perform or that performance would have been unreasonable under the circumstances. As to the consequences of the failure to perform, it was suggested that the draft instrument should be more specific, for example, by establishing the type of liability incurred by the carrier and the consequences of non-performance on the subsequent execution of the contract.

117. After discussion, the Working Group generally agreed that subparagraph 11.3(a) should be recast to reflect the above views and suggestions. It was agreed that the new structure of the paragraph should address, first, the circumstances under which the carrier should follow the instructions received from the controlling party, then, the consequences of execution or non-execution of such instructions. The Secretariat was requested to prepare a revised draft of the provision, with possible variants, for continuation of the discussion at a future session.

(ii) Subparagraph 11.3(b)

118. A question was raised regarding the meaning of the words “the controlling party shall indemnify the carrier”. As already pointed out at the ninth session of the Working Group (see A/CN.9/510, para. 56), it was recalled that the notion of indemnity inappropriately suggested that the controlling party might be exposed to liability. It was suggested that the notion of “indemnity” should be replaced by that of “remuneration”, which was more in line with the rightful exercise of its right of control by the controlling party. Subject to that suggestion, the Working Group found the substance of subparagraph 11.3(b) to be generally acceptable.

(iii) Subparagraph 11.3(c)

119. The Working Group found the substance of subparagraph 11.3(c) to be generally acceptable.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 57. Carrier’s execution of instruction

Draft paragraph 57(1)—Variant A or Variant B

46. The Working Group heard the view that there were two main substantive differences between Variants A and B of draft paragraph 57(1) which established the circumstances under which the carrier was required to execute the instructions of the controlling party. The first difference was thought to be the reference in draft paragraph 1(a) of Variant B that the controlling party was entitled to exercise the right of control, and the second, more substantive difference was said to be draft paragraph 1(c) of Variant A, that made reference to additional expense, loss or damage that the carrier or performing party might incur in the execution of the

instructions from the performing party. It was suggested that the safeguards for the carrier such as those set out in draft paragraph 1(c) of Variant A were important and should be retained, but that they might be sufficiently expressed in draft article 57(3).

47. While there were expressions of support for Variant A, which expressly allowed the carrier to refuse to carry out instructions that carried an additional expense, loss or damage to the carrier or to any other goods on the same voyage, a strong preference was expressed in the Working Group for Variant B of draft paragraph 57(1).

48. Following specific discussion regarding Variant B of draft paragraph 57(1), the Working Group decided to delete reference to the performing party in subparagraph (c) in keeping with its previous decision to exclude performing parties from the right of control provisions. In addition, a drafting suggestion was made to merge subparagraphs (b) and (c), since their content was thought to be quite similar. In response to the concern that the flexible standards of subparagraphs (b) and (c) might not be objectively interpreted in determining the reasonableness of a carrier's failure to execute instructions, it was suggested that the principle in draft article 1 bis from Variant A could be adopted into Variant B. However, it was indicated that the reasonableness test in draft paragraph 1 bis of Variant A would not of itself render more objective the interpretation of the standards in subparagraphs (b) and (c). It was observed that a carrier's right to refuse to execute instructions would ultimately involve a determination of a reasonableness standard in either suggested variant of draft paragraph 57(1). In addition, it was suggested that the burden of proof for the carrier's failure to execute the instructions should be dealt with in draft paragraph 57(4).

Conclusions reached by the Working Group regarding draft paragraph 57(1):

49. After discussion, the Working Group decided that:

- The text of Variant B of draft paragraph 1 was preferable to that of Variant A; and
- The Secretariat would take into account drafting suggestions made with a view to improving the text (see also para. 51 below).

Draft paragraph 57(2)

50. There was agreement in the Working Group that in keeping with decisions made previously, reference in draft paragraph 57(2) to persons outside of the controlling party and carrier should be deleted. However, there was some support for the concern raised that revising the text of draft paragraph 57(2) in this fashion could result in the inability of the carrier to obtain reimbursement for any damages that it might have to pay to other shippers resulting from loss or damage caused to their goods by the execution of the controlling party's instructions. Following from this suggestion, a view was expressed that it might be necessary to include a reference in draft paragraph 1 allowing the carrier to decline execution of the instructions if such execution would cause damage to the goods of other shippers, but it was thought that a more appropriate solution would be to clarify that in draft paragraph 57(2), the carrier had the right to be reimbursed for any damages that it was required to pay to third parties.

Conclusions reached by the Working Group regarding draft paragraph 57(2):

51. After discussion, the Working Group decided that:

- Reference to parties other than the controlling party and the carrier should be deleted from draft paragraph 2;
- Care must be taken in the modification of the text that the right of the carrier to claim reimbursement for damages paid to other shippers as a result of the execution of the instructions was retained; and
- The Secretariat would be requested to consider whether it was necessary to include any reference to possible damage caused to the goods of other shippers in draft paragraph 57(1).

Draft paragraph 57(3)

52. There was general agreement in the Working Group that the first sentence of draft paragraph 57(3) should be deleted, but that the text in square brackets should be retained and the brackets removed. It was noted that the purpose of deleting the first sentence was to avoid duplication, but it was suggested that the content of the first sentence regarding the amount of security that must be provided by the controlling party should be maintained.

53. Some concerns were expressed regarding the intention of draft paragraph 57(3)(b), since it was thought that by requesting the security, the carrier was indicating its intention to carry out the instruction, and that the carrier was not entitled to refuse to execute instructions based on expense pursuant to Variant B of draft paragraph 57(1). The suggestion was therefore made to delete draft paragraph 57(3)(b). However, there was support for the opposing view that the principle in draft paragraph 57(3)(b) was still useful in light of the ability of the carrier to decline to execute instructions that interfered with its normal operations, although the drafting in this regard could be clarified. An additional clarification was suggested of the implied right of the carrier to refuse execution of the instructions if security was not provided by the controlling party.

Conclusions reached by the Working Group regarding draft paragraph 57(3):

54. After discussion, the Working Group decided that the Secretariat should be requested to modify the text such that:

- The text appearing in square brackets should be retained and the brackets deleted;
- The first sentence of the draft paragraph should be deleted but the principle regarding the amount of security that must be provided should be maintained in a revised draft; and
- The text of subparagraph (b) should be clarified or replaced to indicate that the carrier may refuse to execute the instruction if no security is provided.

Draft paragraph 57(4)

55. The Working Group was reminded that the nature of the liability of the carrier for non-execution of the instructions of the controlling party and any limitation on that liability, as well as questions of burden of proof, were intended to be discussed in relation to draft paragraph 57(4). The view was expressed that the text of draft paragraph 57(4) proposed in paragraph 20 of A/CN.9/WG.III/WP.50/Rev.1 was an improvement on the existing text in the draft convention, since it clarified the basis of liability and the limitation on that liability.

56. By way of further clarification, the view was expressed that physical loss or damage that arose in connection with the carrier's failure to comply with instructions would be covered

by the general provisions of draft article 17 of the draft convention. To the extent that losses were physical, it was thought that draft paragraph 57(4) could be deleted in deference to the general liability rules. However, it was noted that such losses were more likely to be economic losses rather than physical ones, such as, for example, losses resulting from a failure to unload the goods at a scheduled or programmed port of call entailing a subsequent sale at a reduced profit. It was indicated that the text of draft paragraph 57(4) did not adequately deal with the possibility of economic loss, and that deletion of the text to rely on the general liability provisions would not solve the problem either. There was general agreement in the Working Group that in light of the very complicated provisions that would be required to cover economic loss, the economic loss in this regard should be left to national law. While it was thought by some that simple deletion of draft paragraph 57(4) would subject the physical loss aspect to the general liability and limitation provisions and the economic loss aspect to national law as intended by the Working Group, there was support for the view that provisions clarifying this intention should be prepared for further consideration. In addition, it was thought that a more general provision leaving economic loss to be governed by national law might be necessary elsewhere in the draft convention, and that issue was left for future consideration by the Working Group.

57. There was some support for the view that if the issue of economic loss was left to national law, that the issue of limitation of economic loss would also have to be left to national law. The Working Group took note of this suggestion for future consideration.

Conclusions reached by the Working Group regarding draft paragraph 57(4):

58. After discussion, the Working Group decided that:

- The current text of draft paragraph 57(4) should be deleted; and
- The Secretariat should be requested to prepare text for the consideration of the Working Group indicating that physical losses under this provision should be covered by the general liability rules and the rules on limitation of liability, and that economic losses should be governed by national law.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 54. Carrier's execution of the instructions

Paragraph 2

97. It was suggested that the word “diligently” should be added before “executing any instruction” in paragraph 2 of draft article 54, in order to balance the rights of the parties concerned. It was noted that there was a need to qualify the execution of the instructions in some way, so that the controlling party would not be liable for additional expenses or damage that was attributable to the carrier's lack of diligence in executing the controlling party's instructions. Broad support was expressed for the suggestion.

98. It was proposed that the text in square brackets in paragraph 2 of draft article 54 should be deleted, because the Working Group, at its nineteenth session, had decided to delete all reference to the shipper's liability for delay (see A/CN.9/621, paras. 177 to 184). Consistency with that earlier decision also required the deletion of the text in square brackets in paragraph 2

of draft article 54, since the shipper and the controlling party would often be the same. The proposal of deletion was widely accepted. Some expressions of support for the deletion, however, were qualified by the observation that the deletion of references to liability for delay in paragraph 2 of draft article 54 did not mean that such liability would not arise, since paragraph 2 of draft article 54 dealt with redress of the carrier against the controlling party, and the carrier was itself subject to liability for delay under the draft convention.

99. In the course of that discussion, the view was expressed that paragraph 2 of draft article 54 exposed the controlling party to a potentially substantial liability. It was, therefore, suggested that the Working Group should consider ways to limit the controlling party's exposure, for instance by limiting its liability under paragraph 2 of draft article 54 to foreseeable additional expenses or liability. There was general agreement within the Working Group that the controlling party could indeed be protected against exorbitant reimbursement claims by inserting the word "reasonable" before "additional expenses". However, the Working Group was divided in respect of a possible limitation of the controlling party's obligation to indemnify the carrier against loss or damage that the carrier might suffer as a result of executing the controlling party's instructions.

100. The Working Group was invited to consider possible means to achieve the proposed limitation. Proposals to that effect included adding words such as "reasonably foreseeable" before the words "loss or damage", or requiring the carrier to give notice or warn the controlling party about the possible magnitude of loss or damage that the carrier might suffer in carrying out the instructions received from the controlling party. However, in the course of the Working Group's discussions, a number of objections were voiced to those proposals. It was said that inserting any such limitation would be contrary to the nature of paragraph 2 of draft article 54, which contemplated a recourse indemnity obligation, rather than an independent liability, for the controlling party. It was also noted in that connection, that to the extent that the controlling party would be asked to indemnify the carrier for compensation that the carrier had to pay to other shippers under the draft convention, those payments by the carrier could not be regarded as being entirely unforeseeable to the controlling party. Furthermore, it was said that any limitation by means of a foreseeability requirement would mean that the carrier would have to bear the loss or damage that exceeded the amount originally foreseen by the controlling party, which was not felt to be an equitable solution. By the same token, the carrier should not have the burden of anticipating all possible types of loss or damage that might arise from the controlling party's instruction and should not be penalized with a duty to absorb loss or damage actually sustained only because the carrier was unable to foresee the loss or damage when considering the instructions received from the controlling party.

101. Having considered the various views that were expressed, the Working Group agreed that it would be preferable to refrain from introducing a requirement of foreseeability as a condition for the controlling party's obligation to indemnify the carrier under paragraph 2 of draft article 54.

Paragraph 4

102. It was proposed that the text in square brackets in paragraph 4 of draft article 54 should be retained and the square brackets removed. This difference in approach, as compared to the decision taken by the Working Group in respect of the same phrase in paragraph 2 was justified on the grounds that paragraph 4 referred to the carrier's own liability for delay, whereas

paragraph 2 was conceived to indirectly make the controlling party liable for delay. Broad support was expressed to remove the square brackets and retain the text, as it would provide greater legal certainty by making it clear that articles 17 to 23 also apply to the carrier's liability under paragraph 4 of draft article 54.

Conclusions reached by the Working Group regarding draft article 54:

103. The Working Group was in agreement that:

- The word “reasonable” should be inserted before or after “additional” in paragraph 2;
- The word “diligently” should be inserted before “executing any instructions pursuant ...” in paragraph 2;
- The text in square brackets in paragraph 2 should be deleted; and
- The text in square brackets in paragraph 4 should be retained and the square brackets should be deleted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 55. Carrier's execution of instructions

173. The Working Group approved the substance of draft article 55 and referred it to the drafting group.

Article 53. Deemed delivery

Goods that are delivered pursuant to an instruction in accordance with article 52, paragraph 1, are deemed to be delivered at the place of destination, and the provisions of chapter 9 relating to such delivery apply to such goods.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(e) Paragraph 11.4

120. The Working Group found the substance of paragraph 11.4 to be generally acceptable.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 58. Deemed delivery

59. The Working Group approved the substance of draft article 58.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 55. Deemed Delivery**

104. A concern was expressed regarding the reference to chapter 10 in draft article 55. It was questioned whether requirements to give notice of arrival should apply in cases where delivery was made under the instructions of the controlling party. The Working Group agreed that the text of draft article 55 was acceptable in substance.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 56. Deemed delivery**

174. The Working Group approved the substance of draft article 56 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 55. Deemed delivery**

180. The Commission approved the substance of draft article 55 and referred it to the drafting group.

Article 54. Variations to the contract of carriage

1. The controlling party is the only person that may agree with the carrier to variations to the contract of carriage other than those referred to in article 50, subparagraphs 1 (b) and (c).
2. Variations to the contract of carriage, including those referred to in article 50, subparagraphs 1 (b) and (c), shall be stated in a negotiable transport document or in a non-negotiable transport document that requires surrender, or incorporated in a negotiable electronic transport record, or, upon the request of the controlling party, shall be stated in a non-negotiable transport document or incorporated in a non-negotiable electronic transport record. If so stated or incorporated, such variations shall be signed in accordance with article 38.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]**Draft article 55. Variations to the contract of carriage*****Separate treatment in draft article 55 of variations to the contract of carriage***

17. As noted above in paragraph 11, there was general agreement in the Working Group for the structure of draft article 55 as it appeared in A/CN.9/WG.III/WP.56 in terms of it providing for separate treatment of the exercise of the right of control that resulted in a variation of the contract of carriage. Some concern was expressed that, while the creation of a separate

provision concerning exercises of the right of control that resulted in variations to the contract of carriage was a positive step, paragraphs (b) and (c) of draft article 54 could also be considered variations to the contract of carriage, and that further modifications could be considered to the drafting of the draft articles 54 and 55 in order to clarify these concerns. Further, it was suggested that the title of draft article 55 could require adjustment, in addition to modifications that would be necessary to the definitions of “right of control” and “controlling party” in draft article 1.

Rights and obligations of the parties to the contract of carriage prior to its variation

18. Concern was expressed that it was unclear in the text of draft article 55 how a variation of the contract resulting from an exercise of the right of control would affect the rights and obligations of the parties to the previously existing contract of carriage. While it was suggested that the application of general contract law would appropriately govern any potential problem, the suggestion was made that specific text should be included in draft article 55 to ensure that any variation to the contractA/CN.9/594of carriage did not affect the rights and obligations of the parties to the contract prior to its variation.

“[negotiable]” transport document or electronic transport record

19. The question was raised whether to include in the text of draft paragraph 55(2) reference to “negotiable” transport documents and electronic transport records by including the text that currently appeared in square brackets. The view was expressed that limiting this reference to negotiable transport documents and electronic transport records rendered the rule too narrow. In addition, it was thought that simple deletion of the word “negotiable” as it appeared in square brackets might expand the types of documents too broadly because the term “transport documents” could include such a document that evidences the carrier’s receipt of the goods but does not evidence or contain a contract of carriage.

20. The contrary view was also expressed in the Working Group that practical problems could arise if the reference were widened beyond “negotiable” transport documents and electronic transport records, since such documents and records had to be in the possession of the controlling party in order for it to exercise its right of control, but in the case of non-negotiable transport documents or electronic transport records, it was unlikely that the controlling party would be in possession or control of them. Further, it was noted that since negotiable transport documents and electronic transport records had a special character in terms of providing conclusive evidence of the contract of carriage, it was a legal necessity for such variations to be noted thereon, and that such a legal necessity did not exist for non-negotiable transport documents or electronic transport records, variations to which could be governed by commercial practice.

21. It was further suggested that, in the case of non-negotiable transport documents or electronic transport records, the controlling party should be entitled to have a new document or record issued so as to reflect the variation of the contract of carriage. The Working Group agreed that the word “negotiable” should be deleted and that modification of this provision should take into account the concerns raised in the paragraph above, in addition to a consideration of how this provision would operate with draft paragraph 56(2)(c).

Conclusions reached by the Working Group regarding draft article 55:

22. After discussion, the Working Group decided that:

- The Secretariat should be requested to adjust the text of draft article 55 in keeping with the general concerns raised in the discussion as set out in the above paragraphs;
- The exclusivity of the controlling party's exercise of the right of control should be made equally clear in draft articles 54 and 55; and
- The word “negotiable” should be deleted in draft paragraph 55(2) and further modification of this provision should take into account the concerns raised in the paragraphs above, including the operation of this provision with draft paragraph 56(2)(c).

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 56. Variations to the contract of carriage

105. It was observed that paragraph 2 of draft article 56 provided that variations to the contract of carriage were required to be stated in negotiable transport documents or incorporated into negotiable electronic transport records, but that their inclusion in non-negotiable transport documents or electronic transport records was at the option of the controlling party. Some concern was raised regarding the clarity of the term “at the option of”, and a suggestion was made that it should be deleted so as to treat negotiable and non-negotiable transport documents and electronic transport records in similar fashion. That proposal was not accepted, however, since non-negotiable transport documents and electronic transport records were only one means of proving the contract of carriage, rather than the only means, to treat them the same way as negotiable transport documents and electronic transport records would be to unnecessarily elevate their status, as well as to invite practical difficulties in recovering the non-negotiable documents and records to incorporate the changes. Further, it was pointed out that the carrier always had the option of issuing new non-negotiable transport documents and electronic transport records if it so desired. However, the suggestion to replace the term “at the option of” with “upon the request of” was supported by the Working Group.

106. In response to the question whether non-negotiable transport documents that required surrender should also be included in paragraph 2 of draft article 56, the Working Group agreed that they should be included, and that they should be treated in a similar fashion to that of negotiable transport documents.

Conclusions reached by the Working Group regarding draft article 56:

107. The Working Group agreed that:

- The same treatment should be given to non-negotiable transport documents that required surrender as that given to negotiable transport documents in paragraph 2 of draft article 56, and requested the Secretariat to make the appropriate adjustments to the text; and
- In paragraph 2, the phrase “at the option of the controlling party” should be substituted with “upon the request of the controlling party”.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 57. Variations to the contract of carriage

175. Subject to the deletion of paragraph 3 as superfluous as suggested in footnote 159, the Working Group approved the substance of draft article 57 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 56. Variations to the contract of carriage

181. The Commission approved the substance of draft article 56 and referred it to the drafting group.

Article 55. Providing additional information, instructions or documents to carrier

1. The controlling party, on request of the carrier or a performing party, shall provide in a timely manner information, instructions or documents relating to the goods not yet provided by the shipper and not otherwise reasonably available to the carrier that the carrier may reasonably need to perform its obligations under the contract of carriage.
2. If the carrier, after reasonable effort, is unable to locate the controlling party or the controlling party is unable to provide adequate information, instructions or documents to the carrier, the shipper shall provide them. If the carrier, after reasonable effort, is unable to locate the shipper, the documentary shipper shall provide such information, instructions or documents.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(f) Paragraph 11.5

121. The view was expressed that, since subparagraph 7.3(a) dealt with the obligation of the shipper to provide information to the carrier, that obligation should be reflected in paragraph 11.5. It was suggested that the end of the first sentence of paragraph 11.5 should be amended to provide the carrier with the choice to seek instructions from “the shipper or the controlling party” and not exclusively from “the controlling party”. It was generally felt, however, that the obligation for the shipper to provide information in cases where the controlling party could not be identified was already contained in the second sentence of paragraph 11.5. It was thus unnecessary to refer to the shipper in the first sentence. Furthermore, providing the carrier with a choice to seek instructions from either the shipper or the controlling party would run counter to the policy that, during the carriage, the counterpart of the carrier should be the controlling party. Consistent with that policy, the shipper would only intervene as a substitute for the controlling party if that party could not be located or was unable to provide the requested information.

122. Another view was that, in addition to the carrier, performing parties such as warehouses or stevedores who held the goods in their custody might need to seek instructions from the shipper or the controlling party. It was thus suggested that the first sentence of paragraph 11.5

should be amended to refer to “the carrier or the performing party”. That suggestion was generally supported.

123. As a matter of drafting, it was suggested that it might be misleading to combine in the same provision a first sentence dealing with an obligation of the carrier and a second sentence dealing with an obligation of the shipper. It was generally felt that the formulation of the paragraph should be made clearer. Subject to the above suggestions, the Working Group found the substance of paragraph 11.5 to be generally acceptable.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 59. Obligation to provide information, instructions or documents to Carrier

Questions regarding scope of and need for draft article 59

60. The following questions concerning the scope of, and need for, the draft article were raised:

(a) The controlling party might not necessarily have a vested interest in the cargo and, therefore, it might not always be the party best placed to provide the carrier with the required information;

(b) Since the controlling party did not need to give its assent to its designation as controlling party and might even be unaware of its designation, it was not appropriate to impose on the controlling party the type of obligations provided for in the draft article;

(c) The draft article referred not only to information, but also to “instructions or documents”, not all of which might necessarily be available to the controlling party;

(d) The relationship between the information referred to in the draft article and the information that the shipper was already required to provide under draft paragraph 30(a) was not clear;

(e) It might not be appropriate to request, in the second sentence of the draft article, that the shipper should provide information not obtained from the controlling party, since the shipper, at the time the need for information arose, might no longer have an interest in the carriage, for instance because the information related to instructions for unloading pursuant to special delivery requests made by the controlling party;

(f) It was not clear what might be the consequences of failure by the controlling party or the shipper to provide the information sought by the carrier; and

(g) Only the carrier, as party to the contract of carriage, and not the performing party, should have the right to request additional information, instructions or documents.

Responses to issues regarding scope and need for draft article 59

61. In response to those questions, strong support was expressed for the principle reflected in the draft article, as it was crucial for the carrier to be able to turn to a specific party to obtain information that became necessary after the carrier had taken the goods in its custody. Such information might be needed, for instance, with a view to carrying out instructions given under

draft article 54 or as a result of supervening facts (e.g. a strike at the port of unloading or the need for special measures to preserve the goods). Furthermore, it was pointed out that:

(a) The designation of a controlling party would typically occur pursuant to the sales contract or documentary credit so that a buyer/consignee or a bank issuing a letter of credit could usually be expected to have anticipated such possibility;

(b) Even when a controlling party had not expressly accepted its designation as controlling party, or was unaware of the designation, the controlling party could normally be assumed to have an interest in preserving the goods, for instance because it had purchased them or had a security interest in them;

(c) The position of the performing party was different in the context of draft article 59 as compared with other provisions in which reference to the performing party was easily deleted as being outside of the contractual relationship, and thus the reference could be maintained to the maritime performing party; and

(d) The availability of the information, instructions or documents could be taken into account through the addition of the phrase “if available” to ease the burden on the controlling party.

Consequences of failure to provide the information sought

62. As regards the consequences of failure by the controlling party or the shipper to provide the information sought by the carrier, the following possibilities were noted:

(a) The carrier would be excused from liability for damage to the goods or delay in their delivery that resulted from lack of the information contemplated by the draft article. This would flow from the general liability regime under article 17 and would not require special rules under draft article 59;

(b) The carrier might have the right to refuse to carry out instructions given under draft article 54 unless and until the controlling party or the shipper provided the information it sought pursuant to draft article 59. This consequence might be implied by the requirement, in draft article 57, paragraph 1, Variant B, (b), that instructions given to the carrier could be reasonably executed, but it was suggested that the Working Group might wish to consider further clarification in due course.

Prevailing view and additional drafting suggestions

63. The prevailing view that emerged within the Working Group was that the draft article provided a useful rule to address a concrete problem and that its substance should be retained. However, certain questions remained regarding the possible overlap of this provision with the draft paragraph 30(a) shipper’s obligation to provide information, and the appropriateness of making this ability to access information an obligation of the controlling party. As a possible solution to these problems, it was suggested that the title of the draft article could be adjusted to reflect its scope with respect to the provision of additional information, and the text of the provision could be redrafted to provide for slightly different obligations on the controlling party that was active, or exercised its right of control, and the controlling party that did not exercise its right of control.

Conclusions reached by the Working Group regarding draft article 59:

64. The Working Group decided that:

- The substance of draft article 59 should be retained;
- The title of the draft article should be examined for adjustment to differentiate it from that of draft article 30 by referring to “additional” information, instructions or documents and by removing the reference to “obligations”;
- The reference to the performing party should be retained and examined with a view to determining if it was necessary with respect to this provision; and
- The Secretariat should be requested to reformulate the draft article, taking into account the above deliberations, for consideration by the Working Group at a later stage.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 57. Providing additional information, instructions or documents to carrier**

108. The Working Group was reminded that its most recent consideration of draft article 57 on the provision of additional information, instructions or documents to the carrier was at its seventeenth session (see A/CN.9/594, paras. 60 to 64).

109. It was explained that the purpose of draft article 57 was not to create an additional obligation with respect to cargo interests, but to provide a mechanism whereby the carrier could obtain additional information, instructions and documents that became necessary during the course of the carriage. It was noted that while draft article 29 appeared to be similar, it concerned a different obligation, that is, the obligation of the shipper to provide information, instructions and documents as a pre-condition for the transport of the goods.

110. By way of further explanation, the Working Group heard that the intention of draft article 57 was to create a system whereby the carrier not only received instructions from the controlling party pursuant to draft articles 52 and 53, but that the carrier could also request information, instructions or documents from the controlling party further to draft article 57. Should such a need for instructions, information or documents arise during the carriage, the provision was intended to place some onus on the controlling party to recognize that its obligation to the carrier in this regard was an important one.

111. While it was thought by some that the consequences of a failure to fulfil the obligation in draft article 57 would be left to national law, it was suggested that the practical approach under the draft convention if any loss or damage was caused as a result of a failure of the controlling party to provide such information, instructions or documents, the carrier could resort to draft article 17(3)(h) to relieve itself of liability for the loss or damage.

112. It was observed that draft article 29 contained similar obligations to those contained in draft article 57, but that article 29 concerned the obligations of the shipper rather than the controlling party. It was suggested that, in order to clarify the difference in the intended application of draft article 57 as compared with draft article 29, the obligation that the controlling party “shall provide such information, instructions or documents” should be reduced, such as by rephrasing the provision instead to allow the carrier to request the

information, instructions or documents from the controlling party. That proposal was not taken up by the Working Group. Further, while it was recognized that the contexts of draft articles 29 and 57 were different, it was suggested that the Secretariat should review the two provisions in order to align the approach taken in draft article 57 with that taken in draft article 29, such as, for example, with respect to the timely provision of information. There was support in the Working Group for that proposal.

Conclusions reached by the Working Group regarding draft article 57:

113. The Working Group was in agreement that:

- The text of draft article 57 should remain in the text as drafted; and
- The Secretariat should be requested to consider aligning the text with that of draft article 29 on the shipper's obligation to provide information, instructions and documents, bearing in mind the different contexts of draft articles 29 and 57.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 58. Providing additional information, instructions or documents to carrier

176. The Working Group approved the substance of draft article 58 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 57. Providing additional information, instructions or documents to carrier

182. The Commission approved the substance of draft article 57 and referred it to the drafting group.

Article 56. Variation by agreement

The parties to the contract of carriage may vary the effect of articles 50, subparagraphs 1 (b) and (c), 50, paragraph 2, and 52. The parties may also restrict or exclude the transferability of the right of control referred to in article 51, subparagraph 1 (b).

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(g) Paragraph 11.6

124. Broad support was expressed for the principle expressed in paragraph 11.6 under which the provisions regarding the right of control should be non-mandatory. A question was raised regarding the interplay of paragraphs 11.6 and 11.1 if paragraph 11.1 was to be interpreted as defining the right of control by way of an open-ended list. It was stated in response that the

word “comprises” in paragraph 11.1 had been used as opposed to the word “includes” precisely to make it clear that the list in that paragraph was exhaustive.

125. Doubts were expressed regarding the extent to which party autonomy should be allowed to deviate from article 11. It was stated that it might be inappropriate to allow carriers, for example, to exclude totally the right of the controlling party to change the initial instructions regarding delivery of the goods, even where the carrier knew that the initial instructions had become unreasonable or should otherwise be changed.

126. Regarding the third sentence of the paragraph, the view was expressed that the words “any agreement ... must be listed in the contract particulars” might overly restrict the effect of paragraph 11.6 by allowing only agreements fully expressed in a bill of lading. Other types of agreement could be used for the purposes of paragraph 11.6, for example, through incorporation by reference to a contractual document outside the bill of lading. Such incorporation by reference would also be particularly important where electronic documentation was used. It was suggested that a revised draft of paragraph 11.6 should avoid suggesting any restriction to the freedom of the parties to derogate from article 11. That suggestion was broadly supported. Subject to that suggestion, the Working Group found the substance of paragraph 11.6 to be generally acceptable.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 60. Variation by agreement

Expansion of the list of non-mandatory provisions subject to variation

65. While the Working Group was generally of the view that the content of draft article 60 was acceptable, the view was expressed that the list of provisions that were capable of variation by agreement should be expanded, particularly in light of the commercial nature of the draft convention, and unless there was a requirement for mandatory provisions to protect certain parties. Particular provisions mentioned for possible inclusion within draft article 60 were said to be draft paragraph 56(1)(a), draft paragraph 56(1)(d) and draft article 59. However, there was support for the view that a cautious approach should be taken to adding to the list of non-mandatory provisions in draft article 60, since there were relevant parties that needed protection in regard to these provisions, such as the consignee or a later holder of a bill of lading. It was generally agreed that the possibility of adding provisions to draft article 60 should be examined carefully on an article by article basis.

Possibility of overlap with draft paragraph 55(2)

66. The attention of the Working Group was drawn to the possibility that the second sentence of draft article 60 requiring that any variation by agreement be stated or incorporated in the contract particulars might overlap slightly with draft paragraph 55(2) requiring the notation of variations to the contract of carriage on the transport document or the electronic transport record.

Conclusions reached by the Working Group regarding draft article 60:

67. After discussion, the Working Group decided that:

- The possibility of adding provisions to the list of non-mandatory provisions in draft article 60 would be undertaken on an article by article basis; and
- The Secretariat would examine the possibility of any overlap with draft paragraph 55(2) in its preparation of a text.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 58. Variation by agreement**

114. While there was general agreement in the Working Group with the text of the provision as it appeared in A/CN.9/WG.III/WP.81, it was observed that should the Working Group decide to amend or delete draft article 53(5), a correction would have to be made to draft article 58. It was further observed that, if draft article 53(5) were deleted, it might not be sufficient in the context of draft article 58 to merely change the reference from “article 53, paragraph 5” to “article 52, paragraph 2”. The Secretariat was requested to take note of those drafting concerns.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 59. Variation by agreement**

177. The Working Group approved the substance of draft article 59 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 58. Variation by agreement**

183. After deciding that it was not necessary to add a reference to draft article 53, paragraph 2, to draft article 58, the Commission approved the substance of draft article 58 and referred it to the drafting group.

CHAPTER 11. TRANSFER OF RIGHTS

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

6. Transfer of contractual rights (draft article 12)

57. The Working Group, which considered that a provision on the transfer of rights was useful in the context of the draft instrument, heard several observations relating to it. It was stated that draft article 12.1.1(iii) and 12.2.1 and 2 were difficult to interpret and were in need of clarification; as to the reference in draft article 12.3 to “the national law applicable to the contract of carriage” it was said that it was either unnecessary and could be deleted or it raised questions of conflicts of laws to which no answers were provided. As to draft article 12.2.2, some support was expressed for it; however, it was also said that it might open the way for the carrier, by using standard clauses in the contract of carriage, to extend liabilities from the shipper to the holder of the transport document. It was said that the last two sentences of draft article 12.3 might interfere with national provisions on form of transfers of contractual rights and that deleting them might be considered.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(a) General remarks

128. The Working Group heard that article 12 of the draft instrument constituted a novel approach, at least with regard to maritime conventions. It was noted that there were two principal reasons for the inclusion of a chapter on transfer of rights: first, to ensure that the provisions of the draft instrument were coherent throughout in terms of the issue of liability of the parties, and second, in order to set out the necessary rules to accommodate the electronic communication component of the draft instrument. It was explained that subparagraph 12.1.1 and paragraph 12.2 related to a negotiable transport document, whilst paragraphs 12.3 and 12.4 concerned non-negotiable transport documents and instances where no transport document at all was issued. It was stated that subparagraph 12.1.1 should be read in conjunction with the definition of “holder” in paragraph 1.12, and that subparagraph 12.1.2 concerned negotiable electronic records. It was explained that subparagraph 12.2.1 contained a declaration of the non-liability of a holder who did not exercise any right under the contract of carriage, whilst subparagraph 12.2.2 made it clear that a holder who exercised a right under the contract of carriage also assumed any liabilities pursuant to that contract, to the extent that they were ascertainable pursuant to that contract. Subparagraph 12.2.3 and paragraph 12.3 were said to be self-explanatory and administrative in nature. It was further stated that paragraph 12.4 should be read with subparagraph 11.2(d), since that provision constituted a qualification of paragraph 12.4.

129. The suggestion was made that article 12 be deleted from the draft instrument in its entirety, or that the entire chapter be placed in square brackets. In response to these suggestions, it was recalled that article 12 was inserted into the draft instrument as a response to problems that had been encountered in the preparation of the UNCITRAL Model Law on

Electronic Commerce, which were specific to bills of lading, and the notion of “functional equivalency” between electronic records and paper documents. It was concluded at that time that the law of bills of lading was insufficiently codified in an international instrument to be able to accommodate an electronic record functionally equivalent to a paper-based bill of lading. It was recalled that the prevailing view at that time was that the development of rules regarding paper transport documents would facilitate the development and use of electronic records. The Working Group was cautioned that if it decided that the task of codifying rules on bills of lading was too difficult, then it would fail to accomplish its objective regarding electronic records. It was pointed out that the preliminary exchange of views in the Working Group made it clear that the entire chapter warranted further discussion.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Transfer of rights

212. The Working Group also heard a brief report on the informal intersessional consultations held on the transfer of rights in the draft instrument (draft articles 59 to 62 in A/CN.9/WG.III/WP.32 and draft article 61 bis in A/CN.9/WG.III/WP.47, para. 12) as an introduction to the Working Group’s consideration of provisions on transfer of rights at its next session. Five items relating to transfer of rights were indicated as being of particular importance for future discussion: the regime that should be applicable to the nominative document not issued “to order”; whether to adopt a “general statement” or an “enumerated list” approach to third-party liability; rights exercised by third parties without the assumption of liability; the applicable law; and notification to the carrier of transfer of rights. Moreover, it was indicated that the Working Group could consider at its current session the proposed new text of draft article 61 bis, contained in A/CN.9/WG.III/WP.47, paragraph 12, and begin a discussion on contractual obligations transferable to third parties without their consent.

Conclusions reached by the Working Group on transfer of rights

213. After discussion, the Working Group decided:

- Draft article 61 bis as contained in A/CN.9/WG.III/WP.47, paragraph 12 should be inserted in the draft instrument for consideration at a future session, subject to any drafting suggestion with respect to electronic commerce.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Substantive topics considered for inclusion in the draft convention

72. Prior to continuing with the next topic scheduled for consideration by the Working Group (see A/CN.9/WG.III/WP.60, para. 26), a proposal was made regarding a reconsideration of the substantive topics currently being considered for inclusion in the draft convention. It was observed that pursuant to the most recent time frame set out by the Commission for the completion of the work of Working Group III, there were certain time pressures on the Working Group to complete its work on the draft convention. While it was observed that all of

the substantive topics currently included in the draft convention were considered important and worthy of efforts toward achieving international legal harmonization, some were more contentious than others and required more detailed treatment, and were thus possibly not well-suited for inclusion in the draft convention. It was further suggested that while these topics were important, they did not belong in the same group as the core subjects of the draft convention, which included provisions such as those with respect to the liability regime and to electronic commerce. It was thought that the more difficult and complex issues, for example, the right of retention of the goods, liens, the position of third parties to the contract of carriage, transfer of liabilities and freight, might better be considered at greater length and for possible inclusion in another type of international instrument, such as a model law.

73. The advantages of placing some of the more difficult issues in the draft convention on an agenda for future and separate work outside of the draft convention were said to be several:

- (a) The text of the draft convention would be simplified and streamlined;
- (b) The text of the draft convention could be capable of broader acceptance;
- (c) The more complicated legal issues could be treated more suitably under a more flexible international legal instrument such as a model law;
- (d) Additional time could be devoted to the more difficult issues; and
- (e) The streamlined draft convention might be more rapidly completed.

74. In light of this general concern, it was proposed that the Working Group could consider recommending to the Commission placing the treatment of these more difficult issues on its agenda for consideration as future work. It was said that if the Working Group approved of this approach, it could request the assistance of the Secretariat in making that recommendation to the Commission.

75. This suggestion received strong support in the Working Group. While it was agreed that any removal of substantive topics from the current draft convention for placement on the list of more complicated topics for future work would require consultations, the view was expressed that the Working Group could begin immediately to draw up an open and preliminary list of such topics.

Conclusions reached by the Working Group:

76. After discussion, the Working Group agreed that certain of the more complicated and difficult issues that were currently treated in the draft convention should be removed from consideration for the time being, and placed on a list for future treatment, possibly by means of a model law or other more flexible international legal instrument.

Transfer of rights—Chapter 12

77. In light of its decision to defer the consideration of some of the more complex issues until a future date, the Working Group heard that chapter 12 on transfer of rights was one of the topics that should be so deferred. It was further suggested that only draft article 62 should fall into the category of issues that should be deferred for future discussion, and that draft articles 61 and 63 should be considered by the Working Group during its current session. A contrary view was expressed that chapter 12 should be deleted in its entirety from the draft convention. While it was thought to be premature to delete the chapter, there was support in the Working

Group for the view that consideration of the entire chapter should be deferred until a future date.

Conclusions reached by the Working Group:

78. After discussion, the Working Group agreed that its consideration of chapter 12 on transfer of rights should be deferred for future discussion, following consultations.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Chapter 12 – Transfer of Rights

115. The Working Group was reminded that its most recent consideration of chapter 12 on transfer of rights was at its seventeenth session (see A/CN.9/594, paras. 77 to 78), when it had agreed that its consideration of chapter 12 on transfer of rights should be deferred for future discussion, following consultations. The Working Group had not considered the text since that time, and it was recalled that a decision on the disposition of chapter 12 was necessary.

116. To that end, the Working Group heard a proposal intended to facilitate discussion regarding the disposition of chapter 12 as presented in A/CN.9/WG.III/WP.96. It was suggested that it would be a mistake for the Working Group to eliminate the entire chapter from the draft convention as a result of some of its provisions being perceived as too difficult, too contentious or not yet mature enough for inclusion in the draft convention. Instead, it was thought that some of the provisions in the chapter should be retained in the draft convention as useful and necessary. It was proposed that draft article 59 be retained as having been non contentious in previous readings, but being of great technical importance for the purposes of electronic commerce in order to achieve functional equivalence with paper documents. In terms of draft article 60, it was suggested that paragraphs 1 and 3 were important to retain in the draft convention, since they had been relatively non-contentious in previous readings, and given their importance in terms of clarifying the legal position of intermediate holders such as banks. However, it was thought that paragraph 2 of draft article 60 could be deleted since it concerned the sensitive matter of transfer of liabilities, which was an issue not yet considered ripe for inclusion in the draft convention. Finally, it was proposed that draft article 61 should not be retained in the draft convention, as being a problematic provision combining applicable law with substantive legal provisions.

117. There was strong support in the Working Group for the retention of portions of chapter 12 in the draft convention. While there was general agreement with the proposal set out in A/CN.9/WG.III/WP.96 regarding which provisions should be retained, a number of delegations felt that it was also important to retain draft article 60 (2) in the draft convention for further consideration.

Conclusions reached by the Working Group regarding the disposition of chapter 12:

118. The Working Group was in agreement that:

- Draft article 59 should be retained in the text for further discussion;

- All three paragraphs of draft article 60 should be retained in the text for further discussion; and
- Draft article 61 should be deleted from the draft convention.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Chapter 11. Transfer of rights

185. There was some support for the view that, as a whole, the draft chapter was not sufficiently developed to achieve either certainty or harmonization of national law. It was also suggested that the draft chapter contained vague language and that further clarification and modification to the draft chapter was required if it was to be of benefit to future shippers, consignees and carriers.

186. It was suggested that draft articles 59 and 60 should be revised in such a way that the transfer of liabilities under the contract of carriage would coincide with the transfer of the rights under the underlying contract. That, however, was said to be a complex area of the law, which was ultimately better suited to being treated in a separate instrument. If the draft Convention were to venture into such a delicate area, it would also need to address other complex issues regarding the transfer of liabilities, such as whether a third-party holder of the document was bound and under which circumstances a transferor was relieved of its obligations. Those considerations, it was said, called for the deletion of the entire chapter or at least for allowing Contracting States to “opt out” of the draft chapter.

187. The Commission took note of those views but was generally favourable to retaining the draft chapter.

Article 57. When a negotiable transport document or negotiable electronic transport record is issued

1. When a negotiable transport document is issued, the holder may transfer the rights incorporated in the document by transferring it to another person:
 - (a) Duly endorsed either to such other person or in blank, if an order document; or
 - (b) Without endorsement, if: (i) a bearer document or a blank endorsed document; or (ii) a document made out to the order of a named person and the transfer is between the first holder and the named person.
2. When a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(b) Paragraph 12.1

(i) Subparagraph 12.1.1

130. In considering the text of subparagraph 12.1.1, there was general support for the principle embodied in the provision that a holder of a negotiable transport document was entitled to transfer the rights incorporated in the document by transferring the document itself. It was stated, however, that there might be exceptions to this principle as, for example, in the case of paragraph 13.3, which provided that the shippers or consignees who were not holders could still sue for loss or damages. It was suggested that this matter could be dealt with through the addition of a phrase into subparagraph 12.1.1 such as, “except for the provisions in article 13.3, the transfer of a negotiable transport document means the transfer of all rights incorporated in it”.

131. A concern was raised with respect to the interaction of subparagraph 12.1.1 and article 71 of the United Nations Convention on Contracts for the International Sale of Goods, which provided that a seller could in certain circumstances suspend the delivery of the goods to the buyer, even after they had already been shipped. It was explained that article 71 of the Sale of Goods Convention represented an exception to the principal rule, which is that embodied in the draft instrument, that only the party with right of control can stop the carriage of the goods. It was suggested that reading article 71 of the Sale of Goods Convention as an exception to the main rule removed the apparent inconsistency between that convention and the draft instrument.

132. In the course of discussions in the Working Group, there was some support for the concern raised with respect to the types of negotiable transport documents included within the terms of subparagraph 12.1.1. It was noted that some national law regimes included bills of lading to a named person as negotiable documents, yet these nominative documents were not included in the list of negotiable transport documents in subparagraph 12.1.1, nor were they included by virtue of the definition of “negotiable transport document” in paragraph 1.14. It was suggested that a bill of lading to a named person should be included in subparagraph 12.1.1, either through direct inclusion, or by including it in paragraph 1.14. Through the course of discussions, it was noted that in most national legal regimes, a nominative bill of lading was non-negotiable, and that it was transferred by assignment rather than by endorsement. By way of explanation, it was noted that subparagraph 12.1.1 was drafted in order to circumvent the difficulties of dealing with the nominative aspect of electronic documents. It was further noted that the drafting decision was made to limit these problems and promote harmonization by using terms such as “to order” and “to bearer” to describe negotiable documents, and it was suggested that reintroducing the nominative document as a negotiable document could negatively affect the ability of the electronic system to differentiate documents.

133. There was strong support in the Working Group to maintain the text of subparagraph 12.1.1 as drafted in order to promote the harmonization and to accommodate negotiable electronic records. The concern regarding nominative negotiable documents under certain national laws was noted

(ii) Subparagraph 12.1.2

134. The Working Group took note that subparagraph 12.1.2 would be discussed at a later date in conjunction with the other provisions in the draft instrument regarding electronic records.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 59. When a negotiable transport document or negotiable electronic transport record is issued**

119. While a question was raised regarding the appropriateness in paragraph 2 of the use of the terms “made out to order or to the order of a named person” in respect of negotiable electronic transport records, the Working Group approved the text of draft article 59.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 60. When a negotiable transport document or negotiable electronic transport record is issued**

178. The Working Group approved the substance of draft article 60 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 59. When a negotiable transport document or negotiable electronic transport record is issued**

188. The view was expressed that the draft article was not sufficiently elaborated as it did not deal, for instance, with the transfer of rights under straight bills of lading. That omission, it was said, illustrated the general inadequacy of the entire chapter.

189. The Commission took note of that view, but agreed to approve the draft article and to refer it to the drafting group.

Article 58. Liability of holder

1. Without prejudice to article 55, a holder that is not the shipper and that does not exercise any right under the contract of carriage does not assume any liability under the contract of carriage solely by reason of being a holder.
2. A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record.
3. For the purposes of paragraphs 1 and 2 of this article, a holder that is not the shipper does not exercise any right under the contract of carriage solely because:
 - (a) It agrees with the carrier, pursuant to article 10, to replace a negotiable transport document by a negotiable electronic transport record or to replace a negotiable electronic transport record by a negotiable transport document; or
 - (b) It transfers its rights pursuant to article 57.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(c) Paragraph 12.2***(i) Subparagraph 12.2.1***

135. It was suggested that subparagraph 12.1.2 could be clarified by providing examples of the types of liabilities that could be assumed by a holder who was not the shipper and who had not exercised any right under the contract of carriage. By way of explanation, it was pointed out that this provision was intended to provide comfort to intermediate holders such as banks that, as long as they did not exercise any right under the contract of carriage, they would not assume any liability under that contract. The question was raised whether this was an appropriate rule for the draft instrument, since the draft article might be misread as suggesting that any time a holder became active or exercised a right, the holder would automatically assume responsibilities or liabilities under the contract of carriage. In response, it was suggested that subparagraphs 12.2.1 and 12.2.2 should be read together, since the latter provision clarified what liabilities a holder would assume in the situation where the holder exercised any right under the contract of carriage.

136. There was some support for the view that the concept in subparagraph 12.2.1 was superfluous. After discussion, the Working Group requested the Secretariat to prepare a revised draft with due consideration being given to the views expressed and to the suggestions made.

(ii) Subparagraph 12.2.2

137. The concerns raised with respect to subparagraph 12.2.1 were echoed with respect to subparagraph 12.2.2, and a request was made that the text in the draft article stipulate which liabilities the holder that exercised any right under the contract of carriage would assume pursuant to that contract. It was suggested that it would be difficult to itemize which obligations in the contract of carriage could be assumed by the holder, and that, in any event, the text of the

provision was sufficiently clear in stating that the liabilities were those that “are incorporated in or ascertainable from the negotiable transport document”. Further reservations were noted with respect to the breadth of the subparagraph, and the possibility was suggested that carriers could expand the liability of holders significantly pursuant to this provision by including standard clauses in the contract of carriage that extended the liabilities of the shipper.

138. By way of explanation, it was pointed out that subparagraph 12.2.2 was intended not to detail which obligations would be imposed on the holder, but rather to state that if there were obligations on a holder, then the later holder would assume those liabilities once that holder exercised any rights under the contract. It was further stated that the existence of any such liabilities was to be decided by the parties who negotiated the contract, and that any liabilities were limited to those that were incorporated in or ascertainable from the contract. It was suggested that any further specification of potential liabilities for the holder would be impossible in an international instrument, and should be left to national law to ascertain those potential liabilities from the contract. In response to this suggestion, it was urged that the issue should be dealt with in the draft instrument rather than be left to the applicable law.

139. Additional concern was raised with respect to the possibility that specific liabilities that might be considered unfair could be incorporated into the contract and thus be assumed by the holder. An example was given of the possibility that a demurrage claim could be incorporated into the contract of carriage, and the receiver of cargo as the holder could become responsible for its payment.

140. The Working Group requested the Secretariat to prepare a revised draft of subparagraph 12.2.2 with due consideration being given to the views expressed.

(iii) Subparagraph 12.2.3

141. The Working Group found the substance of subparagraph 12.2.3 to be generally acceptable.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 60. Liability of the holder

Paragraph 1

120. In considering the text of paragraph 1 of article 60, it was suggested that, while not inaccurate, the phrase “and that does not exercise any right under the contract of carriage” might be perceived in a negative fashion, and should be deleted. In response, the view was expressed that the provision would become too vague if that phrase were deleted. Another view was that the provision could have the unintended consequence of broadly pre-empting the application of national law with respect to the liability of holders if the phrase were deleted. An additional proposal was suggested that in order to satisfy the concerns aimed at through the suggested deletion, the title of the provision could instead be changed to “position of the holder”, or a similar, more neutral term.

121. The Working Group generally approved of the text of paragraph 1 as it appeared in A/CN.9/WG.III/WP.81.

Paragraph 1 and relationship with draft article 53(6)

122. It was observed that, while paragraph 1 of draft article 60

provided that the holder did not assume any liability under the contract of carriage solely by reason of being a holder, draft article 53(6) provided that a person that transferred the right of control without having exercised it was, upon such transfer, discharged from the liabilities imposed on the controlling party. It was thought that the text of paragraph 1 of draft article 60 was more precise than that of draft article 53(6).

123. It was suggested that paragraph 6 of draft article 53 could be amended by following the more precise approach of paragraph 1 of article 60. That suggestion was not taken up, as the Working Group decided to delete draft article 53(6) in its entirety.

Conclusions reached by the Working Group regarding draft articles 60(1) and 53(6):

124. The Working Group was in agreement that:

- The text of draft article 60(1) should remain in the text as drafted;
- The Secretariat should consider the advisability of changing the title of the provision to “position of the holder”, or a similar term; and
- Draft article 53(6) should be deleted.

Paragraph 2

125. It was clarified that, although A/CN.9/WG.III/WP.96 suggested the deletion of paragraph 2 of draft article 60 with a view to expediting the negotiation of the draft convention, the view of the delegation presenting that document was that paragraph 2 nonetheless had a useful substantive role to play and should be retained. It was also indicated that the issues treated in paragraph 2 provided for greater harmonization in the draft convention. Since the draft had achieved harmonization regarding transfer of rights, it was thought to be appropriate that harmonization regarding the transfer of liabilities such as that set out in paragraph 2 should also be sought. For those reasons, there was support in the Working Group for the retention of paragraph 2.

126. However, there was also support in the Working Group for the deletion of paragraph 2 as being too controversial for its content to be agreed upon in a timely fashion for completion of the draft convention. In particular, it was noted that the concept in the draft provision that the liabilities were incorporated into the transport document or electronic transport record did not exist in all legal systems, and that seeking acceptable harmonization on this point could be very difficult. The view was expressed that incorporating paragraph 2 into the draft convention could cause some countries to hesitate in ratifying the draft convention, and that this would be an unfortunate price to pay for a relatively unimportant provision. There was some support for that strongly held view.

127. In response, it was suggested that paragraph 1 of draft article 60 already indicated that the holder was subject to a certain amount of liability, and that paragraph 2 actually operated to limit that potential liability to the obligations contained in the transport document or electronic transport record. In a similar vein, it was observed that simple deletion of paragraph 2 would not necessarily remove all liability on the holder pursuant to the draft convention, and that if

the Working Group decided to delete the provision, the draft convention should be very carefully reviewed to ensure that there were no lingering rules placing liability on the holder.

128. Despite differing views regarding how best to deal with paragraph 2, both those in the Working Group in favour of its retention and those in favour of its deletion were unanimous in concluding that, whatever the fate of the provision, the first alternative text in square brackets was preferable. As such, the first variant should be retained and the brackets around it deleted, and the second alternative text in square brackets should be deleted in its entirety. Further, a drafting question was raised whether the phrase in the first alternative, “liabilities imposed on it”, would be better recast as, “liabilities provided for”, in order to reflect that the document or record would not operate to impose liabilities on the holder.

Conclusions reached by the Working Group regarding draft articles 60(2):

129. The Working Group was in agreement that:

- The text of draft article 60(2) should remain in the text but square brackets should be placed around it to indicate the divided views of the Working Group; and
- The first alternative text in square brackets should be retained and the brackets around it deleted, and the second alternative text should be deleted.

Paragraph 3

130. While there was general approval in the Working Group for the text of draft paragraph 3 as it appeared in A/CN.9/WG.III/WP.81, a question was raised regarding whether the opening phrase of the paragraph, “For the purposes of paragraphs 1 and 2 of this article [and article 44]”, was necessary. There was some support for the view that the phrase did not appear to be necessary, but that the draft convention should be examined in order to ensure that there were no additional provisions in the text to which this paragraph should not apply, thus paving the way for the deletion of the opening phrase.

Conclusions reached by the Working Group regarding draft articles 60(3):

131. The Working Group was in agreement that:

- The text of paragraph 3 should remain in the text without square brackets but including the text retained therein; and
- The draft convention should be examined to see whether the opening phrase, “For the purposes of paragraphs 1 and 2 of this article [and article 44]”, could be safely deleted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 61. Liability of the holder

179. A question was raised with regard to the reference “without prejudice to article 58” at the beginning of paragraph 1 of draft article 61 and its meaning, as the reference seemed irrelevant. It was observed that it left the consequence unclear if the controlling party did not provide the information as requested in draft article 58. It was further noted that the reference created problems of interpretation and it was thus suggested to delete the reference entirely.

180. In response, it was explained that draft article 61 established the obligation of the holder qualified by draft article 58, as the holder was in fact the only person in possession of the information mentioned in draft article 58. Further, it was noted that the reference to draft article 58 should be retained in paragraph 1 of draft article 61, as it served the purposes of clarity. Broad support was expressed for the retention of the reference to draft article 58 in paragraph 1 of draft article 61.

181. With respect to paragraph 2 of draft article 61, the Working Group was reminded that, at its 20th session, no definite decision had been taken and that paragraph 2 had been put into square brackets because of divergences in the Working Group. Subsequently, some support was expressed for the deletion of paragraph 2, in particular because the concern was raised that the phrase “exercise any rights” might be interpreted in a way that minor action would be deemed as an exercise of rights and would thus cause liability. However, broad support was expressed to retain paragraph 2, as it was desirable for the carrier to ascertain if the holder had assumed any liabilities under the contract of carriage and to which extent it had done so. It was noted that that approach also reflected the current practice and it was viewed as clear that minor actions would not be seen as an exercise of rights.

Conclusions reached by the Working Group regarding draft article 61

182. Despite the proposal to delete the phrase “without prejudice to article 58” in paragraph 1, the Working Group approved the substance of draft article 61, subject to the deletion of the square brackets around paragraph 2 and subject to the deletion of the square brackets in the phrase “for the purpose of paragraph[s] 1 [and 2] of this article” in the chapeau of paragraph 3, and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 60. Liability of holder

190. Concerns were expressed that under paragraph 2 of the draft article a holder might face the risk that even a trivial exercise of a right under the contract of carriage might trigger an assumption of liability. In practice, negotiable transport documents might be consigned to a bank without prior notice or agreement. The effect of article 60, paragraph 2, would therefore be to increase the risks on banks or other holders. That was said to be a matter of particular concern for banks in some jurisdictions, where serious reservations had been expressed to paragraph 2 of the draft article.

191. The Commission took note of those concerns, but was generally in favour of maintaining paragraph 2 as currently worded.

192. In connection with paragraph 3, the question was asked whether the position of the holder under draft article 60 was similar to the position of the consignee under draft article 45. If that was the case, and in view of the Commission’s decision in respect of draft article 45 (see para. 141 above), it was suggested that the two provisions might need to be aligned, for instance by

replacing the phrase “does not exercise any right under the contract of carriage” with the phrase “does not demand delivery of the goods”.

193. In response, it was noted that the ambit of the two provisions was different, and that paragraph 3 of the draft article was in fact broader than draft article 45. Draft article 45 was concerned with the consignee, which typically exercised rights by demanding delivery of the goods. Draft article 60, however, was concerned with the holder of the transport document, that is, the controlling party under draft article 53, paragraphs 2 to 4. Limiting the operation of paragraph 3 to cases where the holder had not claimed delivery of the goods would be tantamount to releasing a holder that exercised the right of control from any liability or obligation under the draft Convention. Given the extent of rights given to the controlling party by draft article 52, that result would not be acceptable. The only change that had become necessary in view of the Commission’s decision in respect of draft article 45 was to delete the cross reference in paragraph 3.

194. Having considered the different views on the draft article, the Commission agreed to approve it and to refer it to the drafting group, with the request to delete the reference to draft article 45 in paragraph 3.

When no negotiable transport document or negotiable electronic transport record is issued

[Deleted]

Article 61. When no negotiable transport document or negotiable electronic transport record is issued

When no negotiable transport document or no negotiable electronic transport record is issued:

(a) The transfer of rights pursuant to a contract is subject to the law applicable to the contract for the transfer of such rights;

(b) The transfer of rights other than by contract is subject to the law applicable to such other mode of transfer;

(c) The transferability of rights is subject to the law applicable to the contract of carriage; and

(d) Regardless of the law applicable pursuant to subparagraphs (a) and (b) of this article,

(i) A transfer that is otherwise permissible pursuant to the applicable law may be made by electronic means,

(ii) A transfer shall be notified to the carrier by the transferor or, if applicable law permits, by the transferee, and

(iii) The transferor and the transferee are jointly and severally liable for liabilities that are connected to or flow from the right that is transferred.]

[Last version before deletion: A/CN.9/WG.III/WP.81]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/ WP.21]***(d) Paragraph 12.3***

142. Concern was raised with respect to a conflict that could arise between paragraph 12.3 and national law in countries where notice of transfer of rights must be given by the transferor, and may not be given by the transferor or the transferee as stated in the last sentence of the provision. It was suggested that this potential conflict could be avoided through the inclusion of the following phrase after the words “or the transferee” at the end of the final sentence of the provision: “in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights”. In the alternative, it was suggested that the potential conflict could be avoided through the deletion of the phrase “by the transferor or the transferee” in the final sentence of paragraph 12.3.

143. Whilst support was expressed for the principle behind the opening sentence of paragraph 12.3, concern was expressed with respect to the requirement in the provision that the transfer of rights under a contract of carriage pursuant to which no negotiable transport document was issued “shall be effected in accordance with the provisions of the national law applicable to the contract of carriage relating to transfer of rights”. In particular, it was noted that this provision raised very complex conflict of law issues for certain European countries, given its conflict with the approach taken to the issue of assignment in the Rome Convention on the Law Applicable to Contractual Obligations. It was suggested that a simpler approach might be found, but some uncertainty was expressed regarding whether it would be possible to solve the issue using a single applicable law approach. The suggestion was also made that, with a view to avoiding conflict with any regional convention, paragraph 12.3 could simply refer to “applicable law” in its first sentence, rather than stating how to apply the law.

144. A view was expressed that the Secretariat could promote the harmonization of international approaches to the issue of transfer of rights by examining how the Convention on the Assignment of Receivables in International Trade dealt with the transfer of rights. The Working Group was reminded, however, that the draft instrument was intended to focus on the carriage of goods, and not on the transfer of rights.

145. The Working Group requested the Secretariat to prepare and place in square brackets a revised draft of paragraph 12.3, with due consideration being given to the suggestions made in the course of the discussion.

(e) Paragraph 12.4

146. It was suggested that the text of paragraph 12.4 was unnecessarily complicated and difficult to understand. Criticism was heard that this provision derogated from the law of assignment, and that it did not appear consistent with the approach taken in paragraph 12.3, wherein the transfer of rights was to take place according to applicable law. Further, the specific substantive law set out in paragraph 12.4 appeared to strongly favour the carrier, and might be seen as undermining the balance of rights in the draft instrument as a whole. It was suggested that the matters dealt with in this provision might better be left to the agreement of the parties, than to be decided by any specific rule on joint and several liability.

147. In response to the specific criticisms of paragraph 12.4, support was expressed for the view that paragraph 12.4 was a welcome attempt to state the general principle that a debtor cannot escape liability by transferring its rights to another party. It was also suggested that a provision that ensured that a debtor remained liable until the carrier agreed to the transfer of rights was a positive approach, although it was questioned why a carrier would need joint and several liability on the part of the holder if the carrier had agreed to the transfer. Further, in response to the statement that draft paragraphs 12.3 and 12.4 could apply when no document at all was issued, it was explained that the transfer of rights could take place pursuant to an exchange of electronic data.

148. In light of the discussion with respect to draft article 12 and to paragraph 12.4 in particular, the Working Group requested the Secretariat to prepare and place in square brackets a revised draft of paragraph 12.4, with due consideration being given to the views expressed.

[See also paragraphs 206-210, A/CN.9/576 (15th Session of WG III) under articles 1(21) and 1(22) at p. 48]

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 61. When no negotiable transport document or negotiable electronic transport record is issued

132. While there was general agreement in the Working Group that draft article 61 should be deleted from the draft convention, it was observed that, while subparagraphs (a), (b) and (c) were applicable law provisions that were problematic, subparagraph (d) was a substantive legal provision. The question was raised whether subparagraph (d) could be retained in the draft convention, since it dealt with substantive aspects of the transfer of rights and liabilities. In response, it was indicated that, while subparagraph (d) did not concern private international law, it was nonetheless quite contentious, particularly subparagraph (iii) thereof concerning the transferor and the transferee's joint and several liability for liabilities attached to the right transferred. Consequently, it was thought that subparagraph (d) should also be deleted from the draft convention, and possibly considered for future work.

CHAPTER 12. LIMITS OF LIABILITY

Article 59. Limits of liability

1. Subject to articles 60 and 61, paragraph 1, the carrier's liability for breaches of its obligations under this Convention is limited to 875 units of account per package or other shipping unit, or 3 units of account per kilogram of the gross weight of the goods that are the subject of the claim or dispute, whichever amount is the higher, except when the value of the goods has been declared by the shipper and included in the contract particulars, or when a higher amount than the amount of limitation of liability set out in this article has been agreed upon between the carrier and the shipper.
2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.
3. The unit of account referred to in this article is the Special Drawing Right as defined by the International Monetary Fund. The amounts referred to in this article are to be converted into the national currency of a State according to the value of such currency at the date of judgement or award or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State that is not a member of the International Monetary Fund is to be calculated in a manner to be determined by that State.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

(j) Paragraph 6.7

81. By way of introduction, it was recalled that paragraph 6.7 was derived from articles 6 and 26 of the Hamburg Rules and article 4.5 of the Hague and Hague-Visby Rules. General support was expressed for the principles on which paragraph 6.7 was based. It was generally agreed that it would not be appropriate to insert any amount for limits of liability in the draft instrument at this stage. It was pointed out that more discussion would be needed on that point, particularly if the draft instrument was to govern door-to-door transport, in view of the difference in the amounts of the limits applicable to different modes of transport, which ranged, for example, from 2 special drawing rights per kilogram in maritime transport to 17 special drawing rights per kilogram in air transport (for weight-based limitations).

82. A suggestion was made that it would be appropriate to include in the draft instrument an article providing for an accelerated amendment procedure to adjust the amounts of limitation, for example along the lines of article 8 of the 1996 Protocol to the Convention on Limitation of

Liability for Maritime Claims. The suggestion was noted with interest. However, it was stated that the level of the limits ultimately agreed to be inserted in subparagraph 6.7.1 would have a bearing on support for an accelerated amendment procedure.

83. Another suggestion was that, in line with a proposal made at the workshop on cargo liability regimes organized by the Maritime Transport Committee of OECD in January 2001, “before considering new monetary limits, it would be advisable for the sponsoring agency, as part of preparatory work for a diplomatic conference, to commission an independent study on the changes in the value of money since the limits were fixed in the Hague-Visby Rules”. Some support was expressed for that suggestion. In that context, however, the view was expressed that, in view of the increase in the level of containerization, the average value of cargo in containerized transport had remained relatively stable over the years. Attention was drawn to the possibility of introducing a limitation amount per container as an alternative to the package limitation.

84. It was recalled that the last part of subparagraph 6.7.1 was between square brackets because it had yet to be decided whether any mandatory provision with respect to limits of liability should be “one-sided or two-sided mandatory”, i.e., whether or not it should be permissible for either party to increase its respective liabilities. A widely-shared view was that the text between square brackets should be retained.

85. After discussion, the Working Group decided to retain the entire text of paragraph 6.7 in the draft instrument for continuation of the discussion at a later stage.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(d) Limits of liability

257. A widely shared view was that no attempt should be made to reach an agreement on any specific amount for the limits of liability under subparagraph 6.7.1 at the current stage of the discussion. A suggestion was made that, irrespective of the amount that was finally retained, a rapid amendment procedure should be established by the draft instrument. It was suggested that the 1996 Protocol to the IMO Convention on Limitation of Liability for Maritime Claims might provide a model in that respect. That suggestion was widely supported.

258. The view was expressed that the limits of liability in the context of a multimodal instrument should be considerably higher than the maritime limits established in the Hague and Hague-Visby Rules. It was explained that, should the carrier engage in multimodal transport, a situation where different limits of liability might be applicable (ranging from 2 SDR per kilogram for maritime transport to 8.33 SDR per kilogram for road transport and even 17 SDR per kilogram for air transport), the carrier would in any event get insurance coverage for the higher limit applicable during the carriage, provided that a network system was applicable. It was stated in response that the purpose of a limitation of liability was not to ensure that any conceivable shipment would result in the value of the goods being compensated in case of damage or loss. The purpose of limitation of liability, it was stated, was to ensure predictability and certainty. It was observed that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of losses and damages were fully compensated on the basis of the limitation per package. By way of explanation, it was stated that packages in the practice of

modern containerized transport had generally become smaller and that it was generally recognized that, in containerized transport, the notion of “package” applied to the individual packages inside the container and not to the container itself. It was also explained that the limitation per kilogram set out in the Hague-Visby Rules still corresponded to the average value of containerized cargo, despite considerable regional variations. From a similar perspective, it was stated that, since the adoption of the Hague-Visby protocol, the freight rates in maritime trade had decreased and that such decrease should be taken into account when determining the limits of liability.

259. With respect to the last sentence of subparagraph 6.7.1, it was recalled that the sentence had been bracketed pending a decision as to whether any mandatory provision should be one-sided or two-sided mandatory, that is whether or not it should be permissible for either party to increase its respective liabilities (see A/CN.9/WG.III/WP.21, para. 106). The earlier discussion by the Working Group (see above, para. 214) was noted and it was provisionally agreed that the square brackets should be removed from that provision.

260. With respect to the loss of the right to limit liability under paragraph 6.8, the view was expressed that the reference to the “personal act or omission” of the person claiming a right to limit should be replaced by a reference to the “act or omission” of that person. It was recalled that a similar suggestion had been made at the previous session of the Working Group, for reasons of consistency with the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. It was pointed out in response that the issue of consistency with the Athens Convention would arise mostly in the case where both cargo and passengers were carried on the same vessel, a case that was described as relatively rare. One delegation offered to prepare a study on the issue of consistency between the draft instrument and the Athens Convention for consideration by the Working Group at a future session.

261. It was widely felt that the reference to the “personal act or omission” of the person claiming a right to limit should be considered in the context of the possibility of adding a provision on the intentional fault of the servant or agent of the carrier. In favour of introducing such a provision, it was stated that paragraph 6.8 dealt with the extreme situation where loss or damage to the goods had been caused by the intentional act or omission of the carrier who, in this case, should not be permitted to avoid liability by demonstrating that the acts that caused the loss or damage were those of a servant or agent and not the personal acts or omissions of the carrier. In response, it was recalled that, at the previous session of the Working Group, it had been suggested that the rules on the limitation of liability should be made unbreakable or almost unbreakable to ensure consistency and certainty in interpretation of the rules (A/CN.9/525, para. 88). It was stated that an almost unbreakable limit of liability would result in a situation where it would be easier for the carrier to obtain insurance coverage. However, it was also recalled that, while there existed precedents of international instruments where such unbreakable limits of liability had been implemented, such instruments relied on a relatively high amount limitation (*ibid.*). With a view to alleviating the concern that had been expressed regarding the possibility for the carrier to avoid liability, it was pointed out that the notion of “personal act or omission” under paragraph 6.8 should be understood to apply not only to the contracting carrier but also to each performing party. After discussion, the Working Group decided that the word “personal” should be placed between square brackets for continuation of the discussion at a later stage.

262. A suggestion was made that the draft instrument should make it clear that the carrier should never be liable for more than the value of the goods. It was stated in response that a provision to that effect had been placed in subparagraph 6.2.3. It was generally felt that the purpose of that provision might need to be expressed more clearly in a future draft.

263. Another suggestion was made that the provisions dealing with limits of liability in the draft instrument might need to be adjusted in view of the decisions made by the Working Group with respect to the possibility for the carrier to qualify the description of the goods given by the shipper in the transport document. Should such a qualification be made by the shipper regarding the weight of the goods or the number of packages, the draft instrument should be clear as to which weight and number of packages should be used for the purposes of applying the limits of liability. It was suggested that, in such a context, the qualifications might need to be ignored, much in the same way as a “said to weigh” clause would be ignored under current practice. The Working Group took note of that suggestion.

[For deliberations on the Treatment of non-localized damages, see “Limits applicable to non-localized damages”, at p. 554]

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Draft article 18. Limits of liability

38. The Working Group considered the text of draft article 18 as contained in document A/CN.9/WG.III/WP.32.

Paragraph 1

Level of the limitation on liability

39. There was agreement in the Working Group that the time was not yet ripe for an exchange of views with respect to the appropriate level of limitation on liability to be inserted into paragraph 1. Views were expressed that an increase from the level in the Hague-Visby Rules would be favoured, and that some States would favour a low level of limitation. There was broad approval of a suggestion that a study should be prepared of the different limitation levels in different States, and with respect to different transport regimes. CMI offered to circulate to its members a questionnaire with respect to the limitation levels applicable to maritime claims and any available information on the value of cargo. In addition, member and observer States of the Working Group agreed to submit to the Secretariat information regarding the limits of liability in their various domestic transport regimes, as well as any available statistics on claims figures, in order to facilitate the proposed study. It was suggested that the Secretariat should request information from the International Maritime Organization (IMO) with respect to inflation rates and liability limits, for example in the context of the Athens Convention.

Amendment procedure

40. It was proposed that the draft instrument should include a rapid amendment procedure, so that the limitation level, once agreed upon, could be adjusted without reopening the

negotiation on the entire instrument. It was noted that a rapid amendment procedure had been proposed in paragraphs 11 and 12 of A/CN.9/WG.III/WP.34. It was suggested that reference could also be had to the amendment procedure in the Athens Convention. There was broad support for the inclusion of an amendment procedure in the draft instrument.

Economic loss and “in connection with the goods”

41. It was stated that the words “in connection with the goods” were drawn from article IV.5.a of the Hague-Visby Rules, where the intent was to cover losses caused by a decrease in the market value of goods during a delay, but not to cover economic loss. It was suggested that if the draft instrument was to cover pure economic loss, a different formulation should be used, such as “the carrier’s liability for loss of or damage to the goods or for delay in delivery”. Some support was expressed for deletion of the words “or in connection with”. In addition, the view was expressed that the exclusion of economic damages from paragraph 1 was achieved through the opening phrase, “[s]ubject to article 16(2)”.

42. Doubts were expressed as to the above interpretation of the phrase “in connection with the goods”, and whether it would be prudent to delete it. It was suggested that the phrase was intended to include not only damage to the goods, but also damage caused by other circumstances, such as misdelivery or misrepresentation of the goods in the bill of lading. There was strong opposition to the deletion of the phrase. The observation was made that if the phrase was intended to cover misrepresentation and misdelivery, it might be better to place it in a separate article with a different method for calculating compensation. Further, it was observed that if this latter interpretation of the phrase was accurate, it was possible that “in connection with the goods” should also be inserted into draft article 14 (A/CN.9/WG.III/WP.36). As noted in further discussions in the Working Group, the phrase “in connection with the goods” recurred in several other draft articles and it was recommended that its use should be examined by the Secretariat (see below, paras. 44, 58, 89 and 91).

Possible alternative text

43. Some support was expressed for replacing paragraph 1 with the alternative text reproduced in footnote 92 of A/CN.9/WG.III/WP.32.

Conclusions reached by the Working Group on paragraph 1

44. After discussion, the Working Group decided that:

- The text of paragraph 1 was generally acceptable;
- The phrase “in connection with” would be placed in square brackets in this and other draft articles for further examination and discussion;
- The CMI and the member and observer States of the working group would provide data to the secretariat for the preparation of a comparative study on the limitation levels for loss and delay of various transport regimes, including any available claims statistics;
- The Secretariat should seek to obtain information from the IMO on inflation rates of liability limits;
- The Secretariat would be requested to prepare draft provisions for a rapid amendment procedure for the limitation on liability, using existing models and proposals.

[* * *]

Paragraph 3***General discussion***

48. This paragraph was described as the well-known container rule from the Hague-Visby Rules. There was broad support for the text of this paragraph, however, the question was raised regarding its interaction with the use of a qualifying clause. A suggestion was also made regarding the inclusion of pallets in this paragraph, and the suggestion was made to include pallets by way of the definition of “container” in draft article 1. It was also suggested that the option should be considered of including a separate limit for containers to replace the package limitation.

Conclusions reached by the Working Group on paragraph 3

49. After discussion, the Working Group approved the substance of paragraph 3 and noted that the definition of “container” in draft article 1 might need to be further considered to ensure that it covered pallets.

Paragraph 4***General discussion***

50. General satisfaction was expressed by the Working Group with respect to paragraph 4. It was noted that the paragraph required that the currency be valued at the date of the judgement, so it would not be possible to take advantage of fluctuating currency values in applying this paragraph. A question was raised whether the last sentence of the paragraph could be deleted, since it was duplicated from other conventions and seemed to be mainly of historical interest. A suggestion was made to include in this paragraph a reference to “the date of the arbitral award” or “the date of the final arbitral award”. However, caution was expressed regarding unintended consequences that could result from changes to this well-known text.

Conclusions reached by the Working Group on paragraph 4

51. After discussion, the Working Group approved the substance paragraph 4.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]**Limitation of carrier's liability — Chapter 13**

161. The Working Group was reminded that it had most recently considered the topic of the limitation of carrier's liability at its thirteenth session (see A/CN.9/552, paras. 25-31 and 38-62), and that it had previously considered the topic at its tenth session (see A/CN.9/525, paras. 65-70 and 81-92). It was also recalled that a document containing information relating to delay had been presented by the Government of China (A/CN.9/WG.III/WP.72), and that written proposals on this topic had been submitted for the consideration of the Working Group for this session (see A/CN.9/WG.III/WP.73, paras. 29-36, and A/CN.9/WG.III/WP.77). The consideration by the Working Group of the provisions on the limitation of the carrier's liability was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56.

Draft article 64. Basis of limitation of liability***Paragraph (1)***

162. It was noted that paragraph (1) of draft article 64 provided a method for calculating the limitation level of the liability of the carrier. As in the Hague-Visby and the Hamburg Rules, the approach contemplated that calculation on the basis of both a per kilogram and a per package basis of the goods lost or damage, allowing for limitation of liability based on the higher of the two amounts as calculated. It was further recalled that paragraph (1) provided for an exception when the "nature and value" of the goods lost or damaged had been declared by the shipper before shipment and included in the contract particulars, or when a higher amount had been agreed upon by the parties to the contract of carriage. The Working Group agreed that the final amount of the limitation on liability to be inserted into paragraph (1) should be considered as an element of the overall balance in the liability regime provided in the draft convention, and thus agreed to proceed with its consideration of paragraph (1) without making specific reference to numbers or amounts at this stage of the discussions. In addition, factors that were said to be worthy of consideration in this regard were the tacit amendment procedure for the level of the limitation on the carrier's liability as found in draft article 104 of the draft convention, which offered additional flexibility for future adjustments of the liability limits, and the rule for non-localized loss or damage found in paragraph (2) of draft article 64.

General comments

163. The Working Group was reminded of the general principle for which a limitation on the carrier's liability was included in the draft convention and in other transport conventions. It was said the primary purpose of such provisions on limitation of liability was to regulate the relationship between two commercial parties in order to entitle each of them to obtain a benefit. It was recalled that, without the benefit of a limitation on liability, the carrier would be fully liable for all loss or damage, and that where such goods were in containers, the carrier would have no knowledge regarding their contents, thus potentially exposing the carrier to very high and unexpected risks. Rather than pay expensive insurance costs, and in order to share the burden of that potentially very high risk, the carrier would have to apportion it to every shipper through an increase in freight rates. By allowing for a limitation of the carrier's liability, this allocation of risk allowed the costs of both shippers and carriers to be reduced, with the trade-off that full compensation for high-level losses would not be possible. It was further observed that the aim of an appropriate limitation on liability would reduce the level of recovery for some claims to the limitation amount, but that it would not so limit too many claims. It was also

noted that the optimal limitation level would be high enough to provide carriers with an incentive to take proper care of the goods, but low enough to cut off excessive claims, yet to provide for a proper allocation of risk between the commercial parties.

164. The view was expressed that the limits of liability provided in the Hague or Hague-Visby Rules have proven to be satisfactory. It was observed that the limitation on the carrier's liability that appeared in paragraph (1) allowed for a limitation level on a per package or a per kilogram basis, whichever was higher. It was recalled that the Hague Rules contained only a per package limitation, while the Hague-Visby and Hamburg Rules contained both per package and per kilo limitation provisions, but that each of those conventions predated the advent of modern container transport. The importance of this was said to be that prior to widespread containerization, most goods were shipped in a crate or a large wooden box that counted as one package, while with the widespread use of containers, the per package limitation level was instead based on the number of packages inside the container. This development in practice increased the amounts recoverable from the carrier, as compared with the per kilogram limitation level or pre-container per package limitation would have allowed.

165. In further support of the view that the limits of liability provided in the Hague or Hague-Visby Rules were satisfactory, it was said that the limitation levels of other transport conventions, such as the CMR or the COTIF/CIM conventions, were not directly comparable to those in the maritime transport conventions, since several of the unimodal transport conventions included only per kilogram limitation levels. Thus, it was said, while the per kilogram limitation level was much higher than the Hague-Visby level, in fact, the level of recovery was much greater under those conventions that allowed for a per package calculation of the limitation level. It was also said that certain other conventions, such as the Convention for the Unification of Certain Rules for International Carriage by Air, 1999 (Montreal Convention), at 17 SDRs, set a high limitation level in comparison with other transport conventions, but that it also contained provisions rendering its limitation on liability incapable of being exceeded, even in the case of intentional acts or theft, and that the freight payable for the mode of transport covered by those other transport conventions was much higher than under the maritime transport conventions. Further, it was observed that it could be misleading to compare the regimes from unimodal transport conventions, since each convention contained provisions that were particularly geared to the conditions of that type of transport. In this regard, it was noted that it would be helpful to obtain actual figures with respect to recovery in cases of loss or damage to the goods, and to what extent the per package and per kilogram limits had been involved in those recoveries, but that such information had been sought from various sources and was difficult to obtain. The view was also expressed that, since the transport covered during the door-to-door carriage of the goods could be multimodal, that it might be useful to consider the limitation amounts of other unimodal transport conventions, particularly in reference to cases of non-localized loss or damage to the goods.

166. It was further observed that, through the method in which the goods were packed for shipment, the shipper could essentially unilaterally choose whether any claim for loss or damage would be on the basis of a per package or a per kilogram calculation. In addition, it was noted that while it was not an opportunity of which shippers often availed themselves; a shipper always had the option to declare the value of the cargo it was shipping, or to agree with the carrier on a different limitation level, and thus to avoid falling within the rules for the limitation of the carrier's liability set out in paragraph (1).

167. In further support of the adequacy of the liability limits of the Hague-Visby Rules, it was suggested that, in the bulk trade, the average value of cargo had not increased dramatically since the time of earlier maritime conventions, and that, in the liner trade, the average value of the cargo inside containers had not increased dramatically either.

168. Another strongly supported view, however, was that an increase in the liability limits under the Hague-Visby Rules would be appropriate. It was noted that since broad containerization had meant that cheaper goods could be transported in containers more economically than in the past, examination of figures such as the average value of goods over time could be misleading in attempting to decide upon an equitable limit for the liability of the carrier. It was also pointed out that the value of high-value cargo had increased over the past number of years, and that inflation had also clearly affected the value of goods and depreciated the limitation amounts since the adoption of existing maritime transport conventions, which had been negotiated decades ago. There was support for the view that those factors should be taken into account when considering at what level the limitation in paragraph (1) should be set, and that an increase in the limitation level in traditional maritime conventions should be considered by the Working Group. There were, however, diverging views as to the parameters for such an increase. While there were suggestions that only a moderate increase might be conceivable, there were also views that the liability limits should be based on the amounts set forth in the Hamburg Rules, or above them.

169. In addition to the historical and commercial issues discussed by the Working Group in its consideration of the factors involved in choosing an appropriate level for the limitation of the carrier's liability, the Working Group was encouraged to take into account certain additional factors. In particular, it was said that regard should be had to the need to ensure broad acceptability of the draft convention, such as through careful consideration of the level of the limitation on the carrier's liability in relation to earlier maritime transport conventions. There was support for the view that it was preferable to strike a middle ground in choosing an appropriate limitation level, which might require an increase from levels in historical maritime conventions.

170. A note of caution was voiced that setting the limitation level for the carrier's liability at the level set forth in the Hamburg Rules, which currently governed only a relatively small fraction of the world's shipping, would represent a significant increase for the largest share of the cargo in world trade, which was currently governed by the lower limits of the Hague-Visby Rules, or even lower limits, as was the case in some of the world's largest economies. However, concern was expressed that anything other than increasing the level of the limitation from previous maritime conventions might be perceived as a move backwards rather than forwards.

171. Having heard those views, the Working Group concluded its discussions by emphasizing their merely indicative nature, at the present stage of the deliberations, and reiterating its understanding that any decision on the limit of liability was to be treated as an element of the overall balance in the liability regime provided in the draft convention.

“nature and value of the goods”

172. A question was raised about the use of the phrase “nature and value of the goods” in paragraph (1), and how that phrase differed from that of “a description of the goods” as found in draft article 38(1)(a) regarding contract particulars. It was suggested that the term used in

draft article 64(1) should mirror that of draft article 38(1)(a), since, it was suggested, use of a different term could cause confusion regarding the intention of the shipper with respect to the declared value of the goods. Some reservations were expressed regarding this analysis, as it was thought that since draft article 38 concerned what had been taken into the carrier's custody and what was being transported, rather than a specific declaration of value, a clear difference in the terms used should be retained. However, a suggestion to clarify the drafting and the terms used, possibly by simply deleting the reference to "nature", received support in the Working Group.

Per package and per kilogram

173. Although the suggestion was made that a final decision on the liability limit might be facilitated by retaining only the weight of the goods as an element to calculate the carrier's liability, the Working Group generally agreed that both package and weight should be retained for the Working Group's further consideration.

Conclusions reached by the Working Group regarding draft article 64(1):

174. After discussion, the Working Group decided that:

- The mechanism set out in draft article 64(1) for calculating the limitation level for the carrier's liability was approved;
- The phrase "nature and value of the goods" should be adjusted in keeping with the text set out in draft article 38(1)(a); and
- A final decision on the limitation level for the carrier's liability would be made on the basis of the entire package of rights and obligations contained in the draft convention.

[* * *]

Paragraph (3)

177. It was pointed out that the origin of this paragraph could be traced back to the Hague-Visby Rules. The Working Group noted that paragraph (3) regulated the limitation of liability in terms of the number of packages or shipping units when using containers, pallets or other means of transport. It was noted that when originally drafted for the Hague-Visby Rules, packages were often quite large but that with containerization the size of packages were now typically much smaller. That meant that carriers, by virtue of the definition of packages, now faced a greater exposure to cargo liability in respect of a single container than at the time the Visby Protocol was adopted.

Conclusions reached by the Working Group regarding draft article 64(3):

178. After discussion, the Working Group agreed that the existing text of draft article 64(3) should be maintained.

Paragraph (4)

179. The Working Group noted that paragraph 4 provided that the SDR as defined by the International Monetary Fund should be used as the unit of account for the purpose of calculating the carrier's liability.

Conclusions reached by the Working Group regarding draft article 64(4):

180. The Working Group approved the paragraph 64(4) in substance.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 62. Limits of liability**

133. The Working Group proceeded to consider the text of draft article 62 as contained in document A/CN.9/WG.III/WP.81.

General comments

134. The Working Group was reminded that it had thus far had general exchanges of view on the limits of liability. The exploratory nature of those earlier discussions was reflected by the fact that paragraph 1 of the draft article did not yet indicate a proposed figure for the carrier's limits of liability.

135. By way of general comment, the Working Group was reminded of its earlier understanding at which it had arrived at its eighteenth session (Vienna, 6-17 November 2006), that any decision on the limit of liability was to be treated as an element of the overall balance in the liability regime provided in the draft convention (A/CN.9/616, para. 171). There was support for the suggestion that the consideration of the limit of the carrier's liability under draft article 62, paragraph 1, should not be dissociated from certain other provisions in the draft convention, including: the special amendment procedure for the level of the limitation on the carrier's liability (draft article 99); the number of countries required for the convention to enter into force (paragraph 1 of draft article 97); the provisions allowing for the application of other international treaties and of domestic law to govern the liability of the carrier in case of localized damage (draft articles 26 and the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192)) and the special rule for non-localized loss or damage (paragraph 2 of draft article 62).

Arguments in favour of liability limits closer to those in the Hamburg Rules

136. There was wide and strong support for the view that the draft convention should increase the limits for the carrier's liability, as compared to the limits provided for under the Hague-Visby Rules, and that the new limits should not be lower than those set forth in the Hamburg Rules (i.e. 835 Special Drawing Rights ("SDR") per package or 2.5 SDR per kilogram of gross weight of the goods lost or damaged). There were also expressions of support for the view that, nearly thirty years after their adoption, the liability limits in the Hamburg Rules themselves no longer reflected the realities of commerce and international transport, so that the draft convention should envisage a substantial increase over and above the amounts set forth in the Hamburg Rules, ideally by raising the per package limitation to 1,200 SDR, or at least to the level provided for in the 1980 United Nations Convention on International Multimodal Transport of Goods (i.e. 920 units of account per package of other shipping unit or 2.75 units of account per kilogram of gross weight of the goods lost or damaged).

137. As a further argument in favour of an increase in the liability limits, it was pointed out that the limits of liability in the context of a multimodal transport were considerably higher than the maritime limits established in the Hague and Hague-Visby Rules. It was explained that carriers engaging in multimodal transport were usually exposed to different limits of liability (ranging from 8.33 SDR per kilogram for road transport to even 17 SDR per kilogram for air transport). As the draft convention had door-to-door coverage, the liability limits established in draft article 62, paragraph 1, should not be significantly lower than the liability limits applicable to other modes of transport. Failure to set the limits for the carrier's liability at an acceptable level, as compared to other modes of transportation, might prevent some countries from joining the draft convention, unless they were given the possibility to apply higher limits for domestic or nonlocalized incidents of loss or damage, a result which was recognized as being contrary to the objective of achieving a high degree of uniformity.

138. It was noted that broad containerization had meant that cheaper goods could be transported in containers more economically than in the past. Thus, the claim that the limits of liability provided for under the Hague-Visby Rules would suffice to cover most cargo claims, the average value of which would be lower than the Hague-Visby limits, could be misleading in attempting to decide upon an equitable limit for the liability of the carrier. Instead, it was pointed out that the value of high-value cargo had increased over time, and that inflation had also clearly affected the value of goods and depreciated the limitation amounts since the adoption of existing maritime transport conventions, which had been negotiated decades ago. The possibility to increase the carrier's liability by declaring the actual value of cargo was said not to constitute a viable option, since *ad valorem* freight rates were in some cases prohibitively expensive and in any event too high for most shippers in developing countries.

139. It was further observed that in today's world a significant volume of high-value goods was carried by sea, which for many countries was the only feasible route for foreign trade. A large portion of those goods (such as paper rolls, automobiles, heavy machinery and components of industrial plants) was not packed for transportation purposes, so that the liability limits for gross weight of carried goods under the Hague-Visby Rules were far from ensuring adequate compensation. Anecdotal evidence obtained from cargo insurers suggested that they would in most cases absorb the cost of insurance claims without seeking recourse from the carrier's insurers because the amounts recoverable would be insignificant when compared to the payments made to the cargo owners. Besides an increase in the per package limitation, the Working Group was invited to consider a substantial increase in the limits per gross weight of cargo, so as to align them to the higher limits currently applicable to road transport under the Convention on the Contract for the International Carriage of Goods by Road, 1956 ("CMR") (i.e. 8.33 SDR per kilogram of gross weight).

140. It was also argued that an increase of liability limits would not likely have a dramatic effect on carriers' liability insurance given the small relative weight of insurance in freight costs. It was pointed out that studies that had been conducted at the time the Hamburg Rules entered into force had suggested that the increase in the liability limits introduced with the Hamburg Rules would influence liner freight rates only by 0.5 per cent of the total freight rate, at the most. In some countries, the liability limits for domestic carriage by sea had in the meantime been raised to 17 SDR per kilogram of gross weight, without any adverse effect being felt by the transport industry.

141. It was also said that an increase in the carrier's liability would shift to their insurers part of the risks for which cargo owners currently purchased cargo insurance. It was argued that this by itself might prevent an increase in transportation costs to be eventually borne by consumers, since mutual associations offering protection and indemnity insurance ("P&I clubs") were known for working efficiently and might offer extended coverage to their associates at lower rates than commercial insurance companies offered to cargo owners.

142. The Working Group was further reminded that the principle of monetary limitation of carrier's liability had been introduced in the early 20th century as a compromise to ban the practice of carriers unilaterally excluding their liability for cargo loss or damage, at a time when such liability was not subject to a monetary ceiling under most domestic laws. Apart from the transport industry, very few other economic activities enjoyed the benefit of statutory limits of liability. Besides, sea carriers already enjoyed a double limitation of liability. Indeed, the value of the goods already set the limit for the overall liability of the carrier, including for consequential loss or damage caused by loss of or damage to the goods. For higher-value goods, the carrier's liability was further limited by the monetary ceiling set forth in the applicable laws or international conventions. The combination of those rules already placed carriers in a privileged position, as compared to other business enterprises, and that circumstance should be taken into account when considering adequate monetary liability limits, which should not be allowed to stagnate at a level detrimental to cargo owners.

143. In addition to the historical and commercial issues discussed by the Working Group in its consideration of the factors involved in choosing an appropriate level for the limitation of the carrier's liability, the Working Group was encouraged to take into account certain additional factors. In particular, it was said that regard should be had to the need to ensure broad acceptability of the draft convention, such as through careful consideration of the level of the limitation on the carrier's liability in relation to earlier maritime transport conventions. There was support for the view that it was preferable to strike a middle ground in choosing an appropriate limitation level, which might require an increase from levels in historical maritime conventions. Thus far, 33 countries had ratified the Hamburg Rules and a number of other countries had aligned the limits of liability provided in their domestic laws with the limits provided for in the Hamburg Rules. It was said that it would be extremely difficult to persuade domestic legislators and policy makers in those countries to accept, in an instrument to be finalized in the year 2008, liability limits that were lower than those introduced by the Hamburg Rules in 1978. Concern was expressed that anything other than a substantial increase in the level of the limitation from previous maritime conventions might be perceived as a move backwards rather than forwards.

Arguments in favour of liability limits closer to those in the Hague-Visby

144. In response to calls for a substantive increase in the liability limits, there was also strong support for the view that the draft convention should aim at setting the limits for the carrier's liability in the vicinity of the limits set forth in the Hague-Visby Rules (i.e. 666.67 SDR per package or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher), possibly with a moderate increase.

145. The Working Group was reminded of the general principle for which a limitation on the carrier's liability was included in the draft convention and in other transport conventions. It was said the primary purpose of such provisions on limitation of liability was to regulate the

relationship between two commercial parties in order to entitle each of them to obtain a benefit. It was recalled that, without the benefit of a limitation on liability, the carrier would be fully liable for all loss or damage, and that where such goods were in containers, the carrier would have no knowledge regarding their contents, thus potentially exposing the carrier to very high and unexpected risks. Rather than pay expensive insurance costs, and in order to share the burden of that potentially very high risk, the carrier would have to apportion it to every shipper through an increase in freight rates. By allowing for a limitation of the carrier's liability, this allocation of risk allowed the costs of both shippers and carriers to be reduced, with the trade-off that full compensation for high-level losses would not be possible. It was further observed that the aim of an appropriate limitation on liability would reduce the level of recovery for some claims to the limitation amount, but that it would not so limit too many claims. It was also noted that the optimal limitation level would be high enough to provide carriers with an incentive to take proper care of the goods, but low enough to cut off excessive claims, yet to provide for a proper allocation of risk between the commercial parties.

146. The view was expressed that the limits of liability provided in the Hague or Hague-Visby Rules have proven to be satisfactory. It was observed that the limitation on the carrier's liability that appeared in paragraph 1 allowed for a limitation level on a per package or a per kilogram basis, whichever was higher. It was recalled that the Hague Rules contained only a per package limitation, while the Hague-Visby and Hamburg Rules contained both per package and per kilo limitation provisions, but that each of those conventions predated the advent of modern container transport. The importance of this was said to be that prior to widespread containerization, most goods were shipped in a crate or a large wooden box that counted as one package, while with the widespread use of containers, the per package limitation level was instead based on the number of packages inside the container. This development in practice increased the amounts recoverable from the carrier, as compared with the per kilogram limitation level or pre-container per package limitation would have allowed. It was further observed that, through the method in which the goods were packed for shipment, the shipper could essentially unilaterally choose whether any claim for loss or damage would be on the basis of a per package or a per kilogram calculation.

147. The essential purpose of limitation of liability, it was stated, was to ensure predictability and certainty. It was observed that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of cargo loss was fully compensated on the basis of either the limitation per package or the limitation per kilogram, since the value of most cargo carried by sea was lower than the Hague-Visby limits. By way of explanation, it was stated that packages in the practice of modern containerized transport had generally become smaller and that it was generally recognized that, in containerized transport, the notion of "package" applied to the individual packages inside the container and not to the container itself. From a similar perspective, it was stated that, since the adoption of the Visby protocol, the freight rates in maritime trade had decreased and that such decrease had made shipments of very low value cargo feasible.

148. It was also observed that it would be incorrect to expect that the liability limits should ensure that any conceivable shipment would result in the value of the goods being compensated in case of damage or loss. It was recalled that paragraph 1 provided for an exception when the "nature and value" of the goods lost or damaged had been declared by the shipper before shipment and included in the contract particulars, or when a higher amount had been agreed

upon by the parties to the contract of carriage. Shippers who delivered high value cargo for shipment were expected to be aware of the applicable liability limits and had the option to declare the actual value of the goods against payment of a commensurate higher freight, or to purchase additional insurance to supplement the amounts not covered by the carrier.

149. In addition, it was reiterated that the liability limits in the Hague-Visby Rules were often much higher in practice than might appear at first sight, and that given the volume of container traffic and the “per package” liability limit set out therein, they were often much higher than those in the unimodal transport regimes, where the liability limits for recovery were based only on weight. By way of example, it was said that given the typically higher value of cargo carried by air, the liability limits set forth in the Convention for the Unification of Certain Rules for the International Carriage by Air, Montreal 1999 (Montreal Convention) (i.e. 17 SDR per kilogram of gross weight) only covered some 60 per cent of the claims for loss or damage to air cargo. The portion of cargo claims covered by the liability limits set forth in the CMR (i.e. 8.33 SDR per kilogram of gross weight) was said to be probably even less than 60 per cent.

150. In further support of the view that the limits of liability provided in the Hague or Hague-Visby Rules were satisfactory, it was said that the limitation levels of other transport conventions, such as the CMR or the Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Appendix to the Convention concerning International Carriage by Rail, as amended by the Protocol of Modification of 1999 (“CIM-COTIF”) conventions, were not directly comparable to those in the maritime transport conventions, since several of the unimodal transport conventions included only per kilogram limitation levels. Thus, it was said, while the per kilogram limitation level was much higher than the Hague-Visby level, in fact, the level of recovery was much greater under those conventions that allowed for a per package calculation of the limitation level. It was also said that certain other conventions, such as the Montreal Convention, set a high limitation level in comparison with other transport conventions, but that they also contained provisions rendering their limitation on liability incapable of being exceeded, even in the case of intentional acts or theft, and that the freight payable for the mode of transport covered by those other transport conventions was much higher than under the maritime transport conventions. Further, it was observed that it could be misleading to compare the regimes from unimodal transport conventions, since each convention contained provisions that were particularly geared to the conditions of that type of transport. In this regard, it was noted that it would be helpful to obtain actual figures with respect to recovery in cases of loss or damage to the goods, and to what extent the per package and per kilogram limits had been involved in those recoveries, but that such information had been sought from various sources and was difficult to obtain.

151. In further support of the adequacy of the liability limits of the Hague-Visby Rules, it was suggested that, in the bulk trade, the average value of cargo had not increased dramatically since the time of earlier maritime conventions, and that, in the liner trade, the average value of the cargo inside containers had not increased dramatically either. A note of caution was voiced that setting the limitation level for the carrier’s liability at the level set forth in the Hamburg Rules, which currently governed only a relatively small fraction of the world’s shipping, would represent a significant increase for the largest share of the cargo in world trade, which was currently governed by the lower limits of the Hague-Visby Rules, or even lower limits, as was the case in some of the world’s largest economies. The need to absorb and spread the higher costs generated by an increase in the liability limits would be that lower-value cargo would be

expected to pay a higher freight, even though it would not benefit from the increased liability limits, which would mean that shippers of lower-value cargo, such as commodities, would effectively subsidize the shippers of highest value cargo.

Scope of paragraph 1

152. Concern was expressed with respect to the application of the limit on liability in paragraph 1 to “the carrier’s liability for breaches of its obligations under this Convention.” It was observed that this phrase had replaced the phrase “the carrier’s liability for loss of or damage to or in connection with the goods” throughout the text of the draft convention when it had been consolidated as A/CN.9/WG.III/WP.56. The phrase “loss of or damage to or in connection with the goods”, which had been used in the Hague-Visby Rules, had been considered vague, and as giving rise to uncertainty, and it was thought that the use of the phrase “breaches of its obligations under this Convention” was a drafting improvement that lent the draft convention greater clarity.

153. However, it was pointed out that while there may have been no intention in replacing the phrase to change the scope of the provision, it appeared that the limit on liability in paragraph 1 of the draft convention was broader than that of the Hague-Visby Rules, in that it applied to all breaches of the carrier’s obligations under the draft convention rather than simply relating to the loss or damage to or in connection with the goods. The Working Group was cautioned against over-estimating the difference in scope suggested by the two terms, and it was noted that the main additional obligation that was covered by both phrases was liability for misdelivery, which was also included in the Hague-Visby Rules, although not expressly. In addition, it was noted that the main additional obligation now included in the draft convention that had not been included in the Hague-Visby Rules was the liability of the carrier for misinformation. In regard to the different phrases, the question was raised whether the Working Group intended to limit the carrier’s liability with respect to all of the apparently broader category, or whether the limit on liability in paragraph 1 was intended to be confined to loss or damage related to the goods. The Secretariat was requested to review the drafting history of paragraph 1 with a view to making appropriate proposals to reflect the policy choice made by the Working Group.

Further consideration of draft article 62

154. The Working Group noted that, among the views expressed during the debate, there was a preponderance of opinion for using the liability limits set forth in the Hamburg Rules, with a more or less substantial increase, as a parameter for finding adequate liability limits for the draft convention. However, the Working Group also noted that there was a strongly supported preference for liability limits in the vicinity of the liability limits provided for in the Hague-Visby Rules. The Working Group therefore agreed that no decision on the limits of liability could be made at the present stage.

155. The Working Group further noted the interconnection between its consideration of the limit of liability and other aspects of the draft convention, including the special amendment procedure for the level of the limitation on the carrier’s liability (draft article 99); the number of countries required for the convention to enter into force (paragraph 1 of draft article 97); the provisions allowing for the application of other international treaties and of domestic law to govern the liability of the carrier in case of localized damages (draft articles 26 and the

envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192)) and the special rule for non-localized loss or damage (paragraph 2 of draft article 62).

156. The Working Group therefore agreed to revert to the issue of limits of liability after it had had an opportunity to examine chapter 20 (Final clauses).

Further consideration of the limits of liability

157. Following its earlier exploration of views, the Working Group proceeded to consider further paragraph 1 of draft article 62 on limits of liability, as well as related provisions, with a view to making progress in terms of arriving at figures that could be provisionally inserted into that article for the carrier's limitation of liability.

Associated issues

158. In keeping with its earlier discussion, the Working Group was reminded that there was support for the view expressed at that time that a discussion of the proposed limits of liability for insertion into paragraph 1 of article 62 should not be dissociated from a group of provisions, including: paragraph 2 of draft article 62, as well as to the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192), and draft articles 97 and 99 (see paragraph 135 above). The view was also expressed that other issues with respect to the overall balance of liabilities in the draft convention could be said to be associated with a discussion of the level of the carrier's limitation on liability, such as the period of responsibility of the carrier (draft article 11); the basis of liability of the draft convention (draft article 17); delay in delivery of the goods (draft article 21); the period for notice of loss, damage, or delay (draft article 23); the limitation of the carrier's liability for delay in delivery (draft article 63); and the special rules for volume contracts (draft article 89).

Domestic considerations

159. The Working Group was reminded that a number of States could face strong domestic opposition to changes in the existing limitation level for the carrier's liability in those States. For some, it was thought that although the limitation on liability in the Hague-Visby Rules was currently in force domestically, a small increase of that level would likely be acceptable, while with respect to others, there was some expectation that an increase of the limitation levels to those contained in the Hamburg Rules might be acceptable, but that no amount higher than that would be accepted. In that respect, there was some concern expressed regarding the overall increase that a specific domestic regime might undergo with such an increase in the limitation amounts, and it was observed that a large amount of world trade was currently conducted using limitation levels on the lower end of the scale. On the other end of the spectrum, it was recalled that it could be problematic for many States to accept any limitation level lower than that set out in the Hamburg Rules, and that previous increases in the limitation amounts set out in other international conventions had not caused major problems for States implementing them. Further, it was noted that there was some expectation that the limitation levels agreed in the draft convention might be slightly higher than those in the Hamburg Rules, given the passage of time since the adoption of the Hamburg Rules.

160. However, the Working Group also recognized that the attainment of a level of harmony between States currently party to the Hague Rules or the Hague-Visby Rules and those that

were Contracting States to the Hamburg Rules would be desirable, and would contribute greatly to the overall harmonization of the current regimes covering the international carriage of goods by sea. Concern was expressed that a failure to reach agreement in this regard could lead to renewed efforts toward the development of regional and domestic rules regarding the carriage of goods by sea, thus causing further fragmentation of the international scheme. There was support in the Working Group for the pursuit of productive discussions that would lead to a harmonized result.

Specific figures

161. In light of the considerations set out in paragraphs 157 to 160 above, and in light of the previous discussion in the Working Group on this subject during its current session (see, also, paragraphs 133 to 156 above), a number of specific proposals for the limitation of the carrier's liability were made. Those proposals, which received varying amounts of support, could be described as:

(a) A proposal to adopt slightly higher limitation amounts than those set out in the Hague-Visby Rules, i.e. slightly higher than 666.67 SDR per package and 2 SDR per kilogram of weight of the goods lost or damaged;

(b) A proposal to adopt the limitation amounts in the Hamburg Rules, i.e. 835 SDR per package and 2.5 SDR per kilogram;

(c) A proposal to adopt slightly higher limitation amounts than those in the Hamburg Rules, with no specific amount named;

(d) A proposal to adopt the 835 SDR per package limitation amount of the Hamburg Rules, but to slightly increase the per kilogram limitation;

(e) A proposal to adopt higher limitation amounts than those in the Hamburg Rules, i.e. 920 SDR per package and 8.33 SDR per kilogram; and

(f) A proposal to adopt still higher limitation amounts than those in the Hamburg Rules, i.e. 1,200 SDR per package and 8.33 per kilogram.

162. In addition to the proposal of specific figures for inclusion in paragraph 1 of draft article 62, there was support for treating the provisions listed in paragraph 135 in a manner such as to achieve an overall balance in the draft convention. In particular, if limitation levels on the higher end of the spectrum were chosen, there was support for the view that it would be appropriate to delete certain of those provisions, since the higher limitation amounts would provide sufficient protection for cargo interests.

Compromise proposal

163. In light of the thorough discussion of the issue that had taken place in the Working Group, and the possibility of an emerging consensus regarding the limitation of the carrier's liability in the draft convention, a compromise proposal was made. The elements of the proposal, which were to be treated as parts of an entire package, were as follows:

(a) The level of the carrier's limitation of liability to be inserted into paragraph 1 of draft article 62 should be the amounts set out in the Hamburg Rules, i.e. 835 SDR per package and 2.5 SDR per kilogram;

(b) The level of the carrier's limitation of liability for delay in delivery inserted into draft article 63 should be the same as that of the Hamburg Rules, i.e. 2.5 times the freight payable on the goods delayed;

(c) Paragraph 2 of article 62 with respect to non-localized damage to the goods was said to be in conflict with the limited network principle in draft article 26 and should be deleted;

(d) Draft article 99 should be deleted since the operation of the so-called "tacit amendment procedure" would require a State to denounce the Convention in cases where an amendment was agreed to which the State did not wish to be bound and since its operation could require as long as nine years to accomplish; and

(e) The Working Group should reverse its decision from its nineteenth session to include in the draft convention a provision on national law in proposed new draft article 26 bis (see A/CN.9/621, paras. 189 to 192).

164. There was a positive overall reception in the Working Group for the compromise package set out in the paragraph above, in recognition of the fact that a strong preference had been expressed in the Working Group for using the limits in the Hamburg Rules as a maximum or a minimum basis for further negotiations. A few concerns were raised with respect to some of its constituent elements as follows:

(a) Given the decision of the Working Group at its nineteenth session to subject the carrier's liability for delay in the delivery of goods to freedom of contract of the parties (see A/CN.9/621, paras. 177 to 184), it was thought that raising the limitation of the carrier's liability for delay to 2.5 times the freight from the current "one times the freight" currently in draft article 63 was not a meaningful bargaining chip in the overall compromise, since the carrier would have either excluded its liability for delay altogether, or would have, by implication, agreed to that amount in any event;

(b) A view was expressed that paragraph 2 of draft article 62 should be retained on the basis that, if the limitations on liability in the draft convention were high enough to allow for adequate compensation for damaged cargo, there would be no need to resort to the use of the higher liability limits set out in unimodal transport regimes pursuant to that provision. However, that same argument was also suggested as a reason for which to delete the provision, and it was observed that the prevailing preference during the nineteenth session of the Working Group had been in favour of its deletion (see A/CN.9/621, para. 200); and

(c) There was some support for the retention for the time being of the draft article 99 tacit amendment procedure, since it was thought to allow for a faster amendment process than a protocol to the convention. In this respect, a proposal as made that if draft article 99 were deleted, a so-called "sunset" clause should be included in the text in its stead, so as to provide that the draft convention would no longer be in force after a certain time.

165. While not considered as part of the overall compromise package, the Working Group was reminded that, as observed earlier in the session (see paragraphs 152 and 53 above), it should take into consideration concerns regarding the possible change in the scope of paragraph 1 of draft article 62, brought about by the current phrase in the text "the carrier's liability for breaches of its obligations under this Convention."

Provisional conclusions regarding the limitation on the carrier's liability:

166. It was provisionally decided that, pending further consideration of the compromise proposal on limitation of the carrier's liability: The limitation amounts of the Hamburg Rules would be inserted into the relevant square brackets in paragraph 1 of draft article 62, i.e. 835 SDR per package and 2.5 SDR per kilogram;

- A figure of "2.5 times" would be inserted into the remaining square brackets of draft article 63, and "one times" would be deleted;
- Square brackets would be placed around draft article 99 and paragraph 2 of draft article 62 pending further consideration of their deletion as part of the compromise package, and a footnote describing that approach would be inserted into the text of the draft convention duly noting that draft article 99 could cause constitutional problems in some states regardless of whether the Hamburg Rules limits or the Hague-Visby Rules limits were adopted;
- A footnote would be inserted to draft article 26 indicating that the Working Group was considering reversing the decision that it had taken during its nineteenth session to include an article provision regarding national law tentatively to be called article 26 bis; and
- The Secretariat was requested to review the drafting history of paragraph 1 with a view to making appropriate proposals with respect to the phrase "the carrier's liability for breaches of its obligations under this Convention."

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 62. Limitation of liability***Proposal regarding the limitation on the carrier's liability*

183. The Working Group was reminded that draft article 62 on limitation of liability had been subject to intense discussion at its previous session (see paras. 136 ff. of A/CN.9/642). It was further reminded that in light of the possibility of an emerging consensus regarding the limitation of the carrier's liability in the draft convention, a provisional compromise proposal had been made, which was to be treated as an entire package (see para. 166 of A/CN.9/642). This package included the figures as set out in paragraph 1 of draft article 62, the deletion of paragraph 2 of draft article 62, the deletion of draft article 99, the adjustment of draft article 63 to include a figure of "2.5 times" into the remaining square brackets of draft article 63 and to delete "one times" and the reversal of the Working Group's earlier decision to draft a new provision allowing for the application of national law in situations similar to those contemplated in draft article 27.

184. There was wide support for the efforts made by the Working Group, at its twentieth session, to arrive at a consensus solution for the question of liability limits. Nevertheless, there was strong support for the view that the liability limits currently stated within square brackets in the draft article should be regarded as a starting point for further negotiation. In order to

ensure that draft article 62 would preserve an equitable balance between carrier and cargo interests and to achieve a wider consensus and thus acceptability of the draft convention, a proposal was made to (i) adopt higher limitation amounts than those in the Hamburg Rules, i.e. 920 Special Drawing Rights (“SDR”) per package and 8 SDR per kilogram, and (ii) the deletion of paragraph 2 of draft article 62.

185. There was support for the view that the liability limits set forth in the Hamburg Rules and included in the provisional compromise as contained in paragraph 1 of draft article 62 were out of date. It was further observed that other international conventions that also dealt with transport of goods included higher figures than the draft convention. In that light, reference was made to CIM-COTIF and CMR, of which the latter contained liability limits of 8.33 SDR per kilogram of gross weight. Moreover, it was noted that the draft convention covered not only the carriage by sea, but that it covered multimodal transport, which made the application of the limits above the Hamburg Rules necessary. In addition, it was pointed out that the current wording of paragraph 1 of draft article 62 included all breaches of obligations and was not limited to loss or damage to goods, so that the Hamburg Rules were no longer sufficient.

186. In response, it was noted that the draft convention already represented a major shift in the allocation of risks, in particular in the increase in the carrier’s liability, as the carrier was now under a continuing obligation of seaworthiness and could no longer avail itself of the defence based on nautical fault. It was also noted that the figures in the provisional compromise as contained in paragraph 1 of draft article 62 had been a real compromise, as many jurisdictions had limitations according to the Hague-Visby Rules, which were below the Hamburg Rules, or even lower ones. It was added that even under the liability limits set out in the Hague-Visby Rules, about 90 per cent of cargo loss was fully compensated, since the value of most cargo carried by sea was lower than the Hague-Visby limits. Further, it was observed that, in an age of containerized transportation by larger ships, the increased figures would raise the carrier’s financial exposure to a level that would make the carrier’s liability nearly incapable of being insured at acceptable rates, thus, increasing the costs for transport and ultimately for the goods. In this light, the view was expressed by several delegations that the proposal for limits higher than currently contemplated was unrealistic and only motivated by political, not trade reasons. Some delegations expressed the concern that a move beyond the Hamburg Rules could eventually impede their countries’ accession to the draft convention. It was added that the increase of figures as proposed could prevent the draft convention from becoming a global, effective instrument, which harmonized international trade. The Working Group was cautioned not to destroy the important work, which they had so far reached by upsetting the previous provisional compromise.

187. In response it was observed, however, that the impact of increased liability limits on carriers’ liability insurance should not be overstated, as ship owners also benefited from global limitation of liability pursuant to the London Convention on Limitation for Maritime Claims (LLMC) and several domestic regimes to the same effect. The Working Group was invited not to flatly reject any proposal for increases in liability limits, but to explore avenues for further improving its earlier compromise on the matter. It was suggested, for example, that the Working Group could consider adopting the 835 SDR per package limitation amount of the Hamburg Rules, but to slightly increase the per kilogram limitation to 8 units of account per kilogram of the gross weight of the goods that were the subject of the claim or dispute. The view was expressed that that proposal could be a bridge between the two positions, as many of

the States that had favoured lower figures saw the per package limitation as the one that protected the carrier most. Alternatively, the Working Group might wish to agree on a higher limit per package, while retaining the limits per kilogram in the vicinity of the limit provided for in the Hamburg Rules.

188. In view of the different views that were expressed, the Working Group agreed to suspend its discussions on the issue of liability limits and the provisions which, according to the compromise reached at its twentieth session, were linked to a decision on liability limits, and to revert to it at a later stage of its deliberations.

Scope of paragraph 1 of draft article 62

189. The Working Group recalled that the phrase “for loss of or damage to [or in connection with] the goods” was deleted throughout the text of the draft convention and the phrase “for breaches of its obligations under this Convention” had been added in its stead, with appropriate footnotes (see fn. 169 of A/CN.9/WG.III/WP.101). The rationale for those changes was that the phrase deleted had caused considerable uncertainty and a lack of uniformity in interpretation following its use in the Hague and Hague-Visby Rules, particularly concerning whether or not it had been intended to include cases of misdelivery and misinformation regarding the goods. It was noted that the Secretariat had upon request reviewed the drafting history of paragraph 1, and had made the appropriate proposal as contained in A/CN.9/WG.III/WP.101, including the limitation on liability for misinformation and misdelivery.

190. In that context, some concern was voiced that misinformation should be left to national law. In response, it was stated that there should be no exception, as this would create uncertainty and unpredictability.

Declaration of value

191. It was proposed to move the phrase “except when the value of the good has been declared by the shipper and included in the contract particulars” to a separate provision, in order to distinguish more clearly between a normal hypothesis and a declaration of value. Some support was expressed in favour of the proposal, but the Working Group agreed to revert to the issue when it resumed its deliberations on draft article 62, paragraph 1.

Paragraph 2 of draft article 62

192. The views on paragraph 2 of draft article 62 differed and were linked to the respective view taken on paragraph 1. Support was expressed on its deletion, but only if the figures in paragraph 1 increased above the Hamburg Rules according to the aforementioned proposal. Other views expressed were that paragraph 2 should be deleted with the figures in paragraph 1 as contained in A/CN.9/WG.III/WP.101, because that formed part of the provisional package compromise. Another view expressed was to increase the figures in paragraph 1 as contained in the proposal, but to keep Variant B. A different view expressed was that national law should regulate the contents of paragraph 2. The Working Group took note of those views and agreed to revert to the issue when it resumed its deliberations on draft article 62, paragraph 1.

Paragraph 3

193. In keeping with the Working Group’s earlier decision to add road and rail cargo vehicles to draft article 26(1)(b) on deck cargo in order to give them equivalent status with containers (see above, paras. 73 to 82), a proposal was made to include road and rail cargo

vehicles in the text of paragraph 3 of draft article 62. Although some concern was reiterated from the earlier discussion that adding road and rail cargo vehicles to the text of draft article 62(3) could have unintended consequences in terms of limiting the per package limitation (see above, paras. 78 to 82), the Working Group was of the view that such a change would constitute an improvement to the text.

194. Subject to that adjustment, the Working Group approved the substance of draft article 62(3) and referred it to the drafting group.

Paragraph 4

195. The Working Group approved the substance of draft article 62(4) and referred it to the drafting group.

Further consideration of draft article 62

196. Following its earlier agreement to suspend discussions on the issue of liability limits and the provisions which, according to the provisional compromise reached at its twentieth session, were linked to a decision on liability limits, and to revert to it at a later stage of its deliberations (see above, paras. 183 to 188), the Working Group resumed its consideration of draft article 62.

197. A proposal was made by a large number of delegations for the resolution of the outstanding issue of the compromise package relating to the limitation levels of the carrier's liability in the following terms:

- The limitation amounts to be inserted into paragraph 1 of draft article 62 would be 875 SDR per package and 3 SDR per kilogram and the text of that paragraph would be otherwise unchanged;
- Draft article 99 and paragraph 2 of draft article 62 would be deleted;
- No draft article 27 bis would be included in the text providing for a declaration provision to allow a Contracting State to include its mandatory national law in a provision similar to that in draft article 27 (see footnote 56, A/CN.9/WG.III/WP.101); and
- The definition of "volume contract" in paragraph 2 of article 1 would be accepted.

198. There was widespread and strong support for the terms of the proposal, which was felt to be a very positive step forward towards resolving the outstanding issues surrounding the limitation of the carrier's liability and related issues. The Working Group was therefore urged to adopt that proposal in final resolution of those outstanding issues. There was also strong support expressed for that view.

199. Concerns were expressed that the proposed levels for the limitation of the carrier's liability were too high, and that there was no commercial need for such high limits, which were said to be unreasonable and unrealistic. There was some support for that view, particularly given that a number of delegations felt that the level of limitation of the Hague-Visby Rules was adequate for commercial purposes, and that the provisional compromise reached at the 20th session of the Working Group to include the limitation levels of the Hamburg Rules had been acceptable but only as a maximum in order to achieve consensus. The view was also

expressed that the levels proposed were so high as to be unacceptable, and it was observed that the higher levels could result in higher transportation costs for the entire industry.

200. Other concerns were expressed that, while the proposed increase in the limitation levels for the carrier's liability was welcome, other aspects of the proposal were not acceptable. The view was expressed that the definition of "volume contract" in draft article 1(2) should be further amended in order to provide greater protection for small shippers in light of the overall balance of the draft convention, particularly since freedom of contract provisions were thought to be destructive to provisions on mandatory protection for such shippers. Further, it was observed that the shipper was thought to bear a greater burden of proof than in previous regimes, particularly with respect to proving seaworthiness, and that, pursuant to draft article 36, the shipper was not able to restrict its liability. Other concerns were raised regarding the aspect of the compromise that would approve the text of paragraph 1 of draft article 62 as written, rather than deleting the phrase "for breaches of its obligations under this Convention" and re-inserting the phrase "for loss of or damage to the goods", and the perceived broader ability to limit liability that that text would afford the carrier. The particular example of draft article 29 concerning the obligation of the shipper and the carrier to provide information to each other was raised, where it was suggested that a failure to fulfil that obligation could result in unlimited liability for the shipper, but only limited liability for the carrier. In addition, concern was expressed regarding the deletion of draft article 62(2), since it was thought that the shipper would bear an unfair burden of proof by having to prove where the damage occurred, and that that provision should only have been deleted if a much higher limitation per kilogram had been agreed upon.

201. Other delegations expressed dissatisfaction with the proposal, but expressed a willingness to consider it further.

202. The Working Group, in general, expressed its broad support for the proposal, despite it not having met the expectations of all delegations. In response to concerns that the revised limitation levels should appear in square brackets in the text, since there had also been strong objections to the revised limits, it was decided that there was sufficient support to retain the revised limits in the text without square brackets. It was noted that, according to the practice of the Working Group, provisions were kept in square brackets only when no clear support was expressed in favour of the text in brackets.

203. Subject to implementation into the text of the proposal as outlined in paragraph 197 above, the Working Group approved the substance of draft article 62, paragraph 1, and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Chapter 12. Limits of liability

Draft article 61. Limits of liability

195. The Commission was reminded of the prolonged debate that had taken place in the Working Group concerning the monetary limits for the carrier's liability under the draft

Convention. The Commission was reminded, in particular, that the liability limits set forth in the draft article were the result of extensive negotiations concluded at the twenty-first session of the Working Group with the support of a large number of delegations and were part of a larger compromise package that included various other aspects of the draft Convention in addition to the draft article (see A/CN.9/645, para. 197). Not all delegations that had participated in the deliberations of the Working Group were entirely satisfied with those limitation levels and the large number of supporters of the final compromise included both delegations that had pleaded for higher limits and delegations that had argued for limits lower than those finally arrived at.

196. The Commission heard expressions of concern that the proposed levels for the limitation of the carrier's liability were too high and that there was no commercial need for such high limits, which were said to be unreasonable and unrealistic. There was some support for those concerns, in particular given that a number of delegations felt that the level of limitation of the Hague-Visby Rules was adequate for commercial purposes. It was said that it would have been possible for some delegations to make an effort to persuade their industry and authorities of the desirability of accepting liability limits as high as those set forth in the Hamburg Rules, as an indication of their willingness to achieve consensus. It was also said, however, that the levels now provided for in the draft article were so high as to be unacceptable and they might become an impediment for ratification of the Convention by some countries, which included large trading economies.

197. The Commission took note of those concerns. There was sympathy for the difficulties that existed in some countries to persuade industry and authorities to accept liability limits higher than they might have anticipated. Nevertheless, there was wide and strong support in the Commission for maintaining those limits so as not to endanger the difficult compromise that had been reached, which a large number of delegations were committed to preserving. It was noted that in some countries it had been difficult to gain support for the draft Convention, because domestic stakeholders had felt that the liability limits were lower than their expectations. It was hoped that those who now expressed objections to the liability limits in the draft article might likewise be able to join the consensus in the future. In the context of the draft article, however, the Commission was urged not to attempt to renegotiate the liability limits, even though they had not met the expectations of all delegations.

198. The Commission heard a proposal, which received some support, for attempting to broaden the consensus around the draft article by narrowing down the nature of claims to which the liability limits would apply in exchange for flexibility in respect of some matters on which differences of opinion had remained, including the applicability of the draft Convention to carriage other than sea carriage and the liability limits. The scope of the draft article, it was proposed, should be limited to "loss resulting from loss or damage to the goods, as well as loss resulting from misdelivery of the goods". It was said that such an amendment would help improve the balance between shipper and carrier interests, in view of the fact that the liability of the shipper was unlimited.

199. The Commission did not agree to the proposed amendment to paragraph 1, which was said to touch upon an essential element of the compromise negotiated at the Working Group. The Commission noted and confirmed the wide and strong support for not altering the elements of that general compromise, as well as the expressions of hope that ways be found to broaden even further its basis of support.

200. The Commission approved the substance of draft article 61 and referred it to the drafting group.

Limits Applicable to Non-localized Damages [Deleted]

Article 62. Limits of liability

Variant A of paragraph 2

[2. Notwithstanding paragraph 1 of this article, if (a) the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused] during the sea carriage or during the carriage preceding or subsequent to the sea carriage and (b) provisions of an international convention [or national law] would be applicable pursuant to article 27 if the loss, damage, [or delay] occurred during the carriage preceding or subsequent to the sea carriage, the carrier's liability for such loss, damage, [or delay] is limited pursuant to the limitation provisions of any international convention [or national law] that would have applied if the place where the damage occurred had been established, or pursuant to the limitation provisions of this Convention, whichever would result in the higher limitation amount.]

Variant B of paragraph 2

[2. Notwithstanding paragraph 1 of this article, if the carrier cannot establish whether the goods were lost or damaged [or whether the delay in delivery was caused] during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international [and national] mandatory provisions applicable to the different parts of the transport applies.]]

[Last version before deletion: A/CN.9/WG.III/WP.101]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(e) Treatment of non-localized damages

264. In light of the deliberations of the Working Group regarding the limits of liability, the view was expressed that the limits set out in the Hague-Visby Rules were too low to be acceptable as a default rule in case of non-localized damages. Support was expressed for a proposal that the following provision should be inserted after subparagraph 6.7.1: "Notwithstanding the provisions of subparagraph 6.7.1, if the carrier cannot establish whether the goods were lost or damaged during the sea carriage or during the carriage preceding or subsequent to the sea carriage, the highest limit of liability in the international and national mandatory provisions that govern the different parts of the transport shall apply." It was explained that, where a non-localized damage occurred, the damages to the goods usually were detected at the place of receipt, which meant that only small amounts of goods were damaged (see A/CN.9/WG.III/WP.26). In addition to the proposal that higher limits of liability should apply in case of non-localized damages, it was suggested that the draft instrument should be amended to reflect the policy that, should the carrier wish to avoid the higher limit of liability,

it should bear the burden of proving the part of the carriage during which the damage had occurred. It was stated that such a policy regarding the burden of proof was justified by the fact that the carrier was in a better position than the shipper to investigate the events that had occurred during the voyage.

265. In response to a question regarding the reasons why the draft instrument should apply as a default rule in case of non-localized damages, the view was reiterated that the main consideration regarding that matter should be to ensure predictability and certainty regarding the liability regime applicable to non-localized damages.

266. As a matter of drafting, it was suggested that the draft instrument might need to reflect more clearly the legal regimes governing localized damages under subparagraph 4.2.1 and non-localized damages under subparagraph 6.7.1. The Secretariat was invited to consider the need for improved consistency between those two provisions when preparing a revised draft of the instrument.

267. After discussion, the Working Group decided that the proposal in paragraph 264 above should be reflected between square brackets as one possible variant in a revised version of the draft instrument to be considered at a future session.

[12th Session of WG III (A/CN.9/544) ; referring to A/CN.9/WG.III/WP.32]

2. Scope of application and localized or non-localized damage (draft article 18(2))

44. By way of introduction, the Working Group was reminded that article 18(2) was a new provision in the draft instrument, and that further alternative texts had been proposed (see A/CN.9/WG.III/WP.32, footnote 93).

45. It was stated that a key question with respect to article 18(2) was whether it was advisable to use the same limits of liability in the case of non-localized damage as in the case of localized damage, or whether regard should be had to the other possible limits that might apply with a view to choosing the highest one. It was also stated that a key question was whether it was appropriate to have a specific liability limit for non-localized damage. It was suggested that those issues would be difficult to decide until the limits of liability in article 18(1) had been chosen, and that if the “per kilogram” limit decided upon for article 18(1) by the Working Group was at the same level as that in the Hague-Visby Rules, it might be appropriate to look to unimodal transport conventions in order to select a higher limit for non-localized damage. In addition, it was suggested that regard to national mandatory provisions could also be had, particularly if the scope of application of the draft instrument was very broad and potentially encompassed long inland transport legs. Caution was expressed, however, that certain mandatory national provisions might have no liability limit at all, and that consequently, it might not be appropriate to look to national law in this regard. It was also pointed out that different liability limits for localized damage and non-localized damage had been used in other instruments, for example in the 1980 Convention on International Multimodal Transport of Goods which contained a similar provision on localized damage, as did the UNCTAD/ICC Rules. For these reasons, it was proposed that article 18(2) should be maintained in the draft instrument.

46. A series of alternative proposals were presented with respect to maintaining article 18(2) in the draft instrument. It was suggested that article 18(2) should be maintained in the draft instrument but kept in square brackets, and that as a matter of drafting, the phrase “international and national mandatory provisions” should be changed to “international or national mandatory provisions”. A further refinement suggested was to keep article 18(2) in square brackets pending the insertion of liability limits in article 18(1), but to insert square brackets around the phrase “and national mandatory provisions” in order to mirror the current text in article 8. Another alternative suggested was that article 18(1) could establish the specific liability limit for localized damage, while article 18(2) could establish a second specific liability limit for non-localized damage without any reference to other liability limits in international and national mandatory provisions. There was some support for each of these alternative proposals.

47. There was strong support for the deletion of article 18(2). The Working Group was reminded that the greater the number of exceptions that were created to the broad application of the draft instrument, the more it could undermine the goals of predictability and uniformity. It was suggested that in order to achieve the maximum degree of uniformity possible, the limited network exception in article 8 should be kept as narrow as possible, and the application of article 8 would adequately cover the concerns expressed with respect to non-localized damage. It was further stated that article 18(2) was a repetition of the principle set out in article 8 with respect to localized damage but with a different allocation of the burden of proof. However, it was also suggested that article 8 and article 18(2) were not incompatible. In addition, it was reiterated that the liability limits in the Hague-Visby Rules were often much higher in practice than might appear at first sight, and that given the volume of container traffic and the “per package” liability limit set out therein, they were often much higher than those in the unimodal transport regimes where the liability limits for recovery were based only on weight. The Working Group was also reminded that it had decided that the emphasis in the draft instrument was appropriately placed on the maritime leg, and it was suggested that it was in keeping with this approach that the liability limit for non-localized damage should be that set out for the maritime leg of the transport.

48. With respect to the burden of proof in the case of non-localized damage, it was stated that if the liability limit was low, a carrier might not even attempt to prove where the damage occurred so as to limit a claimant’s recovery to a lower liability limit. In response, it was stated that carriers would be very interested in establishing where the damage occurred so that they could bring recourse action against the subcontractor who was responsible for the damage.

49. In support of the deletion of article 18(2), the Working Group was warned against drawing an artificial distinction between localized and non-localized damage, since the cargo in issue was intended to be maritime cargo, regardless of which leg of the transport it was on, and that the risks would thus be the same, the values of the cargo would be the same, the parties involved would be the same, and the essence of which party insured the goods for what amount would also be the same. It was pointed out that the purpose of liability limits was closely connected to the liability system itself, and that they were part of the overall balance of the liability regime. It was suggested that it might not be appropriate to upset this regime simply because damage might occur outside of the sea leg. However, the importance of draft article 18(2) was emphasized, based on the view that damage to cargo was usually non-localized and that the apparent exception set out in article 18(2) risked becoming the rule, particularly since

damage was often discovered only when the container was opened by the consignee, notwithstanding that some ports were capable of photographing containers to ascertain external damage.

50. The Working Group took note that opinions were fairly evenly divided between those who favoured the deletion of draft article 18(2) in its entirety, and those who favoured retaining it. Those in favour of deletion held that position firmly. However, some of those who favoured maintaining the provision for the moment did so with a number of nuances. Having noted the positions expressed during the discussion with respect to draft article 18(2), the Working Group decided that it would be appropriate to maintain the draft article in square brackets pending the decision of the Working Group on the liability limit set forth in draft article 18(1).

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Paragraph 2

General discussion

45. It was recalled that paragraph 2 had been recently discussed at length (A/CN.9/544, paras. 43-50), and that the Working Group had been fairly evenly divided between those who favoured retaining the paragraph and those who favoured its deletion. It had been decided at that time to maintain the provision in square brackets pending the decision of the Working Group on the liability limit set out in paragraph 1.

Delay in delivery

46. It was suggested that delay in delivery should be treated in similar fashion to loss or damage to the goods in paragraph 2. However, it was noted that delays in delivery in intermodal transport would generally be well-documented as the goods changed between modes of transport, such that proving where the delay occurred would be less problematic than proving where concealed damage occurred. It was suggested in response that if the liability limit for damages for delay in draft article 16 remained at a low level, the carrier might not have any incentive to establish where the delay occurred unless the carrier could otherwise be subject to a higher liability limit. However, the point was made that in fact it would be in the carrier's interest to establish where the delay occurred in order to bring a recourse action against the party who caused the delay. Questions were raised regarding whether a rule in this regard would be too favourable to cargo interests, since it was often difficult to decide what was the real cause of the delay, for example, a one-day delay caused by a rail carrier that ultimately resulted in the container missing its ship. Support was expressed both in favour of and against a provision similar to paragraph 2 regarding delays in delivery.

Conclusions reached by the Working Group on paragraph 2

47. After discussion, the Working Group decided that:

- The text of paragraph 2 would be maintained in square brackets;
- Reference to delay in delivery would be introduced in square brackets in the text of paragraph 2, for continuation of the discussion on that issue.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]***Paragraph (2)***

175. The Working Group next considered paragraph (2) of draft article 64, which contained two variants, both of which set out a special regime for the limitation level with respect to non-localized loss of or damage to the goods. The Working Group agreed to defer its consideration of that provision until it had concluded its discussion at this session on the relationship of the draft convention with other conventions.

Conclusions reached by the Working Group regarding draft article 64(2):

176. The Working Group agreed to defer its consideration of draft article 64(2) until after its discussion of the relationship of the draft convention with other conventions (see paras. 236-238 below).

[* * *]

Draft article 64. Basis of limitation of liability (continued from paras. 175-176 above)***Paragraph (2) (continued)***

236. The Working Group recalled that draft article 64(2) contained two variants, both of which set out a special regime for the limitation level with respect to non localized loss or damage of goods. It further recalled that it had agreed to defer its consideration of that paragraph until after its discussion of the relationship of the draft convention with other conventions (see paras. 175-176 above).

237. The view was expressed that, given the large number of packages that might be placed in a single container, the per package limitation in container trade might in practice lead to a higher compensation in maritime transport as compared to inland transport (see the example in para. 231 above). Therefore, a proposal was made to delete paragraph (2), since it was thought that shippers would obtain higher recovery amounts for damage under the liability regime of the draft convention, and that recovery for non-localized damage should also therefore be subject to the general liability regime under the draft convention. That proposal received some support, with some delegations suggesting that the limitation could be dealt with in draft article 27, and that, in any event, paragraph (2) introduced lack of certainty into the regime. However, it was said that it was premature to delete paragraph (2) and that the Working Group should reconsider the issue once the limitation levels in draft article 64(1) had been determined. It was also suggested that both variants in paragraph (2) were unclear and, if either were to be retained, they would require substantial redrafting.

Conclusions reached by the Working Group regarding draft article 64(2):

238. As this was the final issue discussed at its eighteenth session, due to a lack of time, the Working Group suspended its discussion and agreed to continue discussions on draft article 64(2) at a future session.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Paragraph 2 of draft article 62(2) regarding the limits of liability**

194. The Working Group proceeded to consider the text of paragraph 2 of draft article 62 as found in A/CN.9/WG.III/WP.81.

195. Strong support was expressed for the deletion of draft paragraph 2 in its entirety. The view was expressed that the provision in issue was ambiguous and that it had no place in a “maritime plus” convention. In support of that view, it was said that it was important to recall that the subject matter of the provision was non-localized damage to the goods. Since by definition, it would be unknown during which leg of the transport the damage occurred, only the contracting carrier could be held liable for such damage, and not the performing party. A provision such as draft paragraph 2 was said to undermine the very purpose of adopting an international convention. It was argued, in that connection, that although a limit on the liability of the carrier had not been settled upon, it surmised from previous discussions (see A/CN.9/616, paras. 162 to 174) that in the majority of cases, the limit would be sufficient to cover the damage to any goods, even particularly valuable goods, based on the per package limitation rate. The only result of a provision such as paragraph 2, it was said, would be to undermine the application of the per package limitation amounts in the draft convention by substituting the lesser per kilogram limitation under other transport conventions such as the CMR or CIM COTIF. Further, since only the contracting carrier would be held liable for nonlocalized damage, it was said that there was no logical explanation for the approach suggested in paragraph 2.

196. In addition to arguments raised in favour of the compensation rates of the per package rule in the draft convention (for both sides of the discussion, see, in general, A/CN.9/616, paras. 162 to 174) and for the suggestion that draft paragraph 2 should therefore be deleted, problems were indicated regarding the operation of the draft provision. In particular, it was said that where the damage could be said to occur during two legs of the transport, as for example, in the case of perishable goods in a container that was not properly refrigerated, it was not possible to determine whether draft paragraph 2 should apply. It was also noted that it would often be difficult to determine which transport regime offered the higher limitation amount, since the decision would entail a comparison of per package and per kilogram limitation rates, and, it was said, for goods weighing less than 82 kilograms per package, the per package limitation amount in the draft convention would always result in a higher limitation amount. Further complications were indicated with respect to the intended operation of draft paragraph 2, including difficulty regarding how to decide whether a limit on liability was unbreakable and with respect to the general increase in uncertainty and a need for litigation that it was said paragraph 2 would cause. It was also suggested that draft paragraph 2 was inconsistent with the burden of proof regime under draft article 26.

197. In response, strong support was also expressed for retaining the text of draft paragraph 2, at least in square brackets, until the Working Group had decided on what the limitation level in draft paragraph 1 would be. It was pointed out that the low limitation rate of the Hague-Visby Rules might not be considered sufficient in the case of, for example, heavy machinery cargo, which would not be subject to the per package rule, but would rather benefit from the higher per kilogram rates of the other transport conventions.

198. Views were also expressed regarding what aspects the text should contain, if it were kept. Amongst those that favoured retaining the text of draft paragraph 2, at least in square brackets, there was a preference expressed for Variant A of the draft provision as being more clearly drafted. In terms of the phrase “[or national law]”, there was support both for its retention and its deletion.

199. Further, there was support in the Working Group for the view that, in spite of the arguments for and against retaining draft paragraph 2, the clearest solution to the problem would be to have a suitable limitation on liability in paragraph 1 of draft article 62 apply in the case of all non-localized damage to goods. In such a situation, there was support in the Working Group for the view that draft paragraph 2 could be deleted. In light of that view, it was suggested that draft paragraph 2 should be retained in square brackets pending a decision on paragraph 1 of draft article 62. However, the Working Group was also reminded that for some, the compromise reached regarding the disposition of the phrase “or national law” in draft article 26(1) was closely tied to the disposition of draft article 62(2), particularly with respect to deletion of the phrases “or national law”, and it was suggested that draft article 26(1) should also be placed in square brackets pending the disposition of draft article 62(2).

Conclusions reached by the Working Group regarding paragraph 2 of draft article 62

200. The Working Group recognized the broadly prevailing preference for the deletion of draft article 62(2) but decided to retain the text in square brackets as it appeared in A/CN.9/WG.III/WP.81.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Further consideration of draft article 62

154. The Working Group noted that, among the views expressed during the debate, there was a preponderance of opinion for using the liability limits set forth in the Hamburg Rules, with a more or less substantial increase, as a parameter for finding adequate liability limits for the draft convention. However, the Working Group also noted that there was a strongly supported preference for liability limits in the vicinity of the liability limits provided for in the Hague-Visby Rules. The Working Group therefore agreed that no decision on the limits of liability could be made at the present stage.

155. The Working Group further noted the interconnection between its consideration of the limit of liability and other aspects of the draft convention, including the special amendment procedure for the level of the limitation on the carrier’s liability (draft article 99); the number of countries required for the convention to enter into force (paragraph 1 of draft article 97); the provisions allowing for the application of other international treaties and of domestic law to govern the liability of the carrier in case of localized damages (draft articles 26 and the envisaged text of new draft article 26 bis (see A/CN.9/621, paras. 189 to 192)) and the special rule for non-localized loss or damage (paragraph 2 of draft article 62).

156. The Working Group therefore agreed to revert to the issue of limits of liability after it had had an opportunity to examine chapter 20 (Final clauses).

Further consideration of the limits of liability

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Specific figures

161. In light of the considerations set out in paragraphs 157 to 160 above, and in light of the previous discussion in the Working Group on this subject during its current session (see, also, paragraphs 133 to 156 above), a number of specific proposals for the limitation of the carrier's liability were made. Those proposals, which received varying amounts of support, could be described as:

(a) A proposal to adopt slightly higher limitation amounts than those set out in the Hague-Visby Rules, i.e. slightly higher than 666.67 SDR per package and 2 SDR per kilogram of weight of the goods lost or damaged;

(b) A proposal to adopt the limitation amounts in the Hamburg Rules, i.e. 835 SDR per package and 2.5 SDR per kilogram;

(c) A proposal to adopt slightly higher limitation amounts than those in the Hamburg Rules, with no specific amount named;

(d) A proposal to adopt the 835 SDR per package limitation amount of the Hamburg Rules, but to slightly increase the per kilogram limitation;

(e) A proposal to adopt higher limitation amounts than those in the Hamburg Rules, i.e. 920 SDR per package and 8.33 SDR per kilogram; and

(f) A proposal to adopt still higher limitation amounts than those in the Hamburg Rules, i.e. 1,200 SDR per package and 8.33 per kilogram.

162. In addition to the proposal of specific figures for inclusion in paragraph 1 of draft article 62, there was support for treating the provisions listed in paragraph 135 in a manner such as to achieve an overall balance in the draft convention. In particular, if limitation levels on the higher end of the spectrum were chosen, there was support for the view that it would be appropriate to delete certain of those provisions, since the higher limitation amounts would provide sufficient protection for cargo interests.

Compromise proposal

163. In light of the thorough discussion of the issue that had taken place in the Working Group, and the possibility of an emerging consensus regarding the limitation of the carrier's liability in the draft convention, a compromise proposal was made. The elements of the proposal, which were to be treated as parts of an entire package, were as follows:

(a) The level of the carrier's limitation of liability to be inserted into paragraph 1 of draft article 62 should be the amounts set out in the Hamburg Rules, i.e. 835 SDR per package and 2.5 SDR per kilogram;

(b) The level of the carrier's limitation of liability for delay in delivery inserted into draft article 63 should be the same as that of the Hamburg Rules, i.e. 2.5 times the freight payable on the goods delayed;

(c) Paragraph 2 of article 62 with respect to non-localized damage to the goods was said to be in conflict with the limited network principle in draft article 26 and should be deleted;

(d) Draft article 99 should be deleted since the operation of the so-called “tacit amendment procedure” would require a State to denounce the Convention in cases where an amendment was agreed to which the State did not wish to be bound and since its operation could require as long as nine years to accomplish; and

(e) The Working Group should reverse its decision from its nineteenth session to include in the draft convention a provision on national law in proposed new draft article 26 bis (see A/CN.9/621, paras. 189 to 192).

164. There was a positive overall reception in the Working Group for the compromise package set out in the paragraph above, in recognition of the fact that a strong preference had been expressed in the Working Group for using the limits in the Hamburg Rules as a maximum or a minimum basis for further negotiations. A few concerns were raised with respect to some of its constituent elements as follows:

(a) Given the decision of the Working Group at its nineteenth session to subject the carrier’s liability for delay in the delivery of goods to freedom of contract of the parties (see A/CN.9/621, paras. 177 to 184), it was thought that raising the limitation of the carrier’s liability for delay to 2.5 times the freight from the current “one times the freight” currently in draft article 63 was not a meaningful bargaining chip in the overall compromise, since the carrier would have either excluded its liability for delay altogether, or would have, by implication, agreed to that amount in any event;

(b) A view was expressed that paragraph 2 of draft article 62 should be retained on the basis that, if the limitations on liability in the draft convention were high enough to allow for adequate compensation for damaged cargo, there would be no need to resort to the use of the higher liability limits set out in unimodal transport regimes pursuant to that provision. However, that same argument was also suggested as a reason for which to delete the provision, and it was observed that the prevailing preference during the nineteenth session of the Working Group had been in favour of its deletion (see A/CN.9/621, para. 200); and

(c) There was some support for the retention for the time being of the draft article 99 tacit amendment procedure, since it was thought to allow for a faster amendment process than a protocol to the convention. In this respect, a proposal as made that if draft article 99 were deleted, a so-called “sunset” clause should be included in the text in its stead, so as to provide that the draft convention would no longer be in force after a certain time.

165. While not considered as part of the overall compromise package, the Working Group was reminded that, as observed earlier in the session (see paragraphs 152 and 53 above), it should take into consideration concerns regarding the possible change in the scope of paragraph 1 of draft article 62, brought about by the current phrase in the text “the carrier’s liability for breaches of its obligations under this Convention.”

Provisional conclusions regarding the limitation on the carrier’s liability:

166. It was provisionally decided that, pending further consideration of the compromise proposal on limitation of the carrier’s liability: The limitation amounts of the Hamburg Rules

would be inserted into the relevant square brackets in paragraph 1 of draft article 62, i.e. 835 SDR per package and 2.5 SDR per kilogram;

- A figure of “2.5 times” would be inserted into the remaining square brackets of draft article 63, and “one times” would be deleted;
- Square brackets would be placed around draft article 99 and paragraph 2 of draft article 62 pending further consideration of their deletion as part of the compromise package, and a footnote describing that approach would be inserted into the text of the draft convention duly noting that draft article 99 could cause constitutional problems in some states regardless of whether the Hamburg Rules limits or the Hague-Visby Rules limits were adopted;
- A footnote would be inserted to draft article 26 indicating that the Working Group was considering reversing the decision that it had taken during its nineteenth session to include an article provision regarding national law tentatively to be called article 26 bis; and
- The Secretariat was requested to review the drafting history of paragraph 1 with a view to making appropriate proposals with respect to the phrase “the carrier’s liability for breaches of its obligations under this Convention.”

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Paragraph 2 of draft article 62

192. The views on paragraph 2 of draft article 62 differed and were linked to the respective view taken on paragraph 1. Support was expressed on its deletion, but only if the figures in paragraph 1 increased above the Hamburg Rules according to the aforementioned proposal. Other views expressed were that paragraph 2 should be deleted with the figures in paragraph 1 as contained in A/CN.9/WG.III/WP.101, because that formed part of the provisional package compromise. Another view expressed was to increase the figures in paragraph 1 as contained in the proposal, but to keep Variant B. A different view expressed was that national law should regulate the contents of paragraph 2. The Working Group took note of those views and agreed to revert to the issue when it resumed its deliberations on draft article 62, paragraph 1.

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196. Following its earlier agreement to suspend discussions on the issue of liability limits and the provisions which, according to the provisional compromise reached at its twentieth session, were linked to a decision on liability limits, and to revert to it at a later stage of its deliberations (see above, paras. 183 to 188), the Working Group resumed its consideration of draft article 62.

197. A proposal was made by a large number of delegations for the resolution of the outstanding issue of the compromise package relating to the limitation levels of the carrier’s liability in the following terms:

- The limitation amounts to be inserted into paragraph 1 of draft article 62 would be 875 SDR per package and 3 SDR per kilogram and the text of that paragraph would be otherwise unchanged;

- Draft article 99 and paragraph 2 of draft article 62 would be deleted;
- No draft article 27 bis would be included in the text providing for a declaration provision to allow a Contracting State to include its mandatory national law in a provision similar to that in draft article 27 (see footnote 56, A/CN.9/WG.III/WP.101); and
- The definition of “volume contract” in paragraph 2 of article 1 would be accepted.

198. There was widespread and strong support for the terms of the proposal, which was felt to be a very positive step forward towards resolving the outstanding issues surrounding the limitation of the carrier’s liability and related issues. The Working Group was therefore urged to adopt that proposal in final resolution of those outstanding issues. There was also strong support expressed for that view.

199. Concerns were expressed that the proposed levels for the limitation of the carrier’s liability were too high, and that there was no commercial need for such high limits, which were said to be unreasonable and unrealistic. There was some support for that view, particularly given that a number of delegations felt that the level of limitation of the Hague-Visby Rules was adequate for commercial purposes, and that the provisional compromise reached at the 20th session of the Working Group to include the limitation levels of the Hamburg Rules had been acceptable but only as a maximum in order to achieve consensus. The view was also expressed that the levels proposed were so high as to be unacceptable, and it was observed that the higher levels could result in higher transportation costs for the entire industry.

200. Other concerns were expressed that, while the proposed increase in the limitation levels for the carrier’s liability was welcome, other aspects of the proposal were not acceptable. The view was expressed that the definition of “volume contract” in draft article 1(2) should be further amended in order to provide greater protection for small shippers in light of the overall balance of the draft convention, particularly since freedom of contract provisions were thought to be destructive to provisions on mandatory protection for such shippers. Further, it was observed that the shipper was thought to bear a greater burden of proof than in previous regimes, particularly with respect to proving seaworthiness, and that, pursuant to draft article 36, the shipper was not able to restrict its liability. Other concerns were raised regarding the aspect of the compromise that would approve the text of paragraph 1 of draft article 62 as written, rather than deleting the phrase “for breaches of its obligations under this Convention” and re-inserting the phrase “for loss of or damage to the goods”, and the perceived broader ability to limit liability that that text would afford the carrier. The particular example of draft article 29 concerning the obligation of the shipper and the carrier to provide information to each other was raised, where it was suggested that a failure to fulfil that obligation could result in unlimited liability for the shipper, but only limited liability for the carrier. In addition, concern was expressed regarding the deletion of draft article 62(2), since it was thought that the shipper would bear an unfair burden of proof by having to prove where the damage occurred, and that that provision should only have been deleted if a much higher limitation per kilogram had been agreed upon.

201. Other delegations expressed dissatisfaction with the proposal, but expressed a willingness to consider it further.

202. The Working Group, in general, expressed its broad support for the proposal, despite it not having met the expectations of all delegations. In response to concerns that the revised limitation levels should appear in square brackets in the text, since there had also been strong objections to the revised limits, it was decided that there was sufficient support to retain the revised limits in the text without square brackets. It was noted that, according to the practice of the Working Group, provisions were kept in square brackets only when no clear support was expressed in favour of the text in brackets.

203. Subject to implementation into the text of the proposal as outlined in paragraph 197 above, the Working Group approved the substance of draft article 62, paragraph 1, and referred it to the drafting group.

Article 60. Limits of liability for loss caused by delay

Subject to article 61, paragraph 2, compensation for loss of or damage to the goods due to delay shall be calculated in accordance with article 22 and liability for economic loss due to delay is limited to an amount equivalent to two and one-half times the freight payable on the goods delayed. The total amount payable pursuant to this article and article 59, paragraph 1, may not exceed the limit that would be established pursuant to article 59, paragraph 1, in respect of the total loss of the goods concerned.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]

69. In relation to subparagraph 6.4.2 it was observed that this provision dealt with amounts payable for losses due to delay but not with compensation for loss or damage to the goods. It was stated that since the value of goods was only relevant for calculating compensation for damage or loss, the method for limiting liability in case of delay should be by reference to the amount of the freight. Differing views were expressed as to the limitation that should apply under this provision ranging from the amount of freight payable to an amount equivalent to four times the freight payable for the delayed goods. The view was expressed that the matter should be left to national law. Another view was expressed that whatever amount was agreed upon with regard to the limitation of liability should be mandatory to avoid a risk that standard clauses would be used to limit carrier liability below the amount specified in subparagraph 6.4.2. It was said that the Working Group should also consider how this provision would operate when combined with the overall limit of liability that could be found in paragraph 6.7. It was decided that the limits should be revisited once the provisions on liability and the scope of the draft instrument had been settled.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Paragraph 2

“loss not resulting from loss of or damage to the goods carried”

25. Wide support was expressed in favour of retaining in the draft instrument a provision limiting the liability of the carrier for consequential damages (also referred to as “pure economic loss”) resulting from delay in delivery. It was pointed out that such a provision was commonly encountered in international instruments regulating rail and road carriage. As to the formulation of that provision, it was widely felt that the situation where consequential damages were incurred should be described in clearer and less cumbersome wording than current paragraph 2 (“loss not resulting from loss of or damage to the goods carried”).

“[... times the freight payable on the goods delayed]”

26. A question was raised as to the reasons for a specific method (i.e. reference to the freight) to be used for determining the liability of the carrier for consequential damages (and the limitation of such liability) instead of using the general method (i.e., reference to the value of the goods) set forth in draft articles 17 and 18 to calculate compensation in cases of loss or damage to the goods. It was explained that the consequential damages were conceptually distinct from damages to the goods and had no necessary relationship with the value of the goods. As illustrations of that distinction, it was recalled that several existing transport laws and international instruments made reference to the freight for the calculation of the compensation for consequential damages. However, it was also pointed out that the amount of consequential damages might be considerably higher than the value of the goods, while the freight was typically a small fraction of that value. A suggestion that both methods might be combined along the lines of “[... times the freight payable on the goods delayed, or the limit of liability set forth in article 18, whichever is the highest]” received little support.

27. The discussion focused on the multiplier to be applied if the reference to the freight was to be used. Considerable support was expressed in favour of limiting at a low level the compensation owed by the carrier for consequential damages in case of delayed delivery. Accordingly, it was suggested that the limit should be no higher than (one times) the amount of the freight payable on the goods delayed. Suggestions that alternative multipliers such as 2.5 or 4 should also be considered for continuation of the discussion did not receive considerable support. Strong concern was expressed regarding the possibility to break the limit of such compensation under draft article 19 (for continuation of the discussion, see below, paras. 52-62).

Contractual freedom

28. As a further way of limiting the effect of a provision establishing the liability of the carrier of delayed goods for consequential damages, it was suggested that paragraph 2 should be subject to contractual freedom of the parties. A view held by a considerable number of delegations was that such a reference to contractual freedom would defeat the general principle expressed as a matter of public policy in paragraph 1 (see above, para. 22). However, it was also agreed that the issue might need to be further considered under draft article 19 regarding the loss of the right to limit liability, and also in the context of the general discussion of party autonomy under chapter 19. In that context, it was recalled that a proposal for a revision of

paragraph 2 based on freedom of contract had been made in document A/CN.9/WG.III/WP.34, paragraph 40.

Possible conversion to total loss

29. A proposal was made, based on article 20(1) of the Convention on the Contract for the International Carriage of Goods by Road (CMR), to the effect that, after expiry of a fixed time period of 90 days from the time when the carrier took over the goods, the fact that goods had not been delivered would be conclusive evidence of the loss of the goods, and the person entitled to make a claim might choose to treat them as lost. While some support was expressed for the proposal, it was pointed out that a provision along those lines might make the draft instrument unnecessarily complex, particularly in view of the fact that additional rules might become necessary to avoid over-compensation if the goods were found after expiry of the 90-day period. Such issues as the passing of ownership of the goods to the carrier or the option to be provided to the shipper to choose between the goods and the compensation were generally found too complex and detailed to be needed in the draft instrument.

Placement of paragraph 2

30. The view was expressed that paragraph 2 might be better located as part of draft article 18. It was generally felt that the issue might need to be reconsidered at a future session.

Conclusions reached by the Working Group on paragraph 2

31. After discussion, the Working Group decided that:

- The limitation of the amount payable for consequential damages in case of delayed delivery should be calculated by reference to the freight;
- The words “[one times] the freight payable on the goods delayed” would be inserted in paragraph 2 for continuation of the discussion at a future session;
- The words “[Unless otherwise agreed]” would be inserted at the beginning of paragraph 2, together with a footnote indicating that the issue would need to be reassessed in the context of both draft article 19 and chapter 19. A provision along the lines of article 7(1) of the United Nations Sales Convention should be introduced to promote uniformity in the interpretation of the draft instrument.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 65: Liability for loss caused by delay

Variant A or B

181. The Working Group had before it two variants and proceeded to consider which was preferable. It was noted that there was little substantive difference between Variant A or Variant B. However, Variant A received greater support on the ground that it provided greater clarity.

182. The Working Group was reminded of the objections that had been raised in connection with the treatment of liability for delay in the draft convention and that, for countries that had

raised such objections, either variant of draft article 65 was only acceptable if the draft convention would also contain an equivalent provision for the shipper's liability for delay.

Nature of loss covered by the draft article

183. With a view to facilitating its consideration of the draft article, the Working Group was invited to consider the various types of loss that might be caused by delay in delivery of goods and how each category would be dealt with under the draft convention. Loss caused by delay was said to fall under essentially three categories. The first category was physical damage or loss of goods (for example, of perishable goods, such as fruits or vegetables). The second category was economic loss sustained by the consignee due to a decrease in the market value of the goods between the time of their expected delivery and the time of their actual delivery. The third category was pure economic loss sustained by the consignee, for example where an industrial plant could not operate because components and parts of an essential machine were delivered late.

184. It was noted that the first category of damage caused by delay was clearly outside the scope of draft article 65, as it was covered by the provisions on the calculation of compensation for physical loss of the goods in draft article 23. The third category of loss (pure economic loss) was said to fall clearly under draft article 65. However, as regards the second category (i.e. loss of market value), the situation was said to be unclear. The Working Group concurred with that analysis and with the need for making it clear that draft article 65 was only concerned with pure economic (consequential) loss and that decline in the good's market value was a type of loss that should be covered by draft article 23.

Limitation level for loss caused by delay

185. There was some support for the suggestion that the main parameter for establishing the carrier's liability for delay should be the same as the calculation of compensation for physical damage to the goods in accordance with draft article 23, paragraph 1, namely the market value of the goods at the place of destination. Moving away from the value of freight as a factor for calculating compensation was said to be justified by the fact that freight rates were subject to large fluctuations, with current rates being much lower than, for example, at the time the Hamburg Rules were adopted, in 1978. Maintaining freight as a factor would therefore mean affording the shipper and the consignee much lower protection than in the past.

186. Yet another proposal was to link the limit of liability to whichever was the lesser of the actual amount of the loss or two and one-half times the freight payable for the goods delayed or the total amount payable as freight for all the goods shipped. That proposal received some support and a suggestion was made that further research be undertaken on the utility of referring to the value of goods in determining liability for loss caused by delay.

187. The prevailing view, however, was that, in keeping with other existing instruments, the amount of freight payable on the goods delayed was a more suitable factor for calculating the carrier's liability for economic loss caused by delay, which might be entirely unrelated to the value of the goods. The freight, in turn, had a direct relationship to the obligation that a carrier failed to perform in the manner agreed. It was said that as market value was often completely unforeseeable, such a limit would impose an unreasonable risk on carriers which in turn would have a negative impact on shippers in terms of higher freight rates. It was noted that

compensation for loss due to decline in market value was already dealt with in draft article 23, and if that provision was unclear it ought to be clarified.

188. There were various expressions of support for retaining the liability limit set forth in article 6(1)(b) of the Hamburg Rules, namely two and one-half times the freight payable for the goods delayed. It was also pointed out that the limitation of liability should provide an incentive for carriers to meet their obligation to deliver in due time, and should not, therefore, be too low.

189. The countervailing and strongly supported view was that liability limit of one times the freight for economic loss caused by delay would be adequate. It was explained that a casual comparison of the liability limits set forth in the Hamburg Rules was misleading, as in practice, they would seldom lead to a recovery of two and one-half times the freight paid. In that respect it was pointed out that whilst the Hamburg Rules included a limit of two and one-half times the freight payable, the overall limit of liability, in accordance with article 6(1)(b), was the total amount in freight paid for the shipment. In practice, that meant that in most cases the limit was often one times the freight. For example, a shipper might ship ten containers with a rate of 1,000 SDRs each and a delay on one container would impose liability of 2,500 SDRs but, in what was said to be the more common situation where all the containers were delayed, the limit would be one times the total freight amounting to 10,000 SDRs, and not 25,000 SDRs. Furthermore, it was suggested that the liability limits for delay in the Hamburg Rules applied to all types of liability for delay, whereas draft article 65 was limited to economic (consequential) loss. It was suggested that one times the freight was already a substantial exposure given that the carrier could be liable to a large number of shippers in respect of delay and therefore using freight as the liability limit provided sufficient incentive for a carrier to meet its obligation of timely delivery.

“unless otherwise agreed”

190. The Working Group proceeded to consider whether to retain the phrase “unless otherwise agreed”, which appeared in both variants A and B. It was recalled that the intention behind inclusion of that phrase was to permit contractual freedom in relation to the limits of liability in respect of economic loss caused by delay. Opinion was divided on whether or not to retain that phrase.

191. It was said that retaining that phrase would render one of the basic obligations of the carrier, namely to deliver in time, non-mandatory and would undermine the incentive of carriers to meet that fundamental contractual obligation. In favour of deletion, it was noted that the phrase was unnecessary given that if the parties agreed on a higher limit, that possibility was already recognized in chapter 20 and any agreement on a lower limit would be contrary to the provision regarding contractual freedom. There was strong support for the view that the phrase in question would, in practice, mean that shippers and consignees would be deprived of any compensation for delay, as carriers would routinely include in pre-printed transport documents standard clauses reducing liability for delay to a possibly insignificant amount. While this level of freedom of contract might be acceptable for volume contracts where both parties negotiated on equal footing, it would not be appropriate in other situations in liner transportation, where contracts of carriage were contracts of adhesion, and shippers had no fair opportunity to negotiate their terms.

192. There was also strong support for retaining the phrase in question, it was suggested that the qualification was based on mutual agreement between the parties rather than a unilateral declaration by the carrier and that shippers today often had sufficient bargaining power to negotiate better conditions. It was further suggested that commercial flexibility was important to permit parties to impose different limits on consequential loss appropriate to their needs and that that approach met with commercial practices. Moreover, eliminating party autonomy on the matter would amount to making the carriers into insurers of the timeliness of the arrival of goods shipped. That result would impact negatively in a highly competitive industry where very low freights had been experienced in recent time. Shippers for whom timely arrival was so essential always had the alternative of shipping their cargo by faster means, such as by air, and paying an accordingly higher rate of freight.

193. Having noted the conflicting opinions on the matter, the Working Group agreed that a final decision on whether or not to retain the phrase should be postponed until the Working Group had decided whether or not liability for delay on the part of the shipper would be included in the draft convention. If retained, then that would tend in favour of deletion of the words so as to make that paragraph apply on a mandatory basis.

Conclusions reached by the Working Group regarding draft article 65

194. After discussion, the Working Group decided that:

- The text contained in Variant A was preferred and should be used as the basis for further discussions;
- That the term “unless otherwise agreed” be retained in square brackets for consideration at a future session;
- That any necessary clarification be made to draft articles 23 and 65 with respect to what types of damage were being covered by each provision; and
- That a decision on the appropriate limit of liability for the carrier in respect of consequential loss caused by delay be deferred pending the identification of a consensus regarding any limitation on the liability of the shipper for delay.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 63. Limits of liability for loss caused by delay

205. Since draft article 63 formed a part of the provisional agreement on the compromise package regarding the limitation on liability considered during its 20th session, the Working Group agreed to defer consideration of the provision pending agreement on that compromise package (see above, paras. 183 to 188).

206. A proposal to replace the “two and one-half times” found in square brackets in draft article 63 with the amount “three times” in order to place the provision more in line with the similar provision of CIM-COTIF was not supported.

207. Subject to the deletion of the square brackets and the retention of the text contained in them, the Working Group approved the substance of draft article 63 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 62. Limits of liability for loss caused by delay**

201. In response to a question, it was pointed out that the liability limit set forth in the draft article applied only to economic or consequential loss resulting from delay and not physical loss of or damage to goods, which was subject to the limit set forth in draft article 61.

202. The Commission approved the substance of draft article 62 and referred it to the drafting group.

Article 61. Loss of the benefit of limitation of liability

1. Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

2. Neither the carrier nor any of the persons mentioned in article 18 is entitled to the benefit of the limitation of liability as provided in article 60 if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause the loss due to delay or recklessly and with knowledge that such loss would probably result.

[10th Session of WG III (A/CN.9/525) ; referring to A/CN.9/WG.III/WP.21]**(k) Paragraph 6.8**

86. By way of introduction, it was recalled that paragraph 6.8 was closely modelled on both article 8(1) of the Hamburg Rules and article 4.5(e) of the Hague-Visby Rules. The provision for breaking the overall limitation was of a type that required a personal fault by the carrier but did not contemplate the consequences of wilful misconduct or reckless behaviour by an agent or servant of the carrier. The need to demonstrate personal fault would require the demonstration of some form of management failure in a corporate carrier. The view was expressed that the absence of a provision on wilful misconduct or reckless behaviour by an agent or servant of the carrier was not acceptable. It was also observed that, as currently drafted, the draft instrument might encourage the consignee to sue directly the master of the ship or another agent of the carrier, where that agent had acted recklessly, since the liability of the agent was not subject to limitation. In addition, it was stated that the system currently contemplated in paragraph 6.8 might raise serious difficulties in the context of door-to-door

transport since it was typically inspired by maritime law but did not reflect the approach that prevailed in the law applicable to other modes of transport.

87. A question was raised about the interplay between subparagraph 6.6.4 and paragraph 6.8 and the possible redundancy of those two provisions. It was explained in response that paragraph 6.8 established the general test governing loss of the right to limit liability (i.e., the reckless or intentional behaviour of the carrier), while subparagraph 6.6.4 established as a specific rule that, in case of breach of an agreement that the cargo would be carried under deck, the carrier would be deemed to have acted recklessly. Subparagraph 6.6.4 was thus intended to avoid the shipper being under an obligation to prove the recklessness of the carrier in certain specific circumstances. It was widely agreed that the two provisions served different purposes and were not redundant.

88. With respect to the general policy on which loss of the right to limit liability should be based in the draft instrument, the view was expressed that the rules on the limitation of liability should be made unbreakable or almost unbreakable to ensure consistency and certainty in interpretation of the rules. While examples were given of international instruments where such a policy had been implemented, it was pointed out that such instruments relied on a relatively high-amount limitation. It was also pointed out that in certain countries, unbreakable limits of liability would be regarded as unconstitutional, while in other countries they could be ignored by judges under a general doctrine of fundamental breach.

89. The Working Group was generally of the view that the substance of paragraph 6.8 was acceptable but it was felt by a large number of those delegations that took part in the discussion that further consideration should be given to the possibility of adding a provision on the intentional fault of the servant or agent of the carrier. A note of caution was struck about relying on the concept of reckless behaviour, which might be interpreted differently in different jurisdictions and might thus encourage forum shopping. It was thus suggested that further consideration should be given to the possibility of using the notion of “intentional” rather than “reckless” behaviour. A further point raised was that the relation as between the breakability of the limits of liability and the joint and several liability created in subparagraph 6.3.4 should be further examined.

90. It was suggested that the words “personal act or omission” should be replaced by the words “act or omission”, for reasons of consistency with the Athens Convention relating to the Carriage of Passenger and their Luggage by Sea. It was also suggested that this was a matter of drafting.

91. With respect to the words between square brackets, it was observed that the Working Group would need to consider at a later stage whether the limit of liability should be breakable in cases of delay.

92. After discussion, the Working Group took note of the comments and suggestions made and decided to maintain the text of paragraph 6.8 in the draft instrument for continuation of the discussion at a later stage.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

260. With respect to the loss of the right to limit liability under paragraph 6.8, the view was expressed that the reference to the “personal act or omission” of the person claiming a right to limit should be replaced by a reference to the “act or omission” of that person. It was recalled that a similar suggestion had been made at the previous session of the Working Group, for reasons of consistency with the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea. It was pointed out in response that the issue of consistency with the Athens Convention would arise mostly in the case where both cargo and passengers were carried on the same vessel, a case that was described as relatively rare. One delegation offered to prepare a study on the issue of consistency between the draft instrument and the Athens Convention for consideration by the Working Group at a future session.

261. It was widely felt that the reference to the “personal act or omission” of the person claiming a right to limit should be considered in the context of the possibility of adding a provision on the intentional fault of the servant or agent of the carrier. In favour of introducing such a provision, it was stated that paragraph 6.8 dealt with the extreme situation where loss or damage to the goods had been caused by the intentional act or omission of the carrier who, in this case, should not be permitted to avoid liability by demonstrating that the acts that caused the loss or damage were those of a servant or agent and not the personal acts or omissions of the carrier. In response, it was recalled that, at the previous session of the Working Group, it had been suggested that the rules on the limitation of liability should be made unbreakable or almost unbreakable to ensure consistency and certainty in interpretation of the rules (A/CN.9/525, para. 88). It was stated that an almost unbreakable limit of liability would result in a situation where it would be easier for the carrier to obtain insurance coverage. However, it was also recalled that, while there existed precedents of international instruments where such unbreakable limits of liability had been implemented, such instruments relied on a relatively high amount limitation (*ibid.*). With a view to alleviating the concern that had been expressed regarding the possibility for the carrier to avoid liability, it was pointed out that the notion of “personal act or omission” under paragraph 6.8 should be understood to apply not only to the contracting carrier but also to each performing party. After discussion, the Working Group decided that the word “personal” should be placed between square brackets for continuation of the discussion at a later stage.

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267. After discussion, the Working Group decided that the proposal in paragraph 264 above should be reflected between square brackets as one possible variant in a revised version of the draft instrument to be considered at a future session.

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]**Draft article 19. Loss of the right to limit liability**

52. The Working Group considered the text of draft article 19 as contained in document A/CN.9/WG.III/WP.32.

General discussion

53. General agreement was expressed for the policy expressed in draft article 19 under which the limit of liability could be broken in certain exceptional circumstances. How widely such circumstances should be recognized by the draft instrument was considered to be an issue that needed to be balanced against the decision to be made in respect of the amount specified for such limits, particularly under draft articles 18 and 16. It was stated that, should higher limits be specified, it would be justified to make those limits almost unbreakable in practice. References to article 16(2) and to “delay in delivery”

54. The view was expressed that it would be inappropriate to equate the intent to cause delay in delivery with intent to cause economic loss to the consignee. It was explained that, in certain transport practices, “slow steaming”, “overbooking” or other intentional conduct of the carrier resulting in delay in delivery was customary. Delay might also result from an intentional navigational decision made in the interest of the cargo, for example to avoid a storm. Thus, the mere intent to cause delay (acceptable in certain circumstances) should be distinguished from intent to cause delay with knowledge that economic loss for the consignee would probably result (a situation where the limit of liability should be broken). It was suggested that, in dealing with the issue of delay, the same distinction might need to be made in draft article 19 and in draft article 16(1) between delay where a time for delivery had been stipulated in the contract and unreasonable delay in the absence of such stipulation. Alternatively, the following was suggested as a possible additional paragraph dealing with the issue of delay in delivery:

“Neither the carrier nor any of the persons mentioned in article ... shall be entitled to limit their liability as provided in article 16(2) of this instrument, or a higher limit as provided in the contract of carriage, if the claimant proves that the loss due to delay resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss due to delay or recklessly and with knowledge that such loss due to delay would probably result.”

Possible reference to article 17

55. The view was expressed that a reference to article 17 should be added to the list of provisions creating a limit of liability, since article 17 had the same effect as a limit of liability. It was stated in response that the effect of the draft article was not to establish a limit but simply to provide a method for the calculation of compensation.

Freedom of contract

56. As regards the possibility that the limit of liability might be made totally unbreakable by contractual arrangement between the parties (possibly through a specific stipulation where the contract of carriage was freely negotiated or, in the case of a contract of adhesion, through a mention in any transport document), the general view was that, in cases of wilful misconduct or reckless behaviour of the carrier, such contractual arrangements should be regarded as contrary to public policy and should not be recognized by the draft instrument.

57. The view was expressed, however, that a reference to the terms of the contract of carriage might be necessary in article 19 to reflect the conditions under which a higher limit of liability stipulated by agreement of the parties (or, depending on decisions to be made in respect of chapter 19, a lower limit) might be broken in exceptional circumstances. In response, it was stated that the case where the parties agreed on a higher limit was already covered by

article 18 and the case where a lower limit was stipulated in an Ocean Liner Service Agreement (OLSA), would probably be outside the scope of the draft instrument under chapter 19.

“damage to or in connection with the goods

58. It was widely agreed that the words “in connection with” should be treated as in draft article 18 (see above, paras. 42 and 44).

“[personal] act or omission”

59. It was observed that the obligation to prove the personal act or omission of the person claiming a right to limit its liability (for example, the contracting carrier) resulted in the limit of liability being close to unbreakable in practice. Strong support was expressed for extending the scope of draft article 19 to the situation where the intentional or reckless behaviour was that of a servant or agent of the contracting carrier. Another suggestion was that the words “act or omission of the carrier or any of the persons referred to in draft article 14 bis” should be used. A concern was also expressed as to how the “personal” act or omission of a corporate entity could be demonstrated.

60. Strong support was also expressed for maintaining the reference to the personal act or omission of the person claiming a right to limit its liability, to the exclusion of acts or omissions of the servants or agents of that person. It was stated that a virtually unbreakable limit might deter a lot of litigation. It was also stated that the aim of the draft instrument was not to create a vicarious liability regime that might entail serious difficulties regarding the possible interplay between the draft instrument and the liability regime applicable to a non-maritime subcontractor. It was conceivable that, under the liability regime applicable to the subcontractor, a limit of liability would apply where the limit would be broken under draft article 19 in respect of the contracting carrier. It was suggested that, for the case where such a situation would arise, a rule symmetrical to that contained in draft article 18(2) would be necessary to ensure that, where a subcontractor whose behaviour caused the damage was protected by an unbreakable limit of liability under the law applicable outside the draft instrument, that limit would extend to the person liable under draft article 19. With respect to the concern expressed in respect of the “personal” act or omission of a corporate entity, it was pointed out that such a “corporate entity” was normally established in the form of a legal person and that the notion of a “personal act or omission” was well established in maritime law and understood to encompass the managers of such a legal person. To alleviate that concern, it was suggested that the words “personal act or omission of” might be replaced by “act or omission within the privity or knowledge of”.

“recklessly”

61. The view was expressed that the reference to the “reckless” behaviour of the person claiming a right to limit its liability was uncertain and open to subjective interpretation by national courts. It was suggested that the limit should be breakable only in cases of “intentional or fraudulent” behaviour.

Conclusions reached by the Working Group on draft article 19

62. After discussion, the Working Group decided that:

- The reference to “article 15(3) and (4)” should be updated to read “article 14 bis”;

- The words “[or as provided in the contract of carriage,]” should be maintained in square brackets pending further discussion on chapter 19;
- The issue of delay should be further discussed on the basis of a revised draft to be prepared by the Secretariat to reflect the above proposals;
- The word “personal” should be retained without square brackets;
- The suggestion to add a reference to article 17 might need to be further discussed in the context of chapter 19.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 66. Loss of the right to limit liability

Paragraph (1)

195. The Working Group was reminded that paragraph (1) of draft article 66 set out the conditions which would cause the carrier to lose the benefit of the right to limit its liability. Those conditions were fulfilled if the claimant proved that the loss of, or damage to the goods, or breach of the carrier’s obligation under the draft convention, resulted from a personal act or omission of the person claiming the right to limit liability, done either intentionally or recklessly and with knowledge that the loss or damage would probably occur.

196. It was observed that a provision of this type that allowed for the limitation level to be exceeded in certain circumstances was a common feature in transport conventions. General approval was expressed in the Working Group for the structure and approach of the text in paragraph (1).

“personal”

197. A number of delegations expressed great dissatisfaction with the inclusion of the word “personal” before the phrase “act or omission” in paragraph (1), believing that it made it too difficult for the cargo claimant to prove that the conditions for the provision had been fulfilled and thus for the carrier’s limitation on liability to be exceeded. The Working Group recalled that the issue of whether or not to include this term in the paragraph had been discussed at length during its thirteenth session, and it decided against overturning the decision that it made at that time (see A/CN.9/552, paras. 59-60 and 62).

“[or as provided in the contract of carriage]”

198. The Working Group considered whether to include the phrase “[or as provided in the contract of carriage]” in the text of paragraph (1). The view was expressed that the text could be deleted, since it was thought that the proper conclusion would be reached by those applying the provision regardless of the inclusion of that phrase. In particular, it was thought if the conditions of the paragraph were fulfilled, it would result in a decision that any limitation on liability could be exceeded, regardless of where that limitation was found, and whether or not that particular phrase appeared in the provision. However, concerns were raised that since the draft convention only allowed the parties to agree to increase their level of limitation of liability and not to decrease it, if the phrase were not included, confusion could be caused in some jurisdictions regarding whether or not a higher limitation on liability that was agreed upon

should be allowed to stand, even when the conditions of paragraph (1) had been met. After discussion, the Working Group agreed that the square brackets around the text should be deleted, and the phrase should be retained in paragraph (1).

Drafting concerns

199. Concerns were raised regarding the interaction of draft article 64 and the drafting of draft paragraph 66(1). In particular, since the phrase in the text of draft article 64 “in connection with” had been deleted in favour of the insertion of the phrase “the carrier’s liability for breaches of its obligations under this Convention”, the question was raised whether the revised text included cases of misdelivery of goods or delivery without presentation of the negotiable transport document or for misrepresentation in the transport document. Further, if those situations were not included in draft article 64, the additional question was raised whether these situations could ever result in a case where the carrier’s limitation amount could be exceeded pursuant to draft article 66, since there might never be any intent or knowledge on the part of the carrier.

Conclusions reached by the Working Group regarding draft article 66(1):

200. After discussion, the Working Group decided that:

- The square brackets around the phrase “or as provided in the contract of carriage” should be deleted and the phrase retained; and
- The text of draft paragraph (1) was approved by the Working Group, subject to any drafting adjustments considered necessary by the Secretariat for clarification.

Paragraph (2)

201. The Working Group was reminded that paragraph (2) of draft article 66 set out the conditions which would result in the carrier losing the benefit of the right to limit its liability in case of delay in delivery. Those conditions were fulfilled if the claimant proved that the delay in delivery resulted from the personal act or omission of the person claiming the right to limit liability, done either intentionally or recklessly and with knowledge that the delay would probably result.

202. The Working Group approved the text of draft paragraph (2), with the understanding that a proposal had been made that if an appropriate limitation level were found for the shipper’s liability for delay, the Working Group should consider a similar provision to draft paragraph (2) setting out the conditions pursuant to which that limitation level could be exceeded.

203. A drafting concern was raised regarding the phrase “if the claimant proves” in draft article 66(2) in comparison with the phrase “if it is proved” found in the corresponding provision of the Hamburg Rules at article 8(1) and of the Hague-Visby Rules at article 4.5(e), since it was felt that this would place an extra burden on the cargo claimant.

Conclusions reached by the Working Group regarding draft article 66(2):

204. The Working Group approved draft paragraph (2), bearing in mind that a parallel provision could be needed for the limitation level for the shipper’s liability, should such a level be identified.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 64. Loss of the benefit of limitation of liability

208. The Working Group approved the substance of draft article 64 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 63. Loss of the benefit of limitation of liability

203. The Commission approved the substance of draft article 63 and referred it to the drafting group.

CHAPTER on RIGHTS OF SUIT [deleted]

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

7. Judicial exercise of rights emanating from the contract of carriage (draft articles 13 and 14) and jurisdiction

(a) Right of suit and time for suit (draft articles 13 and 14)

58. It was suggested that in addition to dealing with the right of suit against the carrier (draft article 13.1) there should also be provisions on the carrier's right of suit (e.g. against the shipper when the shipper failed to perform one of its obligations). It was noted that the concept of subrogation differed among national laws, which introduced an element of uncertainty into the provision.

59. It was said that draft article 13.1 was not sufficiently clear as to which were the parties entitled to sue. The question was raised as to whether a party who did not suffer a loss should be able to sue (as indicated in draft article 13.2); however, views were expressed that it was useful to clarify in the draft instrument that the holder of a negotiable transport document had procedural standing to sue, whether on its own account or on behalf of the party who suffered the loss. It was considered that draft article 13.2 gave rise to questions that needed to be clarified; for example, it was said that, when the party who sued did so on behalf of the party who suffered loss, only one party and not both should be able to sue. It was also observed that, if the holder who itself has not suffered any loss or damage sued and lost the case, that outcome would have to be binding also for the party who suffered the loss or damage. Since the last sentence of draft article 13.2 touched upon issues of national law that were difficult to clarify in the context of the draft article, it was suggested that it might be preferable to delete it.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

114. The Working Group had before it chapter 14 comprising draft articles 67 and 68 as currently drafted and contained in A/CN.9/WG.III/WP.56 and an information document concerning this issue in A/CN.9/WG.III/WP.76. The Working Group recalled that it had exchanged preliminary views on the issue of right of suit at its ninth session (A/CN.9/510, paras. 58 to 59) and undertaken a detailed discussion on the issue at its eleventh session (A/CN.9/526, para. 149 to 162).

115. Before turning to consider the draft chapter substantively, the Working Group considered the question whether its provisions should be retained at all. In that respect, it was recalled that at previous sessions of the Working Group there had been support for deleting the draft chapter altogether (see A/CN.9/WG.III/WP.56, footnote 237; and A/CN.9/526, paras. 152 and 157).

116. It was pointed out that the draft chapter attempted to offer uniform solutions for important practical issues for which various legal systems offered different solutions. It had, however, become apparent that the purpose of the chapter, however laudable, was overly

ambitious and that it was unlikely that the Working Group could reach a consensus on the substance dealt with therein.

117. Although certain aspects of draft article 67 could be incorporated into the provisions set forth in chapter 6 regarding liability of the carrier, there was strong support for the deletion of chapter 14 from the draft convention. There were, however, expressions of regret that, by deleting the draft chapter, the draft convention would leave a number of problems relating to the right of suit for possibly diverging domestic laws. For example, often it might be wrongly assumed that the holder of a bill of lading had an exclusive right of suit. Also, in respect of a non-negotiable document, uncertainty would remain as to whether a person that was not party to a contract of carriage but had suffered damage, had a right of suit.

Conclusions reached by the Working Group regarding draft chapter 14:

118. After discussion, the Working Group decided that:

- Chapter 14 be deleted in its entirety;
- Certain aspects of article 67 could be considered for incorporation into chapter 6 (liability of the carrier).

*Parties [Deleted]**Article 67. Parties**Variant A*

1. Without prejudice to articles 68 and 68(b), rights under the contract of carriage may be asserted against the carrier or a performing party only by:

(a) The shipper, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage;

(b) The consignee, to the extent that it has suffered loss or damage in consequence of a breach of the contract of carriage; or

(c) Any person to which the shipper or the consignee has transferred its rights, or that has acquired rights under the contract of carriage by subrogation under the applicable national law, such as an insurer, to the extent that the person whose rights it has acquired by transfer or subrogation suffered loss or damage in consequence of a breach of the contract of carriage.

2. In case of any passing of rights of suit through transfer or subrogation under subparagraph 1(c), the carrier and the performing party are entitled to all defences and limitations of liability that are available to it against such third party under the contract of carriage and under this Convention.

Variant B

Any right under or in connection with a contract of carriage may be asserted by any person having a legitimate interest in the performance of any obligation arising under or in connection with such contract, when that person suffered loss or damage.

[Last version before deletion: A/CN.9/WG.III/WP.56]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(a) Paragraph 13.1

150. By way of introduction, it was recalled that paragraph 13.1 was intended to apply to any contract of carriage, whether or not a document or electronic record had been issued and, if it had been issued, irrespective of its nature. That provision set out a general rule as to which parties had a right of suit under the draft instrument. As a possible deficiency of the current draft, it was mentioned that two parties listed in paragraph 13.1 might suffer loss, for example, where goods were damaged and delayed, an insurer paid the insured portion of the loss, and the consignee had to bear the uninsured portion, such as loss due to delay. It was thus suggested that a revised draft of paragraph 13.1 should make it clear that both parties were entitled to claim to recover their respective portions of the loss. As a matter of drafting, it was also suggested that the readability of the provision might be improved if the words “Without prejudice to articles 13.2 and 13.3” were deleted.

151. Some support was expressed about the principle expressed in paragraph 13.1, under which a contracting shipper or a consignee could only assert those contractual rights that belonged to it and if it had a sufficient interest to claim. This meant that in the case of loss of or damage to the goods the claimant should have suffered the loss or damage itself. If another person, e.g. the owner of the goods or an insurer, was the interested party, such other person should either acquire the right of suit from the contracting shipper or from the consignee, or, if possible, assert a claim against the carrier outside the contract of carriage.

152. Fundamental concerns and questions were raised with respect to paragraph 13.1. It was pointed out that, under most legal systems, the provision could be regarded as superfluous since it established a right of suit where such a right would normally be recognized by existing law to any person who had sufficient interest to claim. At the same time, the provision might be regarded as unduly restrictive in respect of the persons whose right of suit was recognized. It was emphasized that recognizing a right of suit to a limited number of persons by way of closed list was a dangerous technique in that it might inadvertently exclude certain persons whose legitimate right of suit should be recognized. Among such persons possibly omitted unduly from the list contained in paragraph 13.1, it was suggested that the controlling party, in cases where the carrier had refused to follow its instructions, and the person identified in paragraph 7.7 might need to be considered. In the course of that discussion, a note of caution was struck regarding the appropriateness of limiting in any way the exercise of rights of suit, a policy that might run counter to fundamental rights, possibly human rights, that should be recognized to any person who had sufficient interest to claim.

153. The view was expressed that the provision could also be regarded as unduly restrictive regarding the nature of the action that could be exercised. In that respect, a question was raised as to the reasons why paragraph 13.1 dealt only with actions for damages and not with actions for performance.

154. The provision was further criticized on the grounds that it dealt in general terms with claims asserted against the carrier or any performing party. The view was expressed that dealing with claims against the carrier was too restrictive and resulted in an insufficiently balanced provision. Under that view, a provision on the rights of suit should also envisage claims asserted against the shipper or the consignee, for example, claims for payment of freight. As regards claims asserted against the performing party, the view was expressed that the scope of the provision was too broad. It was suggested that, with a view to avoiding conflict with existing mandatory regimes applicable to land carriers, the scope of the provision should be restricted to claims asserted against sea carriers.

155. The overall structure of the provision was criticized as reflective of an approach based on the recognition of an action, as opposed to the recognition of a right, which would be the preferred approach under many legal systems. It was observed that the recognition of an action to a limited number of persons offered the advantage of predictability. However, widespread preference was expressed for a general provision recognizing the right of any person to claim compensation where that person suffered loss or damage as a consequence of the breach of the contract of carriage.

156. Some support was expressed for the retention of the last sentence of paragraph 13.1, which was said to provide a useful rule applicable both to suits based on breach of contract and to suit based on tort. It was generally felt that that sentence appropriately expressed the general

principle that when transferring rights, the transferee could not acquire more rights than the transferor had. The view was expressed, however, that the matter of assignment or subrogation should be left to applicable law. A contrary view was that the matter should not be dealt with through private international law but that the draft instrument should provide a uniform rule governing the situation where claims were made by third parties. In that situation, it was suggested that, where the carrier was sued by a third party on the basis of an extra-contractual claim, the protection afforded by the draft instrument, in particular the limits of liability, should be available to the carrier. The Working Group took note of that suggestion.

157. While strong support was expressed for the deletion of paragraph 13.1, the Working Group decided to defer any decision regarding paragraph 13.1 until it had completed its review of the draft articles and further discussed the scope of application of the draft instrument. The Secretariat was requested to prepare alternative wording in the form of a general statement recognizing the right of any person with a legitimate interest in the contract of transport to exercise a right of suit where that person had suffered loss or damage.

158. In the context of the discussion of paragraph 13.1, the view was expressed that the draft instrument should contain provisions regarding the issues of applicable law and dispute settlement through arbitration. While the view was expressed that no such provisions were needed and that those issues should be entirely left to the discretion of the parties, the widely prevailing view was that such provisions should be introduced in the draft instrument. Strong support was expressed in favour of modelling such provisions on articles 21 and 22 of the Hamburg Rules, although those provisions were criticized by some delegations. Other possible models, including articles 31 and 33 of the CMR, Regulation 44-2001 of the European Union, and the Montreal Convention, were suggested. It was pointed out that a decision would need to be made as to whether the jurisdiction should be exclusive, as in the European Regulation, or not, as in the CMR Convention. A decision would also need to be made as to whether a jurisdiction clause would be binding only on parties to the contract of carriage or also on third parties. A further suggestion was made that the draft instrument should also encourage parties to conciliate before resorting to more adversarial dispute settlement mechanisms.

159. After discussion, the Working Group requested the Secretariat to prepare draft provisions on issues of jurisdiction and arbitration, with possible variants reflecting the various views and suggestions expressed in the course of the above discussion.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Conclusions reached by the Working Group regarding draft chapter 14:

118. After discussion, the Working Group decided that:

- Chapter 14 be deleted in its entirety;
- Certain aspects of article 67 could be considered for incorporation into chapter 6 (liability of the carrier).

When negotiable transport document or negotiable electronic transport record is issued***[Deleted]******Article 68. When negotiable transport document or negotiable electronic transport record is issued***

In the event that a negotiable transport document or negotiable electronic transport record is issued:

(a) The holder is entitled to assert rights under the contract of carriage against the carrier or a performing party, irrespective of whether it suffered loss or damage itself; and

(b) When the claimant is not the holder, it must, in addition to proving that it suffered loss or damage in consequence of a breach of the contract of carriage, prove that the holder did not suffer the loss or damage in respect of which the claim is made.

[Last version before deletion: A/CN.9/WG.III/WP.56]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(b) Paragraph 13.2***

160. It was stated that, under existing law in certain countries, the holder of a bill of lading would only be given a right of suit if the holder could produce a bill of lading and prove that loss or damage had occurred. From that perspective, the combination of paragraphs 13.2 and 13.3 would lead to the questionable result that the holder of a bill of lading would be entitled to exercise a right of suit without having to prove that it suffered loss or damage. It was generally felt, however, that the first sentence of paragraph 13.2 was in line with existing law in most countries and served a useful purpose, in particular by establishing that the holder did not have an exclusive right of suit. From that perspective, it was however suggested that the same principle should apply in the case of paragraph 13.1, where no negotiable instrument had been issued.

161. Doubts were expressed regarding the meaning of the words “on behalf” in the second sentence of paragraph 13.2. While it was felt that the second sentence was needed in order to avoid the possibility that a carrier might have to pay twice, it was generally agreed that further clarification should be introduced in the provision regarding the subrogation relationship to be established between the holder of a bill of lading and the party that suffered loss or damage.

(c) Paragraph 13.3

162. It was recalled that the person exercising a right of suit under the contract of carriage should not be dependent on the cooperation of the holder of a negotiable document if that person, and not the holder, had suffered the damage. Doubts were expressed regarding the operation of the provision under which the claimant should prove that the holder did not suffer the damage. The Working Group agreed that the issue might need to be further discussed at a later stage.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Conclusions reached by the Working Group regarding draft chapter 14:

118. After discussion, the Working Group decided that:

- Chapter 14 be deleted in its entirety;
- Certain aspects of article 67 could be considered for incorporation into chapter 6 (liability of the carrier).

CHAPTER 13. TIME FOR SUIT

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

7. Judicial exercise of rights emanating from the contract of carriage (draft articles 13 and 14) and jurisdiction

(a) Right of suit and time for suit (draft articles 13 and 14)

[* * *]

60. As to draft article 14, it was suggested to refer therein also to the performing carrier (“performing party”) and the consignee. It was also suggested that in draft article 14.4 the 90-day period should be specified as a default rule that would apply unless the law of the State where the proceedings were instituted provided for a longer period. As to the one-year period indicated in draft article 14.1, several views were expressed that the period was adequate; legal certainty and ease of communications between the parties were mentioned as grounds for the acceptability of the time period; however, there were also views in favour of extending the time period to two years, which was the period specified in the Hamburg Rules. Another suggestion was made to provide for a two-to three-year period in case of wilful misconduct. The Working Group took no decision on the matter. As to draft article 14.2, a concern was expressed whether such a rule would be appropriate in a door-to-door transport, especially where the period of responsibility had been contractually restricted in accordance with draft articles 4.1.2 and 4.1.3.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(a) *General remarks*

164. It was recalled that draft article 14 on time for suit was discussed in general terms by the Working Group at its ninth session (A/CN.9/510, para. 60). It was noted that, in keeping with the time for suit in the Hague and Hague-Visby Rules paragraph 14.1 provided a period of one year as the basic time limit for suits against the carrier and the shipper, while the question of adopting a different time period, such as the two-year period specified in the Hamburg Rules, remained open as a policy question for the consideration of the Working Group. It was noted that paragraph 14.2 was intended to clarify the basis on which the time for suit commenced to run in order to overcome problems that had arisen in practice with respect to previous conventions. Paragraph 14.3 was described as an important provision, which followed the Hague-Visby and Hamburg Rules, and which was intended to clarify that a valid extension to the time for suit could be given. It was explained that paragraph 14.4 was also based on the Hague-Visby and Hamburg Rules, and that paragraph 14.5 was placed in square brackets in order to reflect its reliance on the rule in subparagraph 8.4.2, also in square brackets, in accommodating a claimant’s potential inability to identify the carrier in a timely fashion.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]**Time for suit — Chapter 15**

119. The Working Group had before it chapter 15 comprising draft articles 69 to 71 as currently drafted and contained in A/CN.9/WG.III/WP.56 and an information document concerning this issue in A/CN.9/WG.III/WP.76. The Working Group recalled that it had exchanged preliminary views on the issue of time for suit at its ninth session (A/CN.9/510, para. 60) and undertaken a detailed discussion on the issue at its eleventh session (A/CN.9/526, paras. 163 to 182). It was recalled that the need for the draft chapter had not been questioned in previous sessions of the Working Group.

Types of claims to be covered

120. The Working Group began its deliberations by considering the proper scope of the chapter, in particular what types of claims should be covered.

121. There was general agreement within the Working Group that the draft chapter should apply to claims relating to a contract of carriage arising under the draft convention. Other types of claims between the shipper, the carrier and the maritime performing party (for example, for unpaid freight) should remain unaffected by the draft chapter.

122. The Working Group proceeded to consider whether the limitation period should apply only to claims against the carrier or the maritime performing party, or should also extend to claims made against shippers. The Working Group was reminded that that issue had been considered at its eleventh session (see A/CN.9/526, para. 166).

123. Some support was expressed for restricting the scope of the chapter to claims made against the carrier and the maritime performing party, with the time for suit for all other claims being left to national law. In support of that approach, it was suggested that whilst claims against carriers, which in most cases related to cargo loss or damage, were largely standardized, potential claims against shippers, for instance, as a result of delay attributable to inaccurate information or of damage caused by dangerous goods to a vessel, might cover a much broader spectrum of situations. Such claims might therefore require extensive investigation on the part of the carrier, needing longer than ordinary cargo claims to be properly prepared. They should not, therefore, be subject to a limitation period under the draft convention.

124. Against such restriction it was suggested that the scope should, in the interests of predictability and equal treatment of all parties to a contract of carriage, cover claims against both carriers and shippers. It was said that differences in the nature of the claims that could be brought against shippers as compared to those that could be brought against carriers was not relevant given that the chapter did not require a case to be fully argued within the limitation period, but merely introduced a time period within which judicial or arbitral proceedings should be commenced.

125. The Working Group considered the arguments advanced in favour of both propositions. It eventually agreed that the draft convention should cover claims against both the carrier and the performing party as well as claims against the shipper.

Duration of limitation period

126. The Working Group then turned to the question of the appropriate time during which a suit might be brought. There was some support for the suggestion that different time limits should be provided depending on the nature of the claim. It was said that a longer period of time (possibly two years) would be appropriate with respect to claims against shippers given their likely more complex nature, while a shorter time period of one year could be adopted in respect of claims against carriers. The prevailing view within the Working Group, however, favoured the inclusion of one time period that applied to all parties. Support was expressed for the proposal to apply a limit of one year to all claims, since this was the period currently used in many jurisdictions. A longer period it was said, might impact negatively on settlement of claims, given the tendency observed in practice of delaying the submission of claims for settlement until shortly before the limitation period expired. The prevailing view within the Working Group, however, was that the potential complexities arising in relation to claims against the shipper might be better taken into account by a limitation period of two years for all claims.

Article 62. Period of time for suit

1. No judicial or arbitral proceedings in respect of claims or disputes arising from a breach of an obligation under this Convention may be instituted after the expiration of a period of two years.
2. The period referred to in paragraph 1 of this article commences on the day on which the carrier has delivered the goods or, in cases in which no goods have been delivered or only part of the goods have been delivered, on the last day on which the goods should have been delivered. The day on which the period commences is not included in the period.
3. Notwithstanding the expiration of the period set out in paragraph 1 of this article, one party may rely on its claim as a defence or for the purpose of set-off against a claim asserted by the other party.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(b) Paragraph 14.1***

165. There was general support for the principle of limiting the time for suit, as set out in paragraph 14.1. It was questioned why the paragraph discharged the carrier from all liability in respect of the goods once the time for suit had expired, yet it was silent on the discharge of liability of performing parties. Support was expressed for the inclusion of performing parties in this provision.

166. It was recognized that the inclusion of a time-for-suit provision for the shipper in the second sentence of paragraph 14.1 was a new approach. Some general doubt was expressed with respect to this innovation, but support was also expressed for that provision which was said to provide for a balanced approach in limiting the time for suit against both carriers and

shippers. A question was raised why the time for suit for shippers referred only to shipper liability pursuant to article 7 of the draft instrument, and why it did not also refer to shipper liability pursuant to other articles, such as article 9. It was suggested that all persons subject to liability under the contract of carriage should be included in this provision, and that they should be subject to the same period of limitation. A further suggestion was made that paragraph 14.1 not make specific reference to carriers or shippers, but that it simply state that any suit pursuant to the draft instrument would be barred after a period of time to be agreed by the Working Group. Another question raised with respect to the second sentence of the paragraph was why it mentioned only shippers and not other persons who were subject to the same responsibilities and liabilities as shippers under article 7. A further question was raised with respect to a possible error in paragraph 7.7, which made reference to Chapter 13 rather than to Chapter 14 in its reference to provisions concerning shipper's rights and immunities.

167. An important question of terminology was raised with respect to paragraph 14.1. It was noted that the commentary to this provision (A/CN.9/WG.III/WP.21, paragraph 208) stated that the expiration of the time for suit resulted in the extinguishment of the rights of the potential claimant, and as such, suggested that paragraph 14.1 concerned a prescription period rather than a limitation period. It was noted that this distinction was very important, particularly in civil law systems, where the law establishing a time period for the extinction of a right would typically not allow a suspension of the time period. As to whether the *lex fori* or the *lex contractus* would govern the issue of the limitation period, it was pointed out that certain existing international instruments such as the Rome Convention on the Law Applicable to Contractual Obligations would lead to the application of the *lex contractus* as matters of time for suit for claims arising from the contract of carriage would be governed by the proper law of the contract. However, in some jurisdictions, the matter would be regarded as one of civil procedure to be governed by the *lex fori*. It was suggested that any ambiguity with respect to prescription periods versus limitation periods should be carefully avoided, in order to ensure predictability of the time for suit provisions.

168. During the course of the discussion, significant support was expressed for retaining the time period of one year, as set out in the paragraph and in accordance with the Hague and Hague-Visby Rules. It was further suggested that a one-year period would avoid the situation where an extra year was not seen to have significant advantages for the parties, but rather had major disadvantages in terms of increased uncertainty, both terms of the practical aspects of the case such as preservation of evidence, but also with respect to unresolved potential liability for claims. On the other hand, there was also support for the suggestion that one year was not long enough to find the correct party to sue, given the complexity of modern cases and the number of parties involved, and that a two-year period such as that appearing in the Hamburg Rules would be more appropriate. Another suggestion was to extend the one-year period in cases of wilful misconduct to a three-year period. It was noted that the length of the limitation period should be fair and balanced, and should offset other changes that might be effected by the draft instrument as a whole in the allocation of risk amongst the parties. Caution was raised that rules on time for suit had caused difficulties of interpretation in other transport conventions, and the Working Group was urged to agree upon a simple and effective rule.

169. The suggestion was made to insert the one-year time period in square brackets, or alternatively, to simply insert empty square brackets and not state any specific period of time.

The Working Group requested the Secretariat to place “one” in square brackets, and to prepare a revised draft of paragraph 14.1, with due consideration being given to the views expressed.

(c) Paragraph 14.2

170. Whilst there was strong support for the principle that it was necessary to have a very clear and easily ascertainable date for the commencement of the time for suit, doubt was expressed with respect to the choice in paragraph 14.2 of the date of delivery of the goods pursuant to the contract of carriage as set out in subparagraphs 4.1.3 or 4.1.4 as that date. It was suggested that the date of delivery in the contract of carriage might be much earlier than the date of actual delivery and might therefore be detrimental to the consignee. It was further suggested that a better date for the commencement of the time period would be the actual date of delivery. The Working Group was reminded that delivery was not defined in the draft instrument since it was thought to be impossible to provide an appropriate definition of delivery that would satisfy most jurisdictions, thus it was left to national law. It was noted that the choice of the date of delivery in the contract of carriage was intended to avoid the uncertainty surrounding whether delivery meant actual delivery, or whether it meant the date that the carrier offered the goods for delivery, or some other time involved in delivery. It was also noted that actual delivery could be unilaterally delayed by the consignee, and that it could also be highly dependent on local customs authorities and regulations, thus causing great uncertainty concerning the date of delivery and the commencement of the running of the time for suit. It was suggested that in order to avoid uncertainty, it was necessary to choose as the date of commencement of the time period a date that was easily fixed by all parties.

171. Concern was also raised with respect to the choice of the last day on which the goods should have been delivered as the commencement of the time period for suit in the cases where no goods had been delivered. It was stated that if the parties had not agreed, then subparagraph 6.4.1 on delay stated that delivery should be within the time it would be reasonable to expect of a diligent carrier, and that this was not an easily fixed date either.

172. Another issue raised with respect to paragraph 14.2 was the possibility that a plaintiff could wait until the end of the time period for suit to commence his claim, and possibly bar any subsequent counterclaim against him as being beyond the time for suit. It was suggested that a possible solution to this problem could be to include counterclaims in the terms provided for additional time under subparagraph 14.4(b)(ii) of the draft instrument (see para. 177 below).

173. The suggestion was also made that there be a different commencement day regarding the claim against the shipper than for a claim against the carrier.

174. The Working Group requested the Secretariat to retain the text of paragraph 14.2, with consideration being given to possible alternatives to reflect the views expressed.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 69. Limitation of actions

127. The Working Group proceeded to examine the two variants of article 69 as contained in A/CN.9/WG.III/WP.56 and reproduced in paragraph 19 of A/CN.9/WG.III/WP.76. Several issues were considered in relation to article 69. It was noted that Variant A referred to the carrier or shipper being “discharged from liability” if judicial or arbitral proceedings were not

instituted within one year. By contrast Variant B referred to “rights” (or “actions”) being “extinguished” (or “time-barred”) if judicial or arbitral proceedings were not commenced within one year.

128. The Working Group recalled that several substantive questions arose in choosing between the variants. It was recalled that the distinction between a “limitation period” and the extinguishment of a right had been discussed at a previous session of the Working Group and that the difference might affect the applicability of the time period or the choice of applicable law (A/CN.9/526, para. 167).

129. The Working Group heard differing views as to the manner in which the principle of a limitation period should be formulated. It was pointed out that there was no uniformity among legal systems as to the nature and effect of a limitation period. While in some legal systems the expiry of a limitation period typically extinguished the right to which the limitation period related, in other legal systems a limitation period only deprived the entitled party of the possibility to enforce its right through court action. Some legal systems applied both rules, depending on the nature of the claim, some being extinguished, while others became unenforceable. It was further pointed out that such a distinction had a number of practical consequences, such as whether a party to a contract whose claim was affected by the limitation period still retained the possibility of invoking its claim, even though time-barred, as a defence in order to obtain a set off in a claim asserted by the other party to the contract. That possibility existed for claims that were only rendered unenforceable by a limitation period, but was not available when the underlying right was extinguished.

130. There was some support for adopting a rule to the effect that the claimant’s rights under the draft convention would be extinguished by the limitation period, and that, accordingly, the approach taken in Variant A should be adopted. This would mean, in practice, that the party whose right had been extinguished could not use that “time-barred” claim by means of a set-off. Prohibition of the use of “time-barred” claims by means of set-off was said to be supported by the precedent of other international instruments on carriage of goods, in particular the CMR and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway, 2000 (CMNI), which expressly precluded set-off of time-barred claims.

131. However, the prevailing view was that draft article 69 should only affect the enforceability of the claimant’s right and that, accordingly, the approach taken in Variant B, subject to retaining only reference to “action” rather than “right” was preferable. That approach, which would preserve the claimant’s right to set-off, was said to be consistent with the solution adopted in the Convention on the Limitation Period in the International Sale of Goods. It also had the advantage of not preserving the parties’ right to choose whether or not to file a claim on the basis of the party’s assessment of the expected benefit, as compared to the costs of the claim. Without the possibility of set-off, parties might be enticed to file even uneconomical claims in order to protect themselves against the possibility of a claim by the other party to the contract.

132. The question was raised as to whether the limitation period provided in the draft convention would be capable of being suspended or interrupted and, if so, under what circumstances. It was said that various legal systems provided a number of possibilities for suspending or interrupting a limitation period, or even making the period start to run again from zero. Given the variety of solutions found under domestic law, there was support for the

suggestion that that matter should be left to domestic law. In that connection, it was suggested that the draft convention could include a provision indicating which law should govern that question, in which case a choice should be made between the law applicable to the contract rather than the law of the forum. The Working Group was mindful of the diversity of domestic laws on the question of suspension or interruption of limitation periods, but was generally of the view that the draft convention should offer a uniform rule on the matter, rather than leave it to domestic law. The general agreement within the Working Group was that the draft convention should expressly exclude any form of suspension or interruption of the limitation period, except where such suspension or interruption had been agreed by the parties under draft article 71.

Conclusions reached by the Working Group regarding draft article 69:

133. After discussion, the Working Group decided that:

- Draft article 69 should extend to claims both against the carrier and the shipper;
- The time period be fixed at two years for both types of claims;
- Variant B, without references to extinguishment of “rights” should be used as a basis for expressing the principle of limitation period;
- No suspensions or interruptions of the limitation period should be allowed, except as agreed by the parties under draft article 71;
- The party whose claim was time-barred under draft article 69 should nevertheless retain the possibility of set-off; and
- The Secretariat should prepare a revised version of the draft article, taking into account the above considerations.

Draft article 70. Commencement of limitation period

134. The Working Group noted that draft article 70 which provided for the commencement date of the limitation period had been discussed at its seventeenth session (A/CN.9/526, para. 170). At that time, preference had emerged for a commencement date that was linked to the date of actual delivery rather than the date of delivery stipulated in the contract of carriage, supplemented by a rule that referred to the contractual date of delivery in cases where there was total loss of the goods. An outstanding question in this regard was thought to be whether the same commencement date should be used for claims against the carrier, the maritime performing party and the shipper.

Claims against the carrier and maritime performing party

135. It was generally agreed that the purpose of the provision was to provide certainty by way of an easily determinable commencement date on which a person wishing to bring a claim could bring such a claim, and a person against whom a claim might be made would know whether or not that claim was to be made, so that the expiration of the period would be equally certain and predictable.

136. The question was asked, however, as to whether it was sufficiently clear that the draft article intended to refer to the date of actual delivery. It was said that the cross-reference to draft article 11, paragraphs 4 or 5, on the period of responsibility, obscured that intention, to the extent that such cross-reference might link the notion of “delivery” for the purposes of draft

article 70, to the provisions in the contract of carriage that defined the date of delivery. In that respect, it was noted that a court, in determining the question of what constitutes delivery, might refer back to draft article 11 in any event. The Working Group agreed that the draft article should only refer to “delivery”, without reference to draft article 11, paragraphs (4) or (5), since the notion of “delivery”, which was also used in a similar context in article 3(6) of the Hague-Visby Rules and article 20(3) of the Hamburg Rules, was well understood and had been amply clarified in case law.

137. A proposal was made that in the case of total loss of the goods, reference could be had to the date on which the carrier took over the goods as the commencement date instead of “completed delivery”. A further proposal was made to use the date on which the carrier took over the goods for the commencement date for both regular claims and cases of total loss. It was said that a reference to the date on which the carrier took over the goods, which should be stated in the contract particulars pursuant to draft article 38, subparagraph (1)(f)(i), would provide an objectively verifiable element for determining when the limitation period would commence and would better promote legal certainty than a reference to “delivery”, which might require a finding of fact. Further, it was thought that the decision of the Working Group to set the limitation period at two years would provide sufficient time to cover the earlier commencement date in this case. That proposal received some support, but a potential problem was thought to be that the limitation period would start running prior to the right to claim arising. Overall, the Working Group preferred to retain the well-known approach of the date of actual delivery as taken in the Hague-Visby Rules and in the Hamburg Rules on the basis that these represented well-tested formulations. However, there was support for future consideration of using the date that the carrier took over the goods as the commencement date in the case of total loss.

138. Some support was expressed for the text used in the Hamburg Rules in that it contained a reference to partial delivery not expressly dealt with in draft article 70 as currently drafted.

139. It was recalled that as currently drafted, article 70 contained a specific rule for situations of total loss of the goods, since in such cases there would obviously be no “delivery”. The default rule in the draft article tied the limitation period to the “[last] day on which the goods should have been delivered”. The view was expressed that the phrase “should have been delivered” might be ambiguous. In response, it was pointed out that the reference to the date when the goods “should have been delivered” was an accepted default provision for situations of total loss, as it made the contractual date of delivery, which should be verifiable from the contract particulars, the starting point for the limitation period. The reference to the “last” day on which goods should have been delivered, it was further explained, had been included so as to accommodate situations where goods were not required to be delivered at a specific date, but within a certain time, such as in a particular week or month.

140. Some doubts were expressed as to whether the same commencement date should also apply for claims against a maritime performing party. The advantage of one uniform commencement period was that it was said to meet the practical concern of providing predictability and certainty. However some doubts were raised about a uniform commencement period starting before the maritime performing party had received or taken custody of the goods. Some considered that the limitation period should only commence as against maritime performing parties on the date on which damages could be sought. It was noted that whilst that might be true, given that the Working Group had decided on a two-year period and that the date

referred only to the commencement of the limitation period, applying the same date would not be too onerous.

Claim against shipper

141. It was recalled that doubts had been raised as to whether the time of delivery was relevant for the limitation period for claims against the shipper (A/CN.9/526, para. 173). It was suggested that, given the different nature of claims that could be made against shippers as against carriers, a different commencement period should apply relating to the date compared to those that could be made on which damages occurred. Generally, it was said that in accordance with well-established principles of law, a limitation period only started to run when the relevant party against which the limitation period operated had accrued a claim against the other party. Given the greater diversity of possible claims by carriers against shippers, as compared to the more standard nature of cargo claims, the Working Group should attempt to devise specific rules. A general rule that referred to the time when the carrier's claim against the shipper accrued could also be used, if the formulation of more specific rules was not deemed to be feasible. There was some support for that proposal.

142. The countervailing view, however, was that, in the interest of enhancing legal certainty and predictability it would be preferable to provide for the same commencement date for claims against the shipper as for those against the carrier. It was pointed out that in most cases acts by the shipper that might cause damage to the carrier, such as failure to provide information on the dangerous nature of the goods, or appropriate instructions for handling them, would typically occur well before the delivery of the goods, so that, in practice, the carrier already benefited from the fact that the limitation period would not commence before delivery of the goods. Furthermore, it was said that the date of delivery, which was a material event easily ascertainable, better promoted legal certainty than a reference to the time when the shipper breached its obligations or caused damage to the carrier, which would inevitably vary from case to case. The Working Group concurred with the latter view and agreed that the same commencement date should apply to both claims against the shipper and claims against the carrier.

Conclusions reached by the Working Group regarding draft article 70:

143. After discussion, the Working Group decided to:

- Retain the text in draft article 70 but revise it to remove references to article 11 and to take account of the wording in article 20(2) of the Hamburg Rules; and
- Retain the term “last” and remove the square brackets.

[* * *]

Draft article 73. Counterclaims

153. It was recalled that draft article 73 was based on the suggestion made at the eleventh session of the Working Group that the draft convention should address counterclaims and that these types of claims should be treated in a similar fashion to recourse actions (see A/CN.9/526, para. 177).

154. Concerns were expressed that, as drafted, draft article 73 was unclear and too broad. It was suggested that draft article 73 should be revised to limit it to counterclaims that were instituted for set-off. It was recalled that the Working Group had already decided in draft article

69 to retain a reference to “action” rather than “right” which would preserve the claimant’s right to set-off and thus that draft article 73, in its present form, was now otiose. It was agreed that the placement of such a provision on set-off would need to be considered by the Working Group at an appropriate stage.

Conclusions reached by the Working Group regarding draft article 73:

155. After discussion, the Working Group decided that:

- A revised version of draft article 73 dealing with a rule on set-off be prepared and that that version either be located in draft article 73 or at another appropriate place in the draft convention.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 65. Limitation of actions

168. The Working Group agreed that the text of draft article 65 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 65. Period of time of suit

209. A concern was expressed that the Working Group might have unintentionally created a problem in the text of the draft convention by setting a two-year time period for the institution of proceedings for breaches of obligations, while at the same time failing to require that notice of the loss or damage be given to the carrier under draft article 24. It was suggested that such an approach would put the carrier at a disadvantage by allowing for the possibility that without such notice, the carrier could be surprised by a claim at any time within the two years, and that it might not have preserved the necessary evidence, even though prudent cargo interests would usually notify the carrier as soon as the loss or damage was discovered. It was noted that the Working Group had considered the operation of draft article 24 in a previous session (see, most recently, A/CN.9/621, paras. 110-114), and that it had been decided that a failure to provide the notice in draft article 24 was not intended to have a specific legal effect, but rather that it was meant to have a positive practical effect by encouraging cargo interests claiming loss or damage to provide early notice of that loss or damage. Support was expressed by the Working Group for the text as drafted.

210. The Working Group approved the substance of draft article 65 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 64. Period of time for suit

204. The Commission approved the substance of draft article 64 and referred it to the drafting group.

Article 63. Extension of time for suit

The period provided in article 62 shall not be subject to suspension or interruption, but the person against which a claim is made may at any time during the running of the period extend that period by a declaration to the claimant. This period may be further extended by another declaration or declarations.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(d) Paragraph 14.3

175. The Working Group found the substance of paragraph 14.3 to be generally acceptable.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 71. Extension of limitation period

144. It was observed that a provision that enabled parties to extend the limitation period existed under the Hague-Visby Rules (article 3(6)) and the Hamburg Rules (article 20(4)). It was noted that draft article 71 was largely based on the Hamburg Rules in that it permitted a person against which a claim was made to extend the limitation period by declaration any time during the running of the limitation period. It was noted that draft article 71 differed from the Hague-Visby Rules which required an agreement and might permit an extension even after the lapse of the limitation period.

145. In response to a question as to the form requirement for the declaration in article 71, it was pointed out that draft article 3 required the declaration to be in writing but also admitted electronic communications.

146. The Working Group considered the form requirement appropriate.

Conclusions reached by the Working Group regarding draft article 71:

147. After discussion, the Working Group decided that the existing text of draft article 71 should be maintained.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 66. Extension of limitation period**

169. The view was expressed that the substance of draft article 66 was inconsistent with the principle of a limitation period, at least as that principle was understood in some legal systems. It was pointed out that some legal systems distinguished between ordinary limitation periods (“*prescription*” or “*prescripción*”) and peremptory limitation periods (“*déchéance*” or “*caducidad*”). Among other differences, the first type of limitation period was generally capable of being suspended or interrupted for various causes, whereas the second type of limitation period ran continuously without suspension or interruption. It was observed that, in some language versions, the draft article used terms suggesting an ordinary limitation period (“*prescription*”, in the French version, and “*prescripción*” in the Spanish), but the provision itself stated that the period was not subject to suspension or interruption. That, it was said, might give rise to confusion and incorrect interpretation under domestic law. It was therefore proposed that the first sentence of the draft article should be amended by deleting the entire first clause and the word “but” at the beginning of the second clause.

170. In response, it was noted that the Working Group was aware of the lack of uniformity among legal systems as to the nature and effect of a limitation period, in particular of the different types of limitation period that had been mentioned. The Working Group was also mindful of the diversity of domestic laws on the question of suspension or interruption of limitation periods, but was generally of the view that the draft convention should offer a uniform rule on the matter, rather than leave it to domestic law. The general agreement within the Working Group was that the draft convention should expressly exclude any form of suspension or interruption of the limitation period, except where such suspension or interruption had been agreed by the parties under the draft article (see A/CN.9/616, para. 132). At the same time, the Working Group had agreed that the limitation period would be automatically extended, under the circumstances referred to in draft article 68, because the limitation period might otherwise expire before a claimant had identified the bareboat charterer that was the responsible “carrier” (see A/CN.9/616, para. 156).

171. The limitation period provided for in the draft convention was an autonomous rule that, according to draft article 2, should be understood in the light of the draft convention’s international character, and not in accordance to categories particular to any given legal system. Nonetheless, the Working Group agreed that, to avoid misunderstandings, the term “limitation period” should be replaced through the text of the draft convention with a reference to “the period provided in article 65”.

172. Apart from that amendment, the Working Group agreed that the text of draft article 66 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

211. The Working Group approved the substance of draft article 66 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 65. Extension of time for suit**

205. A concern was expressed that it would be unfair to the claimant to allow the person against which the claim was made to control whether or not an extension of the time period would be granted. The suggestion was made that the following phrase should be deleted: “by a declaration to the claimant. This period may be further extended by another declaration or declarations.” However, it was observed that such extensions by declaration or agreement were mechanisms that already existed in the Hague-Visby and Hamburg Rules.

206. Concern was also expressed that prohibiting the suspension or interruption of the period of time for suit would operate to the detriment of claimants by weakening their legal position vis-à-vis the person against which the claim was made. Further, it was suggested that this could elicit a negative response from insurers, since it was thought that any extension of the time for suit would depend on the goodwill of the carrier. In order to alleviate that perceived problem, it was suggested that the following phrase be deleted from the draft provision: “The period provided in article 64 shall not be subject to suspension or interruption, but”. There was some support for that view.

207. In response to those concerns, it was observed that the provision, as drafted, intended to maintain a balance between establishing legal certainty with respect to outstanding liabilities and maintaining flexibility in allowing the claimant to seek additional time to pursue legal action or settlement, if necessary. It was noted that it was particularly important to harmonize the international rules with respect to interruption and suspension, since those matters would otherwise be governed by the applicable law, which varied widely from jurisdiction to jurisdiction. It was feared that the result of such an approach would be forum shopping by claimants, a lack of transparency and an overall lack of predictability, all of which could prove costly. It was also observed that the two-year period of time for suit was longer than that provided for in the Hague-Visby Rules and that it was expected to provide sufficient time for claimants to pursue their actions or for such claims to be settled without the need for suspension or interruption. A number of delegations observed that the draft provision would require them to revise their national laws, but that it was felt that such a harmonizing measure was useful and appropriate in the circumstances. There was support in the Commission for retention of the provision as drafted.

208. After discussion, the Commission approved the substance of draft article 65 and referred it to the drafting group.

Article 64. Action for indemnity

An action for indemnity by a person held liable may be instituted after the expiration of the period provided in article 62 if the indemnity action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the person instituting the action for indemnity has either settled the claim or been served with process in the action against itself, whichever is earlier.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(e) Paragraph 14.4***

176. Concerns were raised with respect to subparagraph 14.4(b)(ii), which set out that an action for indemnity by a person held liable under the draft instrument could be instituted after the expiration of the paragraph 14.1 time for suit in certain circumstances. It was noted that in certain civil law countries, it was not possible to commence an indemnity action until after the final judgement in the case had been rendered, and it was suggested that the 90-day period in subparagraph 14.4(b)(ii) be adjusted to commence from the date the legal judgement is effective. Support was expressed for this position, and alternative language was offered that the 90-day period should run from the day the judgement against the recourse claimant became final and unreviewable.

177. It was suggested that the concern raised with respect to the possibility of counterclaims being barred by the late commencement of claims pursuant to paragraph 14.1 (see above, para. 172) could be met by allowing counterclaims to be made after the expiration of the time for suit, provided that they are instituted within 90 days of the service of process in the main action, pursuant to subparagraph 14.4(b)(ii) as currently drafted. A further suggestion was made that counterclaims could be dealt with in a separate draft article, but that they should nonetheless be treated in similar fashion to subparagraph 14.4(b)(ii).

178. The Working Group requested the Secretariat to prepare a revised draft of paragraph 14.4, with due consideration being given to the views expressed.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]**Draft article 72. Action for indemnity**

148. The Working Group recalled that draft article 72 provided for a special extension of the time period with respect to recourse action so that, for example, the carrier had sufficient time to bring an action against a sub-carrier when the action against the carrier was brought immediately before the lapse of a limitation period. It was recalled that a similar rule existed in both the Hague-Visby Rules (article 3(6 bis) and the Hamburg Rules (article 20(5)).

149. The Working Group had before it two variants (as contained in A/CN.9/WG.III/WP.56 and reproduced in A/CN.9/WG.III/WP.76, para. 47). It was noted that the variants provided for a different commencement date for the additional 90 days after the expiration of the period contained in article 69.

150. It was recalled that variant B had been drafted to meet the concern of certain civil law countries where an indemnity action could not be commenced until after the final judgment was rendered. However, paragraph (a) of draft article 72 was said to adequately address that situation by referring to the time allowed by the applicable law in the jurisdiction where proceedings were instituted.

151. To enhance certainty, a proposal was made that a requirement for early notification to the person against whom a claim for indemnity might be sought should be included to allow that person to preserve evidence that might otherwise be lost during the period. It was suggested that that notice be provided within 90 days after the end of the limitation period and that that period not be subject to extension. That proposal received some support.

Conclusions reached by the Working Group regarding draft article 72:

152. After discussion, the Working Group decided that:

- Variant B be deleted; and
- Variant A be retained and revised to include possible variants relating to providing notice of the original action.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 67. Action for indemnity

173. It was observed that the rule contained in subparagraph (b) of draft article 67 had caused some practical problems in jurisdictions that followed a similar system to that set out in the provision. It was noted that a person who was served with process might not necessarily be liable for the claim, but would nevertheless be forced to initiate an indemnity action within 90 days. It was therefore suggested to either delete the second possibility set out in subparagraph (b), retaining only the reference to the date of settlement of the claim, or to refer instead to the date of notification of the final judgement.

174. In response, it was recalled that the Working Group had already discarded a rule that referred to the date of the final judgement (see A/CN.9/616, para. 152). In any event, a reference to the final judgement would have been impractical, as judicial proceedings might take several years until reaching final judgement, and the person against whom an indemnity action might be brought had a legitimate interest in not being exposed to unexpected liabilities for an inordinate amount of time. It was recognized that at the time a party was served with process it might not be apparent whether the suit would succeed, and, as such, the amount of the judgement would remain unclear. However, at least the party would know that a claim existed and would have a duty to act so that the party that might be ultimately liable under the indemnity claim would be put on notice at an early stage.

175. In that connection, there was no support in the Working Group for elaborating the rule in subparagraph (b) so as to provide that the period for the indemnity claim should run from the

date of the final judgement, provided that the indemnity claimant had notified the other party, within three months from the time when the recovery claimant had become aware of the damage and the default of the indemnity debtor. It was felt that such elaboration would render the provision overly complicated and that it would be preferable to keep the provision in line with article 24, paragraph 5 of the Hamburg Rules, on which the draft article was based.

176. Having noted that the draft article should cover all indemnity actions under the draft convention, but not indemnity actions outside the draft convention, the Working Group agreed to request the Secretariat to review the need for, and appropriate placement of, the phrase “under this Convention”, in the chapeau of the draft article.

177. Subject to that request, the Working Group agreed that the text of draft article 67 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

212. The Working Group approved the substance of draft article 67 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 66. Action for indemnity

209. Although a concern was expressed as to whether it should be possible for a person held liable to institute an action for indemnity after the expiration of the period of time for suit, that concern was not supported, and the Commission approved the substance of draft article 66 and referred it to the drafting group.

Article 65. Actions against the person identified as the carrier

An action against the bareboat charterer or the person identified as the carrier pursuant to article 37, paragraph 2, may be instituted after the expiration of the period provided in article 62 if the action is instituted within the later of:

(a) The time allowed by the applicable law in the jurisdiction where proceedings are instituted; or

(b) Ninety days commencing from the day when the carrier has been identified, or the registered owner or bareboat charterer has rebutted the presumption that it is the carrier, pursuant to article 37, paragraph 2.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(f) Paragraph 14.5***

179. It was recalled that paragraph 14.5 appeared in square brackets due to its link to subparagraph 8.4.2, which was also bracketed, and that if the decision was made to delete subparagraph 8.4.2, then the entire text of paragraph 14.5 would also be deleted as unnecessary. It was reiterated that this provision was intended to accommodate the claimant who could be at risk of running out of time to file suit through no fault of its own if the registered owner waited too long before producing the bareboat charterer pursuant to subparagraph 8.4.2.

180. Mindful of the fact that the fate of this provision depended upon that of subparagraph 8.4.2, the Working Group expressed support for the principle embodied in paragraph 14.5, and for the 90-day time period. However, a doubt was raised whether this provision would be of any assistance to cargo claimants that experienced difficulties in identifying the carrier, since if the registered owner of the vessel successfully rebutted the presumption, the claimant would need to introduce a new claim against the bareboat charterer.

181. It was suggested that subparagraphs (i) and (ii) of subparagraph 14.5(b) be combined into one, since subparagraph (ii) could be considered a sufficiently rigorous condition to subsume subparagraph (i). Whilst it was recognized that the sheer size of a typical bareboat charter, in addition to the likelihood that it would contain confidential information, would make it impractical to produce in a proceeding, it was thought that proof of the facts by the registered owner of the vessel could be expressed in one single condition.

182. The Working Group requested the Secretariat to prepare a revised draft of paragraph 14.4, with due consideration being given to the views expressed. Note was also taken that the Working Group had requested the Secretariat to retain subparagraph 8.4.2 in square brackets, and that it therefore requested the Secretariat to retain paragraph 14.5 in square brackets, bearing in mind that the fate of the latter article was linked to that of the former.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]**Article 74. Actions against the bareboat charterer**

156. It was recalled that article 74 addressed the concern that the limitation period might expire before a claimant had identified the bareboat charterer that was the responsible “carrier” under draft article 40(3). It was agreed that the text in article 74 be modified to take account of the Working Group’s decision to reformulate paragraph 40(3) (see paras. 17-25 and 28 above) and that the revised version of draft article 74 be retained in square brackets for consideration at a future session.

Conclusions reached by the Working Group regarding draft article 74:

157. After discussion, the Working Group decided that the text in draft article 74 be retained in square brackets and be revised in accordance with its decision taken in relation to draft article 40(3).

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 68. Actions against the person identified as the carrier**

178. It was suggested that subparagraph (b) could be shortened by deleting the reference to the bareboat charterer, since the identification of the carrier was the way by which the bareboat charterer would rebut the presumption of being the carrier under that provision. The Working Group agreed to request the Secretariat to review the interplay between the two provisions and to suggest any amendments that might be appropriate for the Working Group's consideration.

179. Apart from that observation, the Working Group agreed that the text of draft article 68 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

213. The Working Group approved the substance of draft article 68 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 67. Actions against the person identified as the carrier**

210. A concern was raised that the bareboat charterer should not be included in draft article 67. By way of explanation, it was noted that the bareboat charterer had been included in the draft provision so as to provide the cargo claimant with the procedural tools necessary to take legal action against the bareboat charterer when that party had been identified as the carrier pursuant to draft article 39. There was support in the Commission for that view.

211. The Commission approved the substance of draft article 67 and referred it to the drafting group.

Possible additional article in cases of removal of actions**[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]****Possible additional article with regard to the removal of actions pursuant to draft article 80(2)**

158. The Working Group recalled that at its sixteenth session, a proposal had been made that the draft convention should provide for the treatment of the time limitation for suit in connection with the removal of actions pursuant to draft article 80(2) (see A/CN.9/591, para. 57).

159. It was suggested that, in general, any action which could be removed under draft article 80(2) would be a declaratory action to deny the carrier's liability and would not include legitimate actions against the shipper such as a claim for liability under chapter 8 (see

A/CN.9/591, paras. 57-59). The Working Group agreed that it was not necessary to have a special rule in connection with the removal of actions pursuant to draft article 80(2).

Conclusions reached by the Working Group regarding possible additional article:

160. After discussion, the Working Group decided no additional article was required in relation to removal of action.

CHAPTER 14. JURISDICTION

General Discussion on the Chapter

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

(b) Jurisdiction

61. It was noted that the draft instrument did not deal with issues of jurisdiction (the reason being, as indicated in the note by the Secretariat (A/CN.9/WG.III/WP.21, Introduction, para. 24), that it seemed premature to formulate a provision on jurisdiction or arbitration at that early stage of the project before some substantive solutions were reached on substantive solutions). While some support was expressed for not including in the draft instrument such a provision on jurisdiction and arbitration, it was widely considered that such a provision would be useful and even, in the view of some, indispensable. While no conclusions were reached as regards the substance of such a provision, several suggestions were made as to its possible content: that the State of delivery of the goods should be one of those which would have jurisdiction; that arbitration should be addressed in the future provision; that the provisions should override a jurisdiction clause in the transport contract (except where the clause was agreed upon after the loss or damage has occurred); that parties by express agreement might be able to decide upon a jurisdiction of their choice; and that articles 21 and 22 of the Hamburg Rules were to serve as a model for the draft provision.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Jurisdiction

General discussion

110. The Working Group proceeded to consider draft chapter 15 on jurisdiction contained in A/CN.9/WG.III/WP.32, consisting of Variant A and Variant B, noting that the difference between the two variants was the inclusion in Variant A of draft article 75 on *lis pendens* (see below, paras. 142 to 144). The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paras. 11 and 82 above). The Working Group heard that an exchange of views had taken place within the informal consultation group not simply with respect to the provisions of draft chapter 15, but with respect to broad principles regarding the desirability of including jurisdiction provisions in the draft instrument, and what form these provisions might take.

111. In general, the Working Group supported the inclusion of a chapter relating to jurisdiction. Some views were expressed that the question of jurisdiction should be left entirely to the choice of the parties to the contract of carriage. In addition, it was feared that negotiations in this complex subject area could ultimately result in a failure to reach consensus on the provisions of the draft instrument, or that jurisdiction provisions along the lines of the Hamburg Rules as currently in the draft instrument could create barriers to States wishing to ratify the instrument. The question was also raised whether draft subparagraph 2(1)(d) regarding the scope of application of the draft instrument should be deleted (see

A/CN.9/WG.III/WP.36, footnote 18) if the Working Group agreed to include a chapter on jurisdiction.

112. The Working Group heard that although the European Community had common rules in the area of jurisdiction as embodied in Brussels Regulation I (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters), that would not prevent its members from negotiating rules in the draft instrument that derogated therefrom, if necessary.

Conclusions reached by the Working Group

113. After discussion, the Working Group agreed to include in the draft instrument a chapter on jurisdiction.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Jurisdiction—Chapter 15

110. The Working Group was reminded that it had considered the provisions of chapter 15 of the draft instrument on jurisdiction at its fourteenth session and that it had agreed to include in the draft instrument a chapter on jurisdiction (see A/CN.9/572, paras. 110-150). Based on those deliberations, and taking into account the decisions made by the Working Group during that session, revised text was proposed for the provisions of chapter 15. With a view to considering both this revised text and certain policy questions that had arisen during intersessional discussions (see A/CN.9/572, para. 166), it was agreed by the Working Group that consideration of these matters should take place by grouping certain of the provisions together on the basis of a list of key issues as set out in the following headings and paragraphs.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

9. The Working Group was reminded that it had first considered the chapter of the draft convention concerning jurisdiction at its fourteenth session (see A/CN.9/572, paras. 110-150) and most recently at its fifteenth session (see A/CN.9/576, paras. 110-175). The discussion of the provisions on jurisdiction was based on the text as found in annexes I and II of A/CN.9/WG.III/WP.56.

[* * *]

Proposed revised text for chapter on jurisdiction

General discussion

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

“Article 1(xx) “Competent court”

““Competent court” means a court in a Contracting State that, according to the rules on the internal allocation of jurisdiction among the courts of that State, may exercise jurisdiction over a matter.

“Article 75. Actions against the carrier

“Unless the contract of carriage contains an exclusive choice of court agreement that is valid under article 76, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier in a competent court within the jurisdiction of which is situated one of the following places:

- “(a) The domicile of the defendant; or
- “(b) The contractual place of receipt or the contractual place of delivery; or
- “(c) The port where the goods are initially loaded on a ship; or the port where the goods are finally discharged from a ship; or
- “(d) Any place designated for that purpose in accordance with article 76(1).

“Article 76. Choice of court agreements

“1. If the shipper and the carrier agree that a competent court has jurisdiction to decide disputes that may arise under this Convention, then that court has non-exclusive jurisdiction, provided that the agreement conferring it is concluded or documented

- “(a) in writing;² or
- “(b) by any other means of communication that renders information accessible so as to be usable for subsequent reference.

“2. The jurisdiction of a court chosen in accordance with paragraph 1 is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction

“(a) is contained in a volume contract that clearly states the names and addresses of the parties and either

- “(i) is individually negotiated; or
- “(ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies its location within the volume contract; and

“(b) clearly states the name and location of the chosen court.

“3. An exclusive choice of court agreement concluded in accordance with paragraph 2 is binding on a person that is not a party to the volume contract only if this is consistent with applicable law as determined by the [international private law] [conflict of law rules] of the court seized and:

² The form requirement will be treated under article 3.

“(a) That person is given adequate notice of the court where the action can be brought;

“(b) The forum is in one of the places designated in article 75 [(a), (b) or (c)].

“4. Subject to paragraph 5, this article does not prevent a Contracting State from giving effect to a choice of court agreement that does not meet the requirements of paragraphs 1, 2, or 3. Such Contracting State must give corresponding notice [to _____].

“5. Nothing in paragraph 4 or in a choice of court agreement effective under paragraph 4 prevents a court specified in article 75 [(a), (b), (c) or (d)] and situated in a different Contracting State from exercising its jurisdiction over the dispute and deciding the dispute according to this Convention. No choice of court agreement is exclusive with respect to an action [against a carrier] under this Convention except as provided by this article.

“Article 77. Actions against the maritime performing party

“In judicial proceedings under this Convention against the maritime performing party, the plaintiff, at its option, may institute an action in a competent court within the jurisdiction of which is situated one of the following places:

“(a) The domicile of the maritime performing party; or

“(b) The port where the goods are initially received by the maritime performing party or the port where the goods are finally delivered by the maritime performing party.

“Article 78. No additional bases of jurisdiction

“Subject to articles 80 and 81, no judicial proceedings under this Convention against the carrier may be instituted in a court not designated under articles 75, 76 or 77.

“Article 79. Provisional or protective measures

“Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. [A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless

“(a) the requirements of this chapter are fulfilled; or

“(b) an international convention that according to its rules of application applies in that State so provides.]

“Article 80. Consolidation and removal of actions

“1. Except when there is an exclusive choice of court agreement that is valid under article 76, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, then the action may be instituted only in a court designated under both articles 75 and 77. If no such court is

available, the action must be instituted in a court designated under article 77(b) if such court is available.

“2. Except when there is an exclusive choice of court agreement that is valid under article 76, a carrier or a maritime performing party that institutes an action that [would affect] [merely aims at affecting] the rights of a person to select the forum under articles 75 or 77, must at the request of the defendant, withdraw that action and may recommence it in one of the courts designated under articles 75 or 77, whichever is applicable, as chosen by the defendant.

“Article 81. Agreements after the dispute has arisen and jurisdiction when the defendant has entered an appearance

“Notwithstanding the preceding articles of this chapter:

“(a) After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

“(b) A competent court before which a defendant appears, without contesting the jurisdiction in accordance with the rules of that court, has jurisdiction over the parties.

“Article 81 bis. Recognition and enforcement

“1. A decision made by a court of one Contracting State that had jurisdiction under this Convention is to be recognized and enforced in another Contracting State in accordance with the law of the Contracting State where recognition and enforcement are sought.

“2. This article does not apply to a decision rendered in another Contracting State that has jurisdiction under article 76(4).

“Article XX. Participation by Regional Economic Integration Organizations

“1. A Regional Economic Integration Organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organization shall in that case have the rights and obligations of a Contracting State, to the extent that that Organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organization shall not count as a Contracting State in addition to its Member States which are Contracting States.

“2. The Regional Economic Integration Organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organization by its Member States. The Regional Economic Integration Organization shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

“3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a Regional Economic Integration Organization where the context so requires.”

74. The Working Group heard a brief report from the delegations proposing the revised text for the chapter on jurisdiction. It was reported that against a background of divergent interests and views in the Working Group regarding the draft provisions on jurisdiction, a delicate compromise had been achieved and that it was reflected in the revised text. It was observed that although total harmonization of the jurisdiction provisions was not possible, it was thought that the compromise achieved could be acceptable to the Working Group, because it was seen to be preferable to the alternative, which was to exclude jurisdiction from the draft convention.

75. There was general support expressed for the proposed compromise set out in the revised articles, particularly given the complexity of the issues, and the view was expressed that a careful balancing of interests had been achieved. The view was expressed that deletion or revisions in substance of the draft compromise could destroy the compromise accomplished.

76. In response to a request for clarification of draft article 76(4), it was observed that the intention of the notice requirement was to indicate that a policy decision had been made regarding paragraph 4 by a Contracting State rather than by individual courts within that State deciding whether or not they would choose to apply paragraph 4. It was further clarified that it was not intended that such a notification would necessarily require a change to the law in the Contracting State but rather that it required a Contracting State to inform the rest of the world whether it would give effect to exclusive choice of court agreements on less strict conditions than those set out in paragraph 2.

77. In further reference to the notice requirement under draft article 76(4), it was observed that receiving the content of national law might not be appropriate for a depositary, and it was thought that notices of the nature contemplated could be extensive, even consisting of case law, and that they could require translation to other languages, a matter that could raise administrative issues with the depositary, and that could create a hurdle for the adoption of the draft convention. In response to those concerns, several views were expressed that such notices could consist of very simple statements regarding whether or not a Contracting State would apply paragraph 4, or that they could be sent to organizations other than the depositary for collection and dissemination. There was general agreement that this matter should be discussed further at a later stage.

78. A concern was raised with respect to the structure of the chapter on jurisdiction, since draft article 75 was concerned only with claims against the carrier, followed by draft article 76, which regulated actions against both the shipper and the carrier, but that it seemed that other than draft article 76, actions by the carrier against the shipper were not treated in the subsequent provisions. The view was expressed that this was not an oversight in regard to draft article 75, since the compromise achieved by the entire chapter was intended to enable cargo interests to have access to a reasonable forum to resolve disputes notwithstanding the existence of an exclusive jurisdiction clause which may have been placed in the contract of carriage by the carrier. In that regard, it was suggested that the brackets around the words “against a carrier” in draft article 76(5) should be deleted so as to bind a carrier to an exclusive jurisdiction forum that it had selected. However, in terms of the observation regarding the overall structure of the chapter, it was observed that article 81 bis had indeed been intended to

be applicable to decisions in legitimate actions by the carrier against the shipper, and that if that was not the case, adjustments should be made to the text of draft article 81 bis.

79. Concerns were also raised regarding the clarity of the text with respect to the intention of draft article 81 bis. The view was expressed that that provision meant that a State that gave notice under draft article 76(4) would not be required by draft article 81 bis to recognize a judgment from a State that did not recognize the exclusiveness of the jurisdiction clause. It was agreed that, if necessary, the text of draft article 81 bis should be clarified to reflect this position.

80. A further concern was raised regarding the relationship between paragraphs 4 and 5 of draft article 76. Since draft article 76(4) was thought to be the core of the compromise on this chapter, it was said to be important to establish why its opening phrase made it subject to paragraph 5. In particular, it was thought that paragraph 4 should not be made subject to the second sentence of paragraph 5, and that it should be made a separate paragraph under draft article 76.

81. A number of views were also expressed reiterating the position that no articles on jurisdiction should be included in the draft instrument. It was also suggested that while the spirit of the compromise was appreciated, the revised articles did not go far enough in promoting uniformity but instead would lead to forum shopping and the filing of a multiplicity of suits thereby reducing certainty and increasing costs to litigants. A further view was reiterated that exclusive jurisdiction clauses should be given full effect in the draft instrument and that the view that such an approach would be unfair to third parties was untenable because insurance could be obtained and third parties could always obtain the information regarding the jurisdiction from public sources or from the carriers themselves.

82. A number of drafting suggestions were made. One suggestion agreed upon was the inclusion of the word “and” between the draft article 76(a) and (b). Other drafting suggestions were to replace the words “in accordance with the law of the Contracting State” in draft article 81 bis (1) with the words “subject to the conditions laid down in the law of the Contracting State” to enhance the clarity of the draft article. The view was also expressed that the wording of draft article 81 bis could be a little stringent and might imply that a court operating under draft article 76(4) might not recognize a judgment of another court operating under the same draft article. It was also suggested that the earlier version of draft paragraph 81 bis (2) set out in paragraph 70 above was preferable as it allowed States that required draft paragraph 81 bis (1) as a legal basis for the recognition of judgments generally, to recognize decisions made pursuant to draft paragraph 76(4). A suggestion was also made that draft article 76(3) should contain a clear conflict of law rule to determine the law governing third parties.

83. Draft article XX, relating to the participation of regional economic integration organizations, was not discussed.

Conclusions reached by the Working Group on proposed jurisdiction chapter:

84. After discussion, the Working Group decided that:

- The compromise contained in the proposed draft text for chapter 16 was both acceptable and accepted, with some reservations regarding the notice given to third parties under draft article 76(3);
- The word “and” should be included between draft paragraphs 76(a) and (b); and

- Further drafting suggestions and clarifications should be considered in light of the comments expressed in the paragraphs above.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Jurisdiction—Chapter 16

General discussion

245. The Working Group was reminded that it had most recently considered the topic of jurisdiction at its sixteenth session (see A/CN.9/591, paras. 9-84), and that it had previously considered the topic at its fourteenth (see A/CN.9/572, paras. 110-150) and fifteenth sessions (see A/CN.9/576, paras. 110-175). It was also recalled that a revised text of the chapter on jurisdiction was prepared for the consideration of the Working Group for this session (see A/CN.9/WG.III/WP.75), which was based upon the text considered at its sixteenth session (see A/CN.9/591, para. 73), as well as consideration of that text (see A/CN.9/591, paras. 74-84). Certain suggestions by the Secretariat for drafting improvements had been included in the text in A/CN.9/WG.III/WP.75, as set out in the footnotes thereto. Discussion in the Working Group of the provisions on jurisdiction was based on the text as found in A/CN.9/WG.III/WP.75.

[* * *]

Discussion of specific provisions in chapter 16

253. The Working Group proceeded to examine the provisions in the chapter on jurisdiction with a view to considering whether a decision could be reached regarding any alternative text presented in A/CN.9/WG.III/WP.75, and whether resolution could be reached regarding other questions raised.

[* * *]

Conclusions reached by the Working Group regarding the provisions in chapter 16:

266. After discussion, the Working Group decided that:

- The Secretariat should make the adjustments to the provisions of chapter 16 as approved above in paragraphs 245 to 265.

[For deliberations on the “opt-in” approach of the Chapter, see paragraphs 246-252,

A/CN.9/616 (18th Session of WG III) under article 74 at p. 671]

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Chapter 14. Jurisdiction

General comment

212. The Commission was reminded that the Working Group had agreed that chapter 14 on jurisdiction should be subject to an “opt-in” declaration system, as set out in draft article 76, such

that the chapter would apply only to Contracting States that had made a declaration to that effect. It was observed that as the chapter on jurisdiction did not contain a provision equivalent to draft article 77, paragraph 5, which provided that certain arbitration clauses or agreements that were inconsistent with the arbitration chapter would be held void, it was desirable that there be clarity regarding the interpretation of the “opt-in” mechanism. To that end, it was observed that the operation of the “opt-in” mechanism meant that a Contracting State that did not make such a declaration was free to regulate jurisdiction under the law applicable in that State. There was support in the Commission for that interpretation of draft article 76. In addition, it was observed that chapter 14 as a whole had been the subject of protracted discussions and represented a carefully balanced compromise, for which support was maintained.

Article 66. Actions against the carrier

Unless the contract of carriage contains an exclusive choice of court agreement that complies with article 67 or 72, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier:

(a) In a competent court within the jurisdiction of which is situated one of the following places:

- (i) The domicile of the carrier;
- (ii) The place of receipt agreed in the contract of carriage;
- (iii) The place of delivery agreed in the contract of carriage; or
- (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; or

(b) In a competent court or courts designated by an agreement between the shipper and the carrier for the purpose of deciding claims against the carrier that may arise under this Convention.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Article 72

Jurisdiction limited to Contracting States

114. There was broad support for the suggestion that the reference to action “in a court” was too broad and should be qualified by inclusion of the words “in a Contracting State”. A related matter was said to be the question of whether it was appropriate that national law be used to establish the competent court for jurisdiction according to the chapeau of draft article 72. In this regard, reference was made to paragraph 33(1) of the Convention for the Unification of Certain Rules for International Carriage by Air (“the Montreal Convention”), which was said to allow resort to both national and international courts to establish jurisdiction. However, there was support for the view that resort to national law was appropriate and not unusual in transport conventions.

Conclusions reached by the Working Group

115. After discussion, the Working Group agreed to add the phrase “in a Contracting State” after the phrase “in a court” in the chapeau of draft article 72.

Parties to whom the rules should apply

116. While views were expressed that jurisdiction provisions should cover all contractual issues, the Working Group continued its deliberations on the assumption that, generally speaking, the provisions of draft article 72 were appropriate as a basis for discussion for jurisdiction over actions against the contracting carrier by the cargo claimant. However, it was felt that in cases against the maritime performing party, the connecting factors to establish jurisdiction against the Contracting carrier currently set out in draft article 72 would not be appropriate. Further, it was suggested that at least two types of maritime performing parties would require different connecting factors in order for jurisdiction over them to be reasonable: jurisdiction over the stevedore or terminal operator should likely be limited to their principal place of business or the place where the service was performed, while jurisdiction over the ocean carrier could likely be reasonably established at the port of loading or the port of discharge. Support was expressed for that view.

Conclusions reached by the Working Group

117. After discussion, the Working Group agreed that:

- The list of connecting factors in draft article 72 would be appropriate only in actions by the cargo claimant against the contracting carrier;
- That actions against the maritime performing party should be subject to different connecting factors.

“plaintiff”

118. It was suggested that the term “plaintiff” currently used in the chapeau of draft article 72 to describe the person having the right to choose jurisdiction might not be appropriate. In that respect, it was noted that a carrier defending a claim for cargo loss or damage could effectively pre-empt the cargo claimant’s choice of jurisdiction by bringing as plaintiff an action for a declaration of non-liability. To prevent that, it was suggested that the term used in the chapeau should make clear that the choice of jurisdiction should be reserved for the cargo claimant. It was suggested that that could be accomplished by replacing the term “plaintiff” with “claimant”, and defining “claimant” in terms such as “the person who brings the action against the carrier”.

Conclusions reached by the Working Group

119. After discussion, the Working Group agreed to replace the term “plaintiff” with a more appropriate term to clearly indicate the intention that it referred to the “cargo claimant” and not the carrier.

Concursus—Concentration of suits in a single forum

120. The question was raised whether the chapter on jurisdiction should ensure that multiple suits arising from the same incident should be concentrated into one single forum. While no specific agreement was reached on this point, it was suggested that the inclusion of the port of loading and the port of discharge as connecting factors in draft article 72 (see below, para. 128)

could assist in providing an obvious and major point of commonality on which many cargo claimants would logically choose to base jurisdiction. Some preference was expressed for rules facilitating the concentration of suits in a single forum, rather than drafting a specific rule for such a purpose. It was also suggested that Brussels Regulation I contained a rule which might be instructive in this regard.

Conclusions reached by the Working Group

121. The Working Group did not reach specific agreement on this matter.

Paragraph (a) Principal place of business or habitual residence

122. In general, the Working Group supported paragraph (a). It was observed that, whilst paragraph (a) referred to the principal place of business of the defendant, article 34 of the draft instrument on contract particulars simply required the name and address of the carrier. The question was raised whether that information should be taken to be the principal place of business, or whether that requirement should be clarified. It was suggested that, in the event that paragraph (b) was deleted, the wording in paragraph (a) could be clarified, perhaps through a reference to the legal domicile of the defendant. While the question was raised whether domicile and principal place of business were truly different, reference was made to article 34 of the Montreal Convention, which referred to “the court of the domicile of the carrier or of its principal place of business through which the contract has been made”.

123. Given this discussion, it was agreed that the reference to “principal place of business” should be included in square brackets for further discussion, and perhaps definition, and that the word “domicile” should be included in square brackets at the end of that paragraph.

Conclusions reached by the Working Group regarding paragraph (a)

124. After discussion, the Working Group agreed:

- To place “principal place of business” in square brackets;
- To insert “domicile” in square brackets at the end of the phrase.

Paragraph (b) Place of contract

125. Strong support was expressed for the deletion of paragraph (b). In keeping with footnotes 223 and 30 of A/CN.9/WG.III/WP.32, it was agreed that in modern transport practice, the place of conclusion of the contract was largely irrelevant to the performance of the contract of carriage and, given that the draft instrument did not distinguish between documentary and electronic contexts, that place could be difficult or impossible to determine. A suggestion was made that the branch through which the contract was made could have some continuing relevance as a connecting factor with respect to suits against parties other than the contracting carrier. It was suggested that this might be borne in mind for future consideration.

Conclusions reached by the Working Group regarding paragraph (b)

126. After discussion, the Working Group agreed to:

- Delete paragraph (b);
- Bear in mind in future discussions the issue of whether the branch through which the contract was made could be a significant connecting factor in actions against maritime performing parties.

Paragraph (c) Place of receipt or delivery

127. General support was expressed for the inclusion of the place of receipt and the place of delivery as connecting factors upon which to base jurisdiction. Concern was expressed that it was unclear whether the terms “place of receipt or the place of delivery” referred to the contractual or actual places of receipt and delivery. It was suggested that this be clarified.

128. It was suggested that, as proposed in paragraph 30 of A/CN.9/WG.III/WP.34, two additional places should be specified, namely the port of loading and the port of discharge. It was suggested that such an inclusion was desirable to encourage the result that all litigation in relation to an accident should take place in the same forum. However, it was suggested that including these additional places could create overly broad connecting factors for jurisdiction, which were unnecessary and could complicate matters. The view was expressed that any need to cover other places was met by paragraph (d) which permitted the plaintiff to choose any additional place

Conclusions reached by the Working Group paragraph (c)

129. After discussion, the Working Group agreed:

- To include reference to port of loading and port of discharge in square brackets;
- To include the words “actual” and “contractual” in square brackets before the word “place” in both instances.

Paragraph (d) Place designated in the transport document and jurisdiction clauses

130. Three views emerged in respect of draft paragraph (d). One approach suggested that exclusive jurisdiction should be the principal rule, such that paragraph (d) should represent the only basis for jurisdiction, and whether or not the jurisdiction agreed upon in the contract of carriage was listed in the draft instrument, it would be the only applicable forum. Some support was expressed for the view that commercial parties should be free to choose jurisdiction, and it was suggested that it would provide commercial certainty.

131. Another view was that paragraph (d) should permit exclusive choice of jurisdiction by the contracting parties, but only if they chose one of the places listed in paragraphs (a) and (c). By way of explanation, it was suggested that, while cargo claimants are sophisticated business people, total freedom of choice of jurisdiction could be open to abuse by the carrier. For that reason, it was suggested that paragraph (d) should only permit a choice from places that objectively had a real connection to the transaction and only in places that were in a Contracting State.

132. A third view was that jurisdiction designated in the transport document would simply be considered an additional jurisdictional basis which would be added to the list of possible jurisdictions from which the cargo claimant could choose in the draft article. The view was expressed that it permitted a choice for the cargo claimant in addition to the places listed currently in paragraphs (a) and (c), but did not limit the cargo claimant to accepting the jurisdiction specified in the jurisdiction clause.

133. The Working Group did not reach a consensus on which view should prevail with respect to jurisdiction clauses in the contract of carriage.

Conclusions reached by the Working Group

134. The Working Group agreed to further consider this matter in light of the discussion, and did not reach specific agreement.

OLSAs

135. The Working Group next heard a proposal (see A/CN.9/WG.III/WP.34, paras. 34 and 35) that two exceptions to the general rules pertaining to jurisdiction as set out in article 72 should be included with respect to OLSAs. It was proposed that, as between parties to an OLSA, there should exist an opportunity to derogate from the terms of the draft instrument, including the choice of forum provisions, and that the choice of forum contained in the OLSA should be exclusive. It was suggested that the conditions and criteria required in order to be considered an OLSA would adequately safeguard the parties to the contract. A second related exception was said to be that when parties to an OLSA designated a forum for cargo claims, that choice should be binding upon third parties, provided that written notice be given to that party as to where the action could be brought and that the place chosen had a reasonable connection to the action. It was said that as the choice of forum was important in terms of providing predictability for commercial parties it was important that that choice be binding on third parties whose rights derived from the OLSA. It was further suggested that this approach could be seen as a compromise approach to the three views expressed with respect to jurisdiction clauses, in that the choice of forum in OLSAs would be exclusive, but otherwise, resort would be had to the list of places set out in the draft instrument.

136. The Working Group did not specifically discuss the OLSA proposal with respect to jurisdiction, although some general concerns were expressed as to the need for the inclusion of a clause on jurisdiction in relation to an OLSA.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Issue 1: Connecting factors—Draft article 72, proposed new definitions, proposed new article 72 bis****Draft article 72**

111. The Working Group considered the following text of draft article 72 proposed by a number of delegations in accordance with the decisions taken by the Working Group at its fourteenth session (see A/CN.9/572, paras. 113-134):

“Article 72.

“In judicial proceedings relating to carriage of goods under this instrument the [cargo claimant], at its option, may institute an action in a court in a Contracting State which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

“(a) The [principal place of business] or, in the absence thereof, the habitual residence of the defendant [or domicile]; or ... [former para. (b) deleted in accordance with decision at A/CN.9/572, para. 126] ...

“(b) The [actual/contractual] place of receipt or the [actual/contractual] place of delivery; or

“[(c) the port where the goods are initially loaded on an ocean vessel; or

“(d) the port where the goods are finally discharged from an ocean vessel; or]

“[(e) Any additional place designated for that purpose in the transport document or electronic record.]”

Chapeau of draft article 72

112. While the Working Group was reminded that some held the view that jurisdiction provisions should not be included in the draft instrument, the general view was that the decision taken at the fourteenth session to include a chapter on jurisdiction should be maintained (see A/CN.9/572, para. 113). There was general agreement in the Working Group on the substance of the chapeau in draft article 72. However, there was support for the view that care should be taken in future discussions to ensure that draft article 72 did not restrict the ability of carriers to make claims against the cargo interests. In addition, the Working Group was invited to consider to what extent the jurisdiction rules in chapter 15 should apply to agreements that were excluded from the scope of application of the draft instrument, particularly in light of draft article 5 as set forth in A/CN.9/WG.III/WP.44, through which third parties to contracts excluded from the scope of application of the draft instrument nonetheless received protection under its provisions.

113. There was an exchange of views regarding the appropriate person to institute an action under draft article 72, given the decision in the previous session of the Working Group that this article should be limited to actions by the cargo claimant against the contracting carrier (see A/CN.9/572, para. 117). Some held the view that the “shipper or other cargo claimant” were the appropriate persons, while others felt that the “shipper, consignee or other cargo interest” or “holder of a transport document” were more appropriate, and still others were dissatisfied with the lack of precision of those terms. There was support for the proposal that the word “plaintiff” should be reinserted as the claimant in the chapeau, and that the insertion of the words “against the carrier” after the phrase “judicial proceedings” would avoid concerns regarding the carrier pre-empting the choice of jurisdiction by taking an action for declaration of non-liability (see A/CN.9/572, para. 118). One view was expressed that this might not achieve the purpose because an action for declaratory relief was not an action “against the carrier”.

Conclusions reached by the Working Group regarding the chapeau of draft article 72

114. After discussion, the Working Group decided that:

- The opening phrase of the provision should be amended to read “In judicial proceedings against the carrier relating to carriage of goods under this instrument, the plaintiff, at its option”;
- Consideration of the views of the Working Group as outlined in the paragraphs above should be taken into account in future adjustments to the chapeau.

Draft paragraph 72(a)

115. It was suggested that the language in draft paragraph 72(a) presented a profusion of different and confusing terms, and that given the short time for commencing an action, clarity was of the essence in the rules for choosing jurisdiction. It was suggested that text drawn from the Brussels I European Regulation (Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters) presented a suitable and well-tested alternative. Despite some doubts raised concerning the recognition of the concept of “domicile” in certain jurisdictions, support was expressed in principle for a proposal made to simplify the text by deleting the language in the paragraph in favour of “the domicile of the defendant”, and by adding a definition of “domicile” to the definition section of the draft instrument as follows:

“‘Domicile’ means the place where: (a) a company or other legal person has its statutory seat or central administration or principal place of business, and (b) a natural person has its habitual residence.”

Conclusions reached by the Working Group regarding the draft paragraph 72(a)

116. After discussion, the Working Group decided that:

- The text of draft paragraph 72(a) should be revised as indicated in the paragraph above.

Draft paragraph 72(b) and proposed new definitions

117. In connection with draft paragraph 72(b), the following definitions were proposed for the consideration of the Working Group:

“Article 1(xx)

“[Unless otherwise provided in the Instrument] “the time of receipt” and “the place of the receipt” means the time and the place agreed to in the contract of carriage or, failing any specific provision relating to the receipt of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such provisions in the contract of carriage or of such customs, practices, or usages, the time and place of receipt of the goods is when and where the carrier or a performing party actually takes custody of the goods.”

“Article 1(xxx)

“[Unless otherwise provided in the Instrument,] “the time of delivery” and

“the place of delivery” means the time and the place agreed to in the contract of carriage, or, failing any specific provision relating to the delivery of the goods in such contract, the time and place that is in accordance with the customs, practices, or usages in the trade. In the absence of any such specific provision in the contract of carriage or of such customs, practices, or usages, the time and place of delivery is that of the discharge or unloading of the goods from the final vessel or vehicle in which they are carried under the contract of carriage.”

118. There was continued support in the Working Group for the inclusion of the place of receipt and the place of delivery as connecting factors upon which to base jurisdiction (see

A/CN.9/572, para. 127). It was noted that the definitions in the above paragraphs could assist in the clarification of this draft paragraph. It was suggested that these definitions could be unnecessary given draft paragraphs 7(2), (3) and (4) in the draft instrument, however some doubt was expressed in this regard as the purpose of draft article 7 was to define the period of responsibility for the carrier, and it was thought to be insufficient for the purposes of draft article 72.

119. With regard to the issue of whether it was more appropriate to refer to the actual or the contractual place of receipt and delivery, some doubts were expressed regarding the actual places, since, for example, the actual place of delivery could be a port of refuge. It was thought that the contractual place of receipt and the contractual place of delivery were preferable in terms of predictability.

Conclusions reached by the Working Group regarding the draft paragraph 72(b)

120. After discussion, the Working Group decided that:

- The definitions proposed should be introduced in the draft instrument for future discussion; and
- The text of draft paragraph 72(b) should refer to the contractual place of receipt and the contractual place of delivery.

Draft paragraphs 72(c) and (d)

121. The view was reiterated that the port of loading and the port of discharge should be included as appropriate connecting factors upon which to base jurisdiction (see A/CN.9/572, para. 128). In addition to the previous discussion in the last session of the Working Group, it was suggested that the inclusion of ports would be practical for a maritime plus convention that may be in need of a logical place to consolidate multiple actions. Practical factors in support of this proposal included that the ports were often the only place that the cargo interest could sue both the contracting carrier and the performing party, and that the witnesses and documents were also most likely to be concentrated in the ports, where the damage was most likely to occur. However, another view suggested that protection from a multiplicity of claims could instead be achieved by inserting an exclusive choice of forum clause into the contract of carriage. It was further thought that in order to be consistent throughout the draft instrument, continued reliance on the contractual approach would suggest that only the place of receipt and delivery were relevant. A further suggestion was made that if ports were included in these subparagraphs, the reference should be to contractual ports.

Conclusions reached by the Working Group regarding draft paragraph 72(c) and (d)

122. After discussion, the Working Group decided that:

- The text of draft paragraph 72(c) and (d) should be retained in square brackets in the draft instrument.

Draft paragraph 72(e)

123. The view was expressed that draft paragraph 72(e) setting out a designated place in the transport document as an additional means for choosing jurisdiction was closely related to the issue of exclusive jurisdiction clauses (see below paras. 156 to 168), and that a decision on the

latter would necessarily affect the former. However, there was also support for the suggestion that the Working Group could decide on whether or not to include draft paragraph 72(e) independently of its decision regarding an exclusive jurisdiction clause. In this vein, it was noted that the inclusion of draft paragraph 72(e) should be an acceptable option as a possible forum, since it was simply one of the choices on the menu of options presented to the cargo claimant by draft article 72. An additional advantage was thought to be that since the jurisdiction designated would be a standard choice in the transport documents, it could present a means for reducing a multiplicity of possible jurisdictions that a carrier could face. A further suggestion was raised that the designated place in the draft paragraph could be limited to Contracting States. Support was expressed for draft paragraph 72(e), provided its language did not attempt to override the menu of other choices of jurisdiction available in draft article 72, and provided that it purported to bind only parties to the agreement. A different view was expressed, however, that such a clause should also be valid for third parties.

Conclusions reached by the Working Group regarding the draft paragraph 72(e)

124. After discussion, the Working Group agreed that:

- The square brackets around draft paragraph 72(e) should be removed;
- Consideration could be given to replacing the word “designated” with “agreed upon” or similar language;
- Consideration could be given to limiting the operation of the provision to places in Contracting States;
- Matters relating to the position of third parties under this provision and to the interrelationship with exclusive choice of forum clauses should be further considered.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 75. Actions against the carrier

Inclusion of the text in paragraph (c) regarding “ports”

10. The view was reiterated that the port of loading and the port of discharge should be included as appropriate connecting factors upon which to base jurisdiction in actions against the carrier under draft article 75 (see A/CN.9/572, para. 128; A/CN.9/576, para. 121 and A/CN.9/WG.III/WP.58).

11. General support was expressed for a proposal to remove the square brackets around draft paragraph 75(c) and to retain the text. It was suggested that the inclusion of the port where goods were initially loaded and finally discharged from a ship as additional bases of jurisdiction was particularly important in the context of door-to-door contracts of carriage, since it provided benefits to both the carrier and the cargo claimant. It was suggested that the carrier would generally prefer to be sued at one of the ports through which the goods passed, rather than at the inland location at which an agent collected or delivered the cargo, while the claimant would have the option to initiate an action against the carrier at the specific port where, for example, damage took place, if it considered it beneficial to do so. It was clarified that whereas including ports on the list of places where judicial proceedings against a carrier

could be brought did not guarantee that suit would be filed at the port, excluding them would make a suit at the port impossible.

12. Several advantages were given in support of the proposal to include ports as a basis for jurisdiction pursuant to draft article 75. One advantage was said to be that since damage or loss was more likely to occur in a port because that was where the cargo was being handled, it would be more convenient to have the claim heard at the port where the loss or damage had occurred, since access to witnesses and other evidence would be more readily available to all parties. Another advantage was said to be that, pursuant to draft article 77, the port might be the only place that the cargo claimant could bring a single action against both the carrier and the performing party, thereby potentially avoiding a multiplicity of actions. In addition, draft paragraph 75(c) was said to enable a carrier that had been sued to claim contribution or indemnity from a negligent performing party in the same action. Further, litigation at a port was said to provide an attractive forum for litigants because lawyers who practised and judges who presided over courts close to ports were more likely to have maritime expertise, particularly when compared to those of inland courts. Additionally, it was suggested that in some jurisdictions, the exclusion of the ability to litigate at a port could interfere with a court's ability to manage its own docket, for example, in allowing for easier consolidation of actions in major casualty cases.

13. A smaller number of delegations expressed the view that inclusion of a clause on ports would unnecessarily broaden the number of jurisdictions open to the claimant taking action. Some delegations reiterated the view expressed in earlier sessions of the Working Group that the chapter on jurisdiction was unnecessary as a whole, with some suggesting that merchant parties had equal bargaining power and would simply subrogate any claims to their insurers. In response, it was suggested that draft article 75 was intended to be a default rule, and that later discussions in the Working Group on freedom of contract would include a discussion of forum selection in situations where parties had equal bargaining power. Other views were expressed that including ports in draft paragraph 75(c) detracted from the certainty of the jurisdiction provisions in the draft convention.

Actual or contractual port of loading or discharge, and ports of refuge

14. The Working Group considered the general question of whether “ports” in draft paragraph 75(c) should refer to ports where actual loading and discharge of the goods took place, or whether the term should refer to the contractual ports. There was strong support for the view that the draft article should refer to the actual ports of loading and discharge. It was noted that although the contractual and actual ports of loading and discharge might often be the same, there would be instances, when, for example, in the case of a port of refuge, the contractual place of discharge was different from the actual port of discharge. Another example was the practice in multimodal transport where, for operational reasons, a carrier might prefer to use a port other than the contractual port of discharge in order to take advantage of an alternative means of transport that would deliver the goods to the consignee more quickly or more cheaply. In addition, the view was expressed that the contract of carriage might only provide for delivery to a port in a particular area only, or not specify any port at all, and that the contractual port of discharge would thus not provide the desired certainty with respect to possible bases of jurisdiction.

15. Some drafting suggestions were made to enhance the clarity of the draft paragraph regarding ports. One suggestion was for the use of terms such as “initial loading” and “final discharge” to be consistent with the terms used in draft article 11(6). Further, a note of caution was sounded against including terminology mixing contractual and actual ports and thus possibly causing confusion, as, for example with respect to the article 2(1) scope of application provisions of the Hamburg Rules.

Other aspects of draft article 75

16. Two other aspects of draft article 75 were considered by the Working Group. The first issue was whether the Working Group was in a position to make a decision between the alternate text in square brackets set out in draft paragraph 75(d). After some initial views were aired expressing a preference for the term “designated” as being less prone to uncertainty than “agreed upon”, it was agreed that a decision on this alternative text would have to await the Working Group’s discussion regarding choice of court agreements. Secondly, caution was raised regarding the definition of the term “domicile” in draft paragraph 1(aa), since, in the national law of some States, “registered office” could be either the central office or a branch office.

Conclusions reached by the Working Group regarding draft article 75

17. After discussion, the Working Group decided that:

- The square brackets in draft article 75(c) should be removed and the text retained;
- The Secretariat should be requested to improve the wording of paragraph (c), with reference to consistency with other relevant provisions such as draft article 11(6), to make clear its reference to actual ports of loading and discharge, and to possibly expressly exclude ports of refuge; and
- The Secretariat should be requested to make the adjustments necessary to the definition of domicile in draft paragraph 1(aa) so as to provide certainty with respect to the term “registered office”.

Presentation of Hague Conference Choice of Court Convention

18. The Working Group heard a presentation from the Hague Conference on Private International Law on the main provisions of the recently-concluded Convention on Choice of Court Agreements, 2005 (the Choice of Court Convention). The Working Group was reminded that the Choice of Court Convention contained rules on jurisdiction arising from exclusive choice of court agreements and on recognition and enforcement of judgments relating to those agreements. One of the provisions highlighted was article 22, which allows Contracting States to opt in to the Choice of Court Convention on a reciprocal basis for the recognition and enforcement of judgments granted by a court designated in a non-exclusive choice of court agreement. While no position was advocated by the Hague Conference, it was mentioned that, while the carriage of passengers and goods was excluded from the scope of application of the Convention under article 2(2)(f), a suggestion had been made to consider linking the draft convention with the Choice of Court Convention. It was also recalled that even without a formal link, states remained free to agree on a bilateral basis to enforce judgments given by a chosen court under the rules of the Choice of Court Convention.

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Proposed revised text for chapter on jurisdiction***General discussion***

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

“Article 75. Actions against the carrier

“Unless the contract of carriage contains an exclusive choice of court agreement that is valid under article 76, the plaintiff has the right to institute judicial proceedings under this Convention against the carrier in a competent court within the jurisdiction of which is situated one of the following places:

“(a) The domicile of the defendant; or

“(b) The contractual place of receipt or the contractual place of delivery; or

“(c) The port where the goods are initially loaded on a ship; or the port where the goods are finally discharged from a ship; or

“(d) Any place designated for that purpose in accordance with article 76(1).

[See also paragraphs 74, 75 and 84, A/CN.9/591 (16th Session of WG III) under General Discussion, Chapter 14 at p. 610]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 75. Actions against the carrier

254. Several delegations expressed the view that the opening phrase of draft article 75, “unless the contract of carriage contains an exclusive choice of court agreement that is valid under articles 76 or 81” should be deleted as allowing for too much freedom of contract in terms of establishing which places should be considered appropriate for the establishment of jurisdiction. In addition, questions were raised regarding whether there should be a provision in the draft convention establishing the rules for designating the appropriate jurisdiction for actions against the shipper and the consignee, in addition to those provisions in draft article 75 and 77, providing such rules for actions against the carrier and the maritime performing party, respectively. In regard to both issues, a preference was expressed for the approach taken in article 21 of the Hamburg Rules. In response, it was said that while there was some sympathy for these suggestions, it was thought that, in light of the delicate compromise struck on these issues during its sixteenth session, the Working Group should at the moment retain its views, as expressed in the text under consideration, and that concerns about the freedom of contract were perhaps best left to the consideration of draft article 76 on choice of court agreements. In

response to a concern raised regarding the use of the word “plaintiff” in draft article 75 and that it could allow an opening for carriers seeking to circumvent the provision by seeking a declaration of non-liability in an anti-suit injunction, it was explained that that problem might be best dealt with in terms of possible drafting adjustments to draft article 80(2), which was aimed primarily at that problem.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 69. Actions against the carrier

181. The Working Group agreed that the text of draft article 69 as contained in A/CN.9/WG.III/WP.81 was acceptable as currently drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 69. Actions against the carrier

214. The Working Group approved the substance of draft article 69 and referred it to the drafting group.

215. With regard to the terms “domicile” and “competent court” used in draft article 69, the Working Group approved the substance of the definitions respectively provided for in paragraphs 28 and 29 of draft article 1 and referred them to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 68. Actions against the carrier; and draft article 1, paragraphs 28 (“domicile”) and 29 (“competent court”)

213. The Commission approved the substance of draft article 68 and the definitions in draft article 1, paragraphs 28 and 29, and referred them to the drafting group.

Article 67. Choice of court agreements

1. The jurisdiction of a court chosen in accordance with article 66, subparagraph (b), is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction:

(a) Is contained in a volume contract that clearly states the names and addresses of the parties and either (i) is individually negotiated or (ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies the sections of the volume contract containing that agreement; and

(b) Clearly designates the courts of one Contracting State or one or more specific courts of one Contracting State.

2. A person that is not a party to the volume contract is bound by an exclusive choice of court agreement concluded in accordance with paragraph 1 of this article only if:

(a) The court is in one of the places designated in article 66, subparagraph (a);

(b) That agreement is contained in the transport document or electronic transport record;

(c) That person is given timely and adequate notice of the court where the action shall be brought and that the jurisdiction of that court is exclusive; and

(d) The law of the court seized recognizes that that person may be bound by the exclusive choice of court agreement.

[See also paragraphs 130-136, A/CN.9/572 (14th Session of WG III) under article 66 at p. 616]

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Issue 4: Exclusive jurisdiction clauses**General discussion**

156. The Working Group was reminded that it had briefly considered at its fourteenth session (see A/CN.9/572, paras. 130-133) the issue of whether the draft instrument should allow for parties to agree in the contract of carriage to exclusive jurisdiction clauses. It was also recalled that there had been an exchange of views with respect to the relationship between exclusive jurisdiction clauses and draft paragraph 72(e) regarding the designation in the transport document of a place of jurisdiction as an additional choice of forum (see above, paras. 123 to 124). Should the draft instrument allow for exclusive jurisdiction clauses?

157. The Working Group considered the general question of whether the draft instrument should allow for parties to the contract of carriage to agree to an exclusive jurisdiction clause. There was strong support for the suggestion that the draft instrument should indeed allow for exclusive jurisdiction clauses, particularly if the possibility for the abuse of such clauses was

tempered by addition of certain conditions that would have to be fulfilled in order for such clauses to be valid. The view was also expressed that exclusive jurisdiction clauses should be limited to cases of derogation by certain volume contracts from the provisions of the draft instrument pursuant to proposed new article 88a(see above, para. 52).

158. A smaller number of delegations expressed the strongly held view that the draft instrument should not allow parties to a contract of carriage to agree to exclusive jurisdiction clauses. It was suggested that it would be difficult to support an exclusive jurisdiction clause that might allow the carrier in some situations to dictate jurisdiction, particularly where a remote geographic location and the costs of litigating disputes could put cargo interests at a disadvantage. Further, it was noted that this issue was of such importance in some jurisdictions that there were domestic provisions in place to override the operation of exclusive jurisdiction clauses.

159. In response to these concerns, it was noted that there were already several conventions in force, such as the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, that allow for exclusive jurisdiction, often without any conditions attached to prevent abuses, and it was suggested that to exclude exclusive jurisdiction clauses from the draft instrument would be unusual in the modern context. While it was admitted that there was a danger that exclusive jurisdiction clauses could pose a danger in adhesion contracts, it was submitted that when contracts were freely negotiated there were strong commercial reasons for making the choice of court provisions exclusive. It was suggested that exclusive jurisdiction clauses were quite common in the commercial context, since they provided a means to increase predictability and to reduce overall costs for the parties. Further, it was suggested that attaching conditions to prevent abuse would eliminate the possibility of surprise, which, it was submitted, was the key concern with respect to exclusive jurisdiction clauses in a commercial context. Additional advantages of providing for exclusive jurisdiction clauses in the draft instrument were said to be a potential reduction of the number of possible jurisdictions in the case of multiple suits, particularly in the absence of concursus provisions, and a reduction in the risk of forum-shopping. It was further suggested that the possibility of having to litigate a claim in a remote location was simply a known risk for parties engaged in the world of international trade.

160. A note of caution was raised regarding the possibility of overstating the importance of including or excluding exclusive jurisdiction clauses in the draft instrument. It was suggested that small claims are usually handled locally, regardless of jurisdiction clauses, and that larger claims are often dealt with on both the cargo and carrier side on a non-local basis by insurers. Of those larger claims, it was suggested that most settle, often to avoid the potentially huge litigation costs involved in pursuing a claim. While some doubts were raised regarding this proposition, there was support for the view that only a small proportion of shipments of goods result in claims, and that only a small proportion of these claims are actually litigated.

Conditions for the validity of exclusive jurisdiction clauses

161. It was suggested that provisions could be included in the draft instrument requiring that certain conditions be fulfilled prior to the valid exercise of an exclusive jurisdiction clause. The conditions suggested were as follows:

- The exclusive jurisdiction clause should contain the name and location of the chosen court;
- The chosen court would have to be in a Contracting State;
- The agreement would be required to indicate the exact name and address of the parties, so that the defendant could be notified of the proceedings against it; and
- The agreement would be required to state that the jurisdiction of the chosen court would be exclusive.

162. An additional condition suggested for inclusion in this regard was that the contract of carriage should be individually or mutually negotiated, such that it would be distinguishable from an adhesion contract. Another view was that it would be more accurate for the requirement to state that the contract must be mutually agreed, rather than mutually negotiated. Further, it was suggested that the other requirements for derogation from the draft instrument set out under proposed new article 88a should also be fulfilled in order to allow for the valid operation of exclusive jurisdiction clauses (see above, para. 52).

163. Views were expressed regarding the suggested conditions, which were, in general, favourably viewed. It was suggested that the requirement that an exclusive jurisdiction clause be expressly agreed might negate the perceived need to limit their validity to proposed new article 88a volume contracts. Further, it was noted that the name and address of the carrier were already required in the contract particulars pursuant to draft article 34 of the draft instrument, and that including that information as necessary for the validity of an exclusive jurisdiction clause would provide an additional incentive for the carrier to comply. However, concern was raised that this requirement could be seen as a hidden “identity of carrier” clause, which was said not to be upheld in many jurisdictions. It was suggested that this requirement could be limited to the name and address of the carrier.

Should exclusive jurisdiction clauses be enforceable against third parties?

164. The view was expressed that, in a commercial context such as that governed by the draft instrument, providing for the application of exclusive jurisdiction clauses to third parties would be justifiable in that it would greatly assist predictability for the parties to the contract, and that the imposition of certain conditions would protect the third party from suffering any hardship. In this vein, it was suggested that the following conditions were appropriate:

- The parties to the initial contract of carriage should expressly agree that they would extend the exclusive jurisdiction clause to the third party;
- The contract of carriage should meet the requirements of proposed new article 88a;
- The third party to be bound should have written or electronic notice of the place where the action could be brought;
- The forum should be one of those specified in draft article 72; and
- The place selected should be in a Contracting State.

165. The view was expressed that the application of exclusive jurisdiction clauses to third parties should not be limited to the context of proposed new article 88a volume contracts, but that the principle should extend to all contracts of carriage. In this connection, it was pointed

out that, in order to be effective, an exclusive jurisdiction clause must bind third parties. It was thought that in situations where it was found acceptable for jurisdiction to be exclusive, it should be exclusive for all purposes under the contract of carriage, regardless of who is claiming the benefit under the contract. It was suggested that the third-party consignee is actually a part of the transaction due to the contract of sale, pursuant to which the consignee is free to negotiate conditions favourable to it, and that to argue that such a party is in need of protection is somewhat artificial. The suggestion was made that thought could be given to a provision along the lines of draft article 77 of the draft instrument, which concerns the application of arbitration provisions to the holder of a negotiable transport document or a negotiable electronic transport record.

166. The contrary view was expressed, that exclusive jurisdiction clauses should never apply to third parties, since they were not parties to the contract. Concern was raised that the application of exclusive jurisdiction clauses to third parties would unfairly take away their right to choose the forum from the options in draft article 72. It was observed that those opposed to exclusive jurisdiction clauses were generally opposed to their application to third parties, and that those in favour of their inclusion in the draft instrument were also generally in favour of extending them to third parties, perhaps with additional conditions. It was also suggested that the discussion in this regard could be somewhat more nuanced, since depending on what type of transport document was issued, a consignee could in some jurisdictions actually be bound by the contract of carriage.

167. It was suggested that the conditions proposed could provide for the building of a compromise position between those firmly opposed to and those firmly in favour of the application of exclusive jurisdiction clauses to third parties. Some reservations were raised with respect to the conditions, such as the timing of the notice, and of its effectiveness if it were included in a bill of lading that arrived after the cargo. In response to this latter point, it was observed that the consignee had no obligation to accept the cargo. In addition, it was said that written notice was both difficult to define and, if it were given in the bill of lading, it could cause difficulties when the bill of lading was repeatedly transferred, such that the ultimate holder might be forced to litigate in a location far away. Further it was suggested that the notice to the third party should be required to be given by the shipper.

Conclusions reached by the Working Group regarding exclusive jurisdiction clauses

168. After discussion, the Working Group decided that:

- Further consideration should be given to the issue of whether exclusive jurisdiction clauses should be allowed pursuant to the draft instrument, and whether they should apply with respect to third parties;
- The attachment of certain conditions to protect parties and third parties from hardship in the face of exclusive jurisdiction clauses could assist the Working Group in coming to a consensus on this issue;
- The Secretariat was requested to prepare draft text on exclusive jurisdiction clauses, bearing in mind the discussion and concerns set out in paragraphs 156 to 167 above.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Draft article 76. Exclusive jurisdiction agreements*****General discussion***

19. The Working Group was reminded that it had considered exclusive jurisdiction clauses at its fourteenth and fifteenth sessions (see A/CN.9/572, paras. 130 to 133, and A/CN.9/576, paras. 156 to 168). The Working Group heard that draft article 76 in annexes I and II of A/CN.9/WG.III/WP.56 had been prepared by the Secretariat, bearing in mind those discussions.

Inclusion of a provision on exclusive jurisdiction

20. The Working Group continued its discussions on the basis of the following proposed draft text, based on the drafting suggestions received from some delegations:

“Article 76. Choice of court agreements

“1. If the shipper and the carrier agree that the courts of one Contracting State or one or more specific courts in one Contracting State have jurisdiction to decide disputes that have arisen or may arise under this Convention, that court or those courts have jurisdiction, provided that the agreement conferring it is concluded or documented

“(a) in writing; or

“(b) by any other means of communication which renders information accessible so as to be usable for subsequent reference.

“2. The jurisdiction of a court or courts chosen in accordance with paragraph 1 is exclusive if the agreement conferring such jurisdiction is contained in a volume contract and this agreement

“(a) clearly states the name and location of the chosen court or courts as well as the names and addresses of the parties; and

“(b) either

“(i) this agreement is individually negotiated; or

“(ii) the volume contract contains a prominent statement that there is an exclusive choice of court agreement and specifies its location within the volume contract.

“3. An exclusive choice of court agreement concluded in accordance with paragraph 2 is binding on a person that is not a party to the volume contract only if the relevant applicable law so provides [, that person is given adequate notice of the place where the action can be brought and the forum is in one of the places designated in article 75(a), (b) or (c)].

“[4. This article does not prevent a Contracting State from giving effect to a choice of court agreement under less strict conditions than those laid down in paragraph 2 provided that it makes a corresponding declaration upon signature or ratification.

Nothing in this paragraph prevents a court specified in article 75(a), (b) or (c) from exercising its jurisdiction.]”

21. It was explained that the proposed text of draft article 76 aimed at reaching a compromise between those delegations that advocated that no exclusive choice of court clauses should be recognized, and those that advocated that all exclusive choice of court clauses should be recognized. The proposal aimed at providing common minimum standards for the validity of choice of court agreements and by allowing a wider recognition of such agreements by States willing to do so. The Working Group heard that the compromise represented by the proposal was intended to allow for the draft convention to be ratified as broadly as possible.

22. The intended operation of the proposal was described. It was observed that proposed article 76 was intended to broaden the treatment of exclusive jurisdiction agreements to include choice of court agreements in general. Proposed paragraph 76(1) set out the requirements for validity of choice of court agreements, while proposed paragraph 76(2) made it clear that exclusive choice of court clauses could be effectively concluded only in volume contracts that met the listed minimum standards. It was further explained that proposed paragraph 76(3) extended an exclusive choice of court agreement that met the paragraph 2 requirements to third parties to the volume contract only when the applicable law allowed and when the additional bracketed conditions intended to safeguard those parties were met. In addition, the function of proposed paragraph 76(4) was described as allowing Contracting States to give effect to choice of court agreements under less strict conditions than those set out in proposed paragraph 2, provided that a declaration to that effect was made upon signature or ratification of the draft convention. Finally, it was explained that the last sentence in proposed paragraph 4 was intended to allow a court designated by draft paragraphs 75(a), (b) or (c) to either accept or decline jurisdiction in the face of an exclusive choice of court agreement that did not meet the requirements of proposed paragraph 2.

General reaction to proposed regime for choice of court agreements

23. It was suggested that the draft convention should not contain a chapter dealing with jurisdiction at all, and that it should instead continue the situation under the Hague-Visby Rules where the matter was left to the freedom of the parties. In response, it was observed that contractual freedom under the Hague-Visby Rules could be affected by restrictions at the national level, and that therefore the harmonization of the law in a uniform instrument would be welcome. Support was expressed for the scheme set out in proposed article 76 to preserve the status quo regarding the acceptance of choice of court agreements, and to allow for exploration of the scheme as a starting point for potential future harmonization.

24. There was support for the view that in the interests of clarity, the validity of exclusive choice of court agreements should not be limited to volume contracts, but should be extended to all contracts of carriage. Further, it was observed that any reference to volume contracts in the chapter on jurisdiction would depend on the outcome of the discussions on volume contracts in general in draft article 95, which still contained some bracketed text. In response to these concerns, it was suggested that the proposed text’s modest ambitions for harmonization regarding choice of court agreements required starting at a level on which there could be potential agreement, and it was thought best to limit the initial application to situations involving sophisticated parties of equal bargaining power, such as in the case of volume contracts. It was also clarified that States that wished to extend the validity of exclusive choice

of court agreements to contracts of carriage beyond volume contracts were free to do so under proposed paragraph 76(4).

25. Other concerns were raised that the scheme for choice of court agreements in proposed article 76 required a potential claimant to enter into too many different levels of inquiry to establish appropriate jurisdiction, thus costing the claimant both time and certainty. In addition, it was observed that the proposal did not solve the problem of geographically remote shippers potentially having to bear the costs of litigating in other States.

Proposed paragraph 76(1)

26. It was observed that proposed paragraph 76(1) set the conditions for the validity of all choice of court agreements. It was further observed that the requirements in proposed paragraph 76(1) had been inspired by article 3 of the Choice of Court Convention. Concern was expressed that failure to mention the competence of a court in this paragraph could result in inadvertently overriding domestic procedural rules by providing a basis for a court to claim jurisdiction when it had none. It was noted that proposed paragraph 76(1) should refer to the competence according to national law of the court chosen in the choice of court agreement, in keeping with similar references in the chapeau of both draft articles 75 and 77.

Proposed paragraph 76(2)

27. It was observed that proposed paragraph 76(2) set out the conditions for the validity of exclusive choice of court agreements, which were parallel to those required for the validity of volume contracts in draft paragraph 95(1). In addition to the conditions of either individual negotiation or a prominent statement of the existence and location of the exclusive choice of court agreement in the volume contract, a valid exclusive choice of court agreement also required the name and location of the chosen court and the names and addresses of the parties.

28. Suggestions were made regarding the specific drafting of paragraph 2. The view was expressed that to be accurate, proposed subparagraph 76(2)(b)(i) should refer to individually negotiated volume contracts rather than to individual clauses of the contract, such as choice of court clauses. It was suggested that this paragraph should also refer to the competence according to national law of the court chosen in the choice of court agreement, as referred to above with respect to paragraph 1.

Proposed paragraph 76(3)

29. It was indicated that proposed paragraph 76(3) set out the requirements to extend paragraph 2 exclusive choice of court agreements to third parties to the volume contract. In particular, it was observed that the exclusive choice of court agreement must be valid between the parties to the volume contract, and the court chosen must be located in one of the jurisdictions designated by draft paragraph 75(a), (b) or (c). In addition, it was required that third parties have adequate notice of the place where the action could be brought and that the relevant applicable law allowed third parties to be so bound.

30. It was observed that the reference to “relevant applicable law” should be interpreted as a reference to the national law of the court seized, including its private international law rules. It was suggested that this interpretation should be made explicit in the text for the sake of clarity.

A question was raised regarding whether the requirement of “adequate notice” would be decided on the basis of applicable national law.

31. It was explained that the bracketed text at the end of proposed paragraph 76(3) intended to provide a minimum standard under the draft convention to make exclusive choice of court agreements binding on third parties to a volume contract, but that a court could, through its national law, require more stringent standards for such agreements to be binding on third parties. Further, it was observed that deletion of the bracketed text would leave the matter entirely to applicable law. In this regard, it was suggested that the bracketed text should be deleted so as not to cause confusion regarding whether the notice requirement was intended to change national law that required the consent of third parties to be bound instead of mere notice. An alternative suggestion was made to replace the bracketed text with the words “and such agreement is included in the contract particulars [or incorporated by reference in the transport document or electronic transport record].” However, the view was also expressed that the square brackets in proposed paragraph 3 should be deleted and the text inside retained in order to include minimum requirements to protect third parties. In addition, it was noted that, in business practice, the need for protection of third parties to the volume contract was limited since these third parties were often actually subsidiaries of the shipper, related corporate entities, or they were freight forwarders.

32. Another view was expressed that in order to better protect third parties to the volume contract, consent should replace notice as a requirement to bind them to exclusive choice of court agreements. Reference in this respect was made to draft subparagraph 95(6)(b), which required consent to bind third parties to the terms of volume contracts. In response, it was suggested that proposed paragraph 76(3) dealt with forum selection matters, seen as procedural in certain jurisdictions, while draft subparagraph 95(6)(b) directly affected substantive rights and obligations and therefore required greater caution and a higher standard of protection. An additional view was expressed that requiring the consent of third parties to be bound by exclusive choice of court agreements would unreasonably burden current business practice, which often saw long strings of sales of the transported goods.

Proposed paragraph 76(4)

33. It was explained that proposed paragraph 76(4) intended to permit choice of court agreements based on requirements less strict than those set out in proposed paragraphs 76(1) and (2), provided that the Contracting State had given the required notice. By way of example, it was indicated that a court located in a State recognizing choice of court agreements under proposed paragraph 76(4) and otherwise competent under draft article 75 of the draft convention could decline jurisdiction in the presence of a valid choice of court agreement that did not meet the requirements of paragraph 2.

34. By way of further example, it was observed that, if a carrier was located in a State that recognized exclusive jurisdiction clauses and the shipper was in a State that did not do so, the carrier could seek a non-declaratory judgment or, where available, an anti-suit injunction, in a court of its State, and the shipper would be unable to obtain withdrawal of the action under proposed paragraph 80(2). It was added that, in this example, the shipper could sue the carrier in a draft article 75 court in the shipper’s own State, but because of proposed paragraph 76(4), the shipper could not demand that the carrier withdraw its non-declaratory judgment action under proposed paragraph 80(2). However, it was added, that the carrier who obtained a non-

declaratory judgment or an anti-suit injunction in this example would not be able to enforce it in a State that did not recognize exclusive jurisdiction clauses.

35. By way of additional example, it was said that if the shipper in the example in the paragraph above sued in its State, where exclusive jurisdiction clauses were not accepted, and then tried to enforce its judgment in the State of the carrier, where exclusive jurisdiction clauses were enforced, the judgment would be refused recognition and enforcement as coming from a non-competent court.

36. It was further observed that, in the case described in paragraph 34 above, concern was expressed that the combined operation of a proposed article 81 bis and proposed paragraph 76(4) could be that if a judgment was rendered based on paragraph 4, courts in other jurisdictions might feel they had an obligation to recognize it under proposed article 81 bis. In order to clarify that courts in other jurisdictions were allowed to recognize such a decision, but were not bound to do so, it was suggested that a sentence be added to proposed article 81 bis to indicate that that article did not require a Contracting State to recognize or enforce a decision from another Contracting State that was based on the application of the first sentence of proposed paragraph 76(4).

37. It was suggested that, for the sake of precision, proposed paragraph 76(4) should refer to choice of court agreements that “did not meet the requirements of proposed paragraphs 76(1) and (2)”, instead of referring to “less strict conditions than those laid down in paragraph 2”. Alternative text was suggested in this regard as follows, “This article does not prevent a contracting State from giving effect to a choice of court agreement which does not meet the requirements in paragraph 1 or 2”, and then continuing on with the existing text, “provided that it ...”. It was further observed that this drafting suggestion would permit a Contracting State to give effect to an exclusive choice of court agreement between the parties of the contract as well as with respect to third parties since the validity of the agreement against third parties was not covered in proposed paragraphs 1 and 2. A further observation was made that proposed paragraph 4 was not intended to authorize anti-suit injunctions, nor had that approach been suggested by other delegations.

38. The view was expressed that the operation of proposed paragraph 76(4) might lead to multiple proceedings. It was indicated in response that the proposed scheme would also reduce the number of proceedings in at least two circumstances: in cases in which proposed paragraph 80(2) operated to allow a request for withdrawal, and the situation in which otherwise competent courts would recognize exclusive choice of court agreements and decline jurisdiction.

39. It was suggested that the requirement of a formal declaration by a Contracting State to give effect to choice of court agreements on conditions less strict than those set out in proposed paragraph 2 should be substituted with a less formal mechanism. However, it was observed that any substitute mechanism should fulfil the two intended purposes of ensuring that governments and not individual courts make the decision to apply less strict conditions, and of facilitating access to information regarding the conditions necessary for the validity of exclusive choice of court clauses in other Contracting States.

Conclusions reached by the Working Group regarding proposed article 76:

40. After discussion, the Working Group decided that:

- Proposed article 76 should be revised in light of the observations of the Working Group expressed above.

[* * *]

Proposed revised text for chapter on jurisdiction

General discussion

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

“Article 76. Choice of court agreements

“1. If the shipper and the carrier agree that a competent court has jurisdiction to decide disputes that may arise under this Convention, then that court has non-exclusive jurisdiction, provided that the agreement conferring it is concluded or documented

“(a) in writing; or

“(b) by any other means of communication that renders information accessible so as to be usable for subsequent reference.

“2. The jurisdiction of a court chosen in accordance with paragraph 1 is exclusive for disputes between the parties to the contract only if the parties so agree and the agreement conferring jurisdiction

“(a) is contained in a volume contract that clearly states the names and addresses of the parties and either

“(i) is individually negotiated; or

“(ii) contains a prominent statement that there is an exclusive choice of court agreement and specifies its location within the volume contract; and

“(b) clearly states the name and location of the chosen court.

“3. An exclusive choice of court agreement concluded in accordance with paragraph 2 is binding on a person that is not a party to the volume contract only if this is consistent with applicable law as determined by the [international private law] [conflict of law rules] of the court seized and:

“(a) That person is given adequate notice of the court where the action can be brought;

“(b) The forum is in one of the places designated in article 75 [(a), (b) or (c)].

“4. Subject to paragraph 5, this article does not prevent a Contracting State from giving effect to a choice of court agreement that does not meet the requirements of paragraphs 1, 2, or 3. Such Contracting State must give corresponding notice [to _____].

“5. Nothing in paragraph 4 or in a choice of court agreement effective under paragraph 4 prevents a court specified in article 75 [(a), (b), (c) or (d)] and situated in a different Contracting State from exercising its jurisdiction over the dispute and deciding the dispute according to this Convention. No choice of court agreement is exclusive with respect to an action [against a carrier] under this Convention except as provided by this article.

[* * *]

74. The Working Group heard a brief report from the delegations proposing the revised text for the chapter on jurisdiction. It was reported that against a background of divergent interests and views in the Working Group regarding the draft provisions on jurisdiction, a delicate compromise had been achieved and that it was reflected in the revised text. It was observed that although total harmonization of the jurisdiction provisions was not possible, it was thought that the compromise achieved could be acceptable to the Working Group, because it was seen to be preferable to the alternative, which was to exclude jurisdiction from the draft convention.

75. There was general support expressed for the proposed compromise set out in the revised articles, particularly given the complexity of the issues, and the view was expressed that a careful balancing of interests had been achieved. The view was expressed that deletion or revisions in substance of the draft compromise could destroy the compromise accomplished.

76. In response to a request for clarification of draft article 76(4), it was observed that the intention of the notice requirement was to indicate that a policy decision had been made regarding paragraph 4 by a Contracting State rather than by individual courts within that State deciding whether or not they would choose to apply paragraph 4. It was further clarified that it was not intended that such a notification would necessarily require a change to the law in the Contracting State but rather that it required a Contracting State to inform the rest of the world whether it would give effect to exclusive choice of court agreements on less strict conditions than those set out in paragraph 2.

77. In further reference to the notice requirement under draft article 76(4), it was observed that receiving the content of national law might not be appropriate for a depositary, and it was thought that notices of the nature contemplated could be extensive, even consisting of case law, and that they could require translation to other languages, a matter that could raise administrative issues with the depositary, and that could create a hurdle for the adoption of the draft convention. In response to those concerns, several views were expressed that such notices could consist of very simple statements regarding whether or not a Contracting State would apply paragraph 4, or that they could be sent to organizations other than the depositary for collection and dissemination. There was general agreement that this matter should be discussed further at a later stage.

78. A concern was raised with respect to the structure of the chapter on jurisdiction, since draft article 75 was concerned only with claims against the carrier, followed by draft article 76, which regulated actions against both the shipper and the carrier, but that it seemed that other than draft article 76, actions by the carrier against the shipper were not treated in the subsequent provisions. The view was expressed that this was not an oversight in regard to draft article 75, since the compromise achieved by the entire chapter was intended to enable cargo interests to have access to a reasonable forum to resolve disputes notwithstanding the existence of an exclusive jurisdiction clause which may have been placed in the contract of carriage by

the carrier. In that regard, it was suggested that the brackets around the words “against a carrier” in draft article 76(5) should be deleted so as to bind a carrier to an exclusive jurisdiction forum that it had selected. However, in terms of the observation regarding the overall structure of the chapter, it was observed that article 81 bis had indeed been intended to be applicable to decisions in legitimate actions by the carrier against the shipper, and that if that was not the case, adjustments should be made to the text of draft article 81 bis.

79. Concerns were also raised regarding the clarity of the text with respect to the intention of draft article 81 bis. The view was expressed that that provision meant that a State that gave notice under draft article 76(4) would not be required by draft article 81 bis to recognize a judgment from a State that did not recognize the exclusiveness of the jurisdiction clause. It was agreed that, if necessary, the text of draft article 81 bis should be clarified to reflect this position.

80. A further concern was raised regarding the relationship between paragraphs 4 and 5 of draft article 76. Since draft article 76(4) was thought to be the core of the compromise on this chapter, it was said to be important to establish why its opening phrase made it subject to paragraph 5. In particular, it was thought that paragraph 4 should not be made subject to the second sentence of paragraph 5, and that it should be made a separate paragraph under draft article 76.

81. A number of views were also expressed reiterating the position that no articles on jurisdiction should be included in the draft instrument. It was also suggested that while the spirit of the compromise was appreciated, the revised articles did not go far enough in promoting uniformity but instead would lead to forum shopping and the filing of a multiplicity of suits thereby reducing certainty and increasing costs to litigants. A further view was reiterated that exclusive jurisdiction clauses should be given full effect in the draft instrument and that the view that such an approach would be unfair to third parties was untenable because insurance could be obtained and third parties could always obtain the information regarding the jurisdiction from public sources or from the carriers themselves.

82. A number of drafting suggestions were made. One suggestion agreed upon was the inclusion of the word “and” between the draft article 76(a) and (b). Other drafting suggestions were to replace the words “in accordance with the law of the Contracting State” in draft article 81 bis (1) with the words “subject to the conditions laid down in the law of the Contracting State” to enhance the clarity of the draft article. The view was also expressed that the wording of draft article 81 bis could be a little stringent and might imply that a court operating under draft article 76(4) might not recognize a judgment of another court operating under the same draft article. It was also suggested that the earlier version of draft paragraph 81 bis (2) set out in paragraph 70 above was preferable as it allowed States that required draft paragraph 81 bis (1) as a legal basis for the recognition of judgments generally, to recognize decisions made pursuant to draft paragraph 76(4). A suggestion was also made that draft article 76(3) should contain a clear conflict of law rule to determine the law governing third parties.

83. Draft article XX, relating to the participation of regional economic integration organizations, was not discussed.

Conclusions reached by the Working Group on proposed jurisdiction chapter:

84. After discussion, the Working Group decided that:

- The compromise contained in the proposed draft text for chapter 16 was both acceptable and accepted, with some reservations regarding the notice given to third parties under draft article 76(3);
- The word “and” should be included between draft paragraphs 76(a) and (b); and
- Further drafting suggestions and clarifications should be considered in light of the comments expressed in the paragraphs above.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 76. Choice of court agreements

255. Despite a view expressed to the contrary, there was general agreement in the Working Group to delete the square brackets surrounding the phrase “claims against the carrier” and retain the text therein, and to delete the alternative “[disputes]” in draft article 76(1).

256. With regard to the alternative text set out in square brackets in draft article 76(2)(b), there was general agreement to retain the text “designates the courts of one Contracting State or one or more specific courts of one Contracting State” as allowing parties to be more precise in choosing the court in a choice of court agreement. It was further agreed to add the word “clearly” at the beginning of the chosen phrase, and to delete the alternative text set out in square brackets in the draft provision.

257. It was agreed that draft paragraph 76(2)(c) could be deleted, since sufficient protection was thought to have been provided as between the parties to a volume agreement in draft paragraph 76(2)(a).

258. It was proposed that the text in draft paragraph 76(3)(b) be retained without square brackets. However, it was suggested that since the term “transport document” had a very broad meaning under the draft convention, the provision should be narrowed slightly to provide for proper notice to be provided to the third party to the volume contract, by deleting the phrase “issued in relation to” and substituting the phrase, “that evidences the contract of carriage for”. There was general support for that proposal.

259. With regard to draft article 76(3)(d) regarding the requirement for binding a third party to a volume contract to a choice of court agreement concluded therein, a concern was expressed that the conditions set out in the provision were not sufficiently clear with respect to how such parties would be bound. In response to this concern, it was proposed that subparagraph (d) be amended to refer to the law of the agreed place of destination of the goods, rather than to the “rules of private international law of the court seized”. While this suggestion was welcomed as a possible solution, concerns were expressed regarding what law was being chosen under this formulation, and it was suggested that “the place of receipt of the goods” might be better wording, but that that connecting factor was unusual, and it was thought to be preferable to refer to the law of the forum or the law governing the contract. Further, the view was expressed that the draft convention had avoided elsewhere making specific reference to the law chosen, and that the current text as found in A/CN.9/WG.III/WP.75 might be preferable. Support was expressed for the view that the provision should be left as it was currently found, or failing that, that the law of the forum should be used so as to avoid a potentially uncertain and confusing rule like the “law of the place of receipt of the goods”. It was agreed that alternative text could

be proposed for draft article 76(3)(d) as follows: “[the law of the place of destination of the goods][the law of the place of receipt of the goods][the applicable law pursuant to the rules of private international law of the law of the forum]”, and that the Secretariat should have regard to the use of the word “court” in this draft article, and specifically, to proper usage of the term “competent court”.

260. The Working Group agreed that under the proposal to include a reservation or “opt in” clause regarding the entire chapter on jurisdiction, paragraphs 4 and 5 of draft article 76 would be deleted.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 70. Choice of court agreements

182. There was not sufficient support for a proposal to add the word “exclusive” to the title of the draft article.

Subparagraph 2(c)

183. It was suggested that the draft paragraph 2(c) requirement of timely and adequate notification of a third party to a volume contract in order for a choice of court agreement to be binding on that party was insufficient, and it was proposed that the consent of such third parties should be required in order for an exclusive choice of court agreement in the volume contract to be binding on them. It was also noted that the special rules for volume contracts set out in draft article 89(1) and (5) provided that a third party could only be bound by the terms of the volume contract that derogated from the draft convention when that party gave its express consent to be so bound. A proposal was made to revise subparagraph 2(c) of draft article 70 to provide greater protection to third parties to volume contracts by adding the following phrase to the end of the subparagraph before the word “and”: “and that person gives its express consent to be bound by the exclusive choice of court agreement”. That proposal received some support.

184. However, opposition was expressed to that proposal. It was said that the paragraph had already been debated at length and that subparagraph 2(c) represented one part of the larger bundle of issues agreed by the Working Group with respect to volume contracts and to jurisdiction. It was observed that for third parties to be bound at all by a volume contract pursuant to draft article 89, they had to give their consent, thus providing for additional protection for such parties. Moreover, it was said that binding a third party to a provision in a contract to which it was not a party was not unique in international trade, for example, in the insurance industry. It was further suggested that it was essential to bind third parties, provided they were adequately protected, in order to provide commercial predictability in knowing where litigation would take place.

Subparagraph 2(d)

185. The Working Group proceeded to consider paragraph 2 of draft article 70, which set out the requirements pursuant to which a third party to a volume contract could be bound by an exclusive choice of court agreement in the volume contract. The fourth requirement set out in subparagraph 2(d) was that the law must recognize that such a person could be bound by the

exclusive choice of court agreement. The Working Group had before it four bracketed options contained in subparagraph 2(d) concerning how best to articulate which applicable law should be consulted in making that determination.

186. To address the concern expressed in footnote 209 of A/CN.9/WG.III/WP.81 that the “court seized” might not necessarily be a competent court, another possible option was added to the four set out in draft subparagraph 2(d) along the following lines: “the law of the place of the court designated by article 69, paragraph (b)”. A preference was expressed by some for this additional option, as the reference therein was to a competent court and it was felt that the revised text would aid certainty and predictability.

187. Some support was expressed for the second option, including the words in square brackets as follows: “The law of the agreed place of delivery of the goods”. However, there were objections to that option on the grounds that cargo interests might not always wish to refer to the law of the place of delivery, for instance, in cases where they preferred to sue the carrier at another location, such as one where the carrier had assets. For the same reasons, there were also objections to the third option in subparagraph 2(d).

188. Some support was also expressed for the fourth option which referred to “the applicable law pursuant to the rules of private international law of the law of the forum”, provided that the words following “applicable law” were omitted. It was proposed that the words following “applicable law” were unnecessary. Further, it was observed that the term “applicable law” was used elsewhere in the draft convention without those additional words, and it was suggested that for the sake of consistency in the draft convention, these words should be omitted from the fourth option.

189. Support was expressed in the Working Group for the first option, which referred to “the law of the court seized”.

190. An additional proposal was made to delete paragraph (d) altogether as complicated and unnecessary, since the court in issue would have regard to the applicable law in any event. Further, it was observed that such deletion would not give States the flexibility to have other requirements in order for exclusive choice of court agreements to bind third parties. The proposal for deletion was not supported.

191. The Working Group was reminded that the entire text of paragraphs 3 and 4 of article 70 had been placed in square brackets pending a decision to be made by the Working Group on whether the application of Chapter 15 to Contracting States should be made subject to a general reservation, or whether the chapter should apply on an “opt-in” or an “opt-out” basis as set out in the three variants in draft article 77. Discussion of paragraphs 3 and 4 was thus deferred until that decision had been made (see paragraph 205 below).

Conclusions reached by the Working Group regarding draft article 70:

192. The Working Group agreed that the text of draft article 70 should be retained as contained in A/CN.9/WG.III/WP.81 and:

- To retain the text of subparagraph 2(c) as drafted;
- Notwithstanding that a number of delegations also supported the deletion of paragraph (d), decided to retain paragraph (d);

- To retain the first bracketed text in paragraph 2(d) as the preferred option; and
- To defer any discussion of paragraphs 3 and 4 until draft article 77 had been discussed.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 70. Choice of court agreements

216. It was proposed that, for greater certainty, the opening phrase of draft article 70(2)(d) “the law of the court seized” should be deleted in favour of the clearer phrase “the law of the court named in the volume contract”, or, in the alternative, that paragraph (d) should be deleted in its entirety. However, it was observed that the issue of binding third parties to the volume contract to a choice of court agreement had been the subject of considerable discussion in the Working Group, and that the consensus as represented by the current text should not be reconsidered.

217. It was observed that, following the decision of the Working Group to amend the definition of “transport document” (see above, paras. 113 to 114), the text of draft paragraph 2(b) should be amended by deleting the phrase “that evidences the contract of carriage for the goods in respect of which the claim arises”. There was support for that suggestion.

218. Subject to the deletion of that phrase, the Working Group approved the substance of draft article 70 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 69. Choice of court agreements

214. A concern was expressed that as the consignee would be the most likely claimant in a case of loss of or damage to the goods, the consignee should not be bound to an exclusive jurisdiction clause pursuant to draft article 69, subparagraph 2 (c), without it having provided its consent or agreement to be so bound. There was some support in the Commission for that view.

215. However, it was again observed that Contracting States were free to refrain from exercising the “opt-in” provision in draft article 76, in which circumstances the State would simply apply its applicable law. One example given was that such a State would be free to regulate questions of jurisdiction arising out of a volume contract, including the circumstances in which a third party might be bound.

216. The Commission approved the substance of draft article 69 and referred it to the drafting group.

Article 68. Actions against the maritime performing party

The plaintiff has the right to institute judicial proceedings under this Convention against the maritime performing party in a competent court within the jurisdiction of which is situated one of the following places:

- (a) The domicile of the maritime performing party; or
- (b) The port where the goods are received by the maritime performing party, the port where the goods are delivered by the maritime performing party or the port in which the maritime performing party performs its activities with respect to the goods.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Draft article 72 bis**

125. The Working Group considered the following text of draft article 72 bis proposed in accordance with the decision taken by the Working Group at its fourteenth session to have a separate provision in the draft instrument on the connecting factors necessary to establish jurisdiction in actions against maritime performing parties (see A/CN.9/572, para. 117):

“Article 72 bis

“In judicial proceedings by the shipper or other cargo interest against the maritime performing party relating to carriage of goods under this instrument, the claimant, at its option, may institute an action in a court in a State party which, according to the law of the State where the court is situated, is competent and within the jurisdiction of which is situated one of the following places:

- (a) The principal place of business or [, in the absence thereof,] the habitual/permanent] residence of the defendant; or
- (b) The place where the goods are [initially] received by the maritime performing party; or
- (c) The place where the goods are [ultimately] delivered by the maritime performing party”.

General discussion

126. It was suggested that the Secretariat should prepare a revised version of this provision bearing in mind the comments made to the similar language contained in draft article 72 (see above paras. 111 to 124).

127. However, it was further suggested that some of the connecting factors contained in draft article 72 bis would not apply to maritime performing parties. In particular, it was indicated that reference to contractual relationships would not be appropriate in the case of maritime performing parties, for whom the contract of carriage had less relevance. It was also indicated that draft paragraphs (b) and (c) regarding the place of receipt and delivery of the goods would not apply to those maritime performing parties who performed duties exclusively on the ship.

Conclusions reached by the Working Group

128. After discussion, the Working Group decided that:

- The Secretariat should be requested to make adjustments to the text of draft article 72 bis based on the views outlined in the above paragraphs.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Draft article 77. Actions against the maritime performing party***General discussion and “[initially]” and “[ultimately]”*

41. The Working Group was reminded that draft article 77 had been inserted into the draft convention in response to a decision taken during its fourteenth session (see A/CN.9/572, paras. 116-117) to create a separate provision with respect to establishing jurisdiction for actions against a maritime performing party. It was recalled that two types of maritime performing party were thought to be relevant in this regard: the more stationary parties, such as stevedores and terminal operators, and the ocean carrier that was not the contracting carrier. It was suggested that, bearing in mind these two groups of maritime performing parties, the “port” where the goods were “initially received” and “ultimately delivered” were appropriate jurisdictions, such that the word “port” should replace “place” and that the square brackets around the words “initially” and “ultimately” should be deleted and the text retained. There was general agreement with this proposal.

Reference to competence of “a court in a Contracting State”

42. The view was expressed that there was a problem in the chapeau of draft article 77 that was repeated from the chapeau of draft article 75 with respect to the phrase “in a court in a Contracting State that, according to the law of the State where the court is situated, is competent”. It was suggested that this phrase was unclear, since it could refer to either the national or international competence of a court. It was suggested that this phrase should be clarified in both draft articles 75 and 77.

43. Difficulty was also expressed with respect to the requirement that the court referred to in draft article 77 was required to be in a Contracting State. The view was expressed that it was conceivable that none of the locations set out in paragraphs (a) and (b) of draft article 77 would be in a Contracting State in a particular situation, and that this could result in a potential claimant under draft article 77 being without an appropriate jurisdiction in which to sue the maritime performing party. While the requirement that the court be in a Contracting State was also set out in draft article 75, it would not cause the same difficulty, since the contractual place of receipt and delivery would provide a certain jurisdiction. A related problem was said to be that paragraph (b) of draft article 77 did not restrict the port to the one in which the maritime performing party operated, and that it could cause a defendant unnecessary hardship if the claim were made in a port in which it did not operate.

Conclusions reached by the Working Group regarding draft article 77:

44. After discussion, the Working Group decided that:

- The square brackets around the words “initially” and “ultimately” would be deleted and words retained in the text;
- The word “port” in paragraph (b) should replace the word “place” in both locations; and
- The problems in the text regarding the competence and location of the court in a Contracting State, and the possibility of taking an action against a maritime performing party in a port in which it did not operate would be considered in a revised text of draft article 77.

[* * *]

Proposed revised text for chapter on jurisdiction*General discussion*

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

Article 77. Actions against the maritime performing party

“In judicial proceedings under this Convention against the maritime performing party, the plaintiff, at its option, may institute an action in a competent court within the jurisdiction of which is situated one of the following places:

“(a) The domicile of the maritime performing party; or

“(b) The port where the goods are initially received by the maritime performing party or the port where the goods are finally delivered by the maritime performing party.

[See also paragraphs 74, 75 and 84, A/CN.9/591 (16th Session of WG III) under General Discussion, Chapter 14 at p. 610]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 77. Actions against the maritime performing party

261. After discussion, the Working Group agreed that the text in square brackets in draft article 77(b) should be retained as necessary to further define the maritime performing party and the brackets around them deleted, but that the words “single” and “all of” could be deleted as redundant.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 71. Actions against the maritime performing party**

193. The Working Group agreed that the text of draft article 71 as contained in A/CN.9/WG.III/WP.81 was acceptable, subject to the deletion of the terms “initially” and “finally” in paragraph (b) to reflect similar drafting changes made in respect of draft article 19(1).

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 71. Actions against the maritime performing party**

219. The Working Group approved the substance of draft article 71 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 70. Actions against the maritime performing party**

217. The Commission approved the substance of draft article 70 and referred it to the drafting group.

Article 69. No additional bases of jurisdiction

Subject to articles 71 and 72, no judicial proceedings under this Convention against the carrier or a maritime performing party may be instituted in a court not designated pursuant to article 66 or 68.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Draft article 78. No additional bases of jurisdiction**

45. The Working Group heard that an additional reference should be made in draft article 78 to draft article 76. The provision was approved with that addition.

Conclusions reached by the Working Group regarding draft article 78:

46. After discussion, the Working Group decided to approve the text of draft article 78, with the addition of a reference to article 76.

[* * *]

Proposed revised text for chapter on jurisdiction***General discussion***

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

“Article 78. No additional bases of jurisdiction

“Subject to articles 80 and 81, no judicial proceedings under this Convention against the carrier may be instituted in a court not designated under articles 75, 76 or 77.

[* * *]

[See also paragraphs 74, 75 and 84, A/CN.9/591 (16th Session of WG III) under General Discussion, Chapter 14 at p. 610]

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 72. No additional bases of jurisdiction

194. The Working Group agreed that the text of draft article 72 as contained in A/CN.9/WG.III/WP.81 was acceptable although the fate of the bracketed text at the end of the draft article could only be determined following discussions on draft article 77 (see paragraph 205 below).

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 72. No additional bases of jurisdiction

220. The Working Group approved the substance of draft article 72 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 71. No additional bases of jurisdiction

218. The Commission approved the substance of draft article 71 and referred it to the drafting group.

Article 70. Arrest and provisional or protective measures

Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless:

- (a) The requirements of this chapter are fulfilled; or
- (b) An international convention that applies in that State so provides.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]**Article 73**

137. The Working Group considered the text of draft article 73, Variant A as contained in document A/CN.9/WG.III/WP.32. The Working Group heard that a portion of the text of subparagraph 21(2)(a) and the entire text of subparagraph 21(2)(b) of the Hamburg Rules had been inadvertently omitted from the text of draft article 73, Variant A, and that regard should be had to those provisions of the Hamburg Rules until that omission could be corrected.

General discussion

138. Concerns were raised with respect to the inclusion of an arrest provision in the jurisdiction chapter of the draft instrument. It was said that including the place of arrest as a basis for jurisdiction could be a highly complicating factor, which could cause problems with respect to the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on Arrest of Ships, 1999 (the “Arrest Conventions”). It was also stated that not addressing the relationship to the Arrest Conventions in this instrument could give rise to uncertainty as to whether the jurisdiction provided for in those conventions could be upheld for claims falling under this instrument. Support was expressed for these concerns, and for the view that the connection between draft article 73 and the Arrest Conventions should be more closely examined before any decision was taken by the Working Group.

Conclusions reached by the Working Group on draft article 73

139. After discussion, the Working Group agreed to place square brackets around draft article 73, pending further evaluation of its relationship with the Arrest Conventions.

Article 74

140. The Working Group considered the text of draft article 74, Variant A as contained in document A/CN.9/WG.III/WP.32. The Working Group heard that draft article 74 represented a compromise between the cargo claimant and the carrier, such that the cargo claimant could choose the jurisdiction in which to sue pursuant to draft article 72, and that the carrier could not deny access to any of the forums listed. However, it was said that the other side of the coin was set out in draft article 74, which limited the cargo claimant to choosing from amongst the forums on that list. While some concern was expressed that the second sentence of draft article 74 referring to protective measures could raise issues with respect to the Arrest Conventions, the opposite view was expressed that that sentence was intended to avoid interference with

protective measures, and as such, should not conflict with the Arrest Conventions. There was general support in the Working Group for draft article 74

Conclusions reached by the Working Group on draft article 74

141. After discussion, the Working Group agreed to maintain draft article 74, but to consider the effects of the second sentence of the article when considering the interaction between draft article 73 and the Arrest Conventions.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Issue 2: Provisions relating to arrest—Draft articles 73 and 74

Draft article 73

129. The Working Group discussed the text of draft article 73 as contained in A/CN.9/WG.III/WP.32. The Working Group was reminded that at its fourteenth session it had decided to place the text of draft article 73 between square brackets pending further evaluation of its relationship with the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on Arrest of Ships, 1999 (the “Arrest Conventions”) (see A/CN.9/572, para. 139).

130. The following alternative text of draft article 73 was also offered for the consideration of the Working Group:

“Article 73

“Nothing in this Chapter shall affect jurisdiction with regard to arrest [pursuant to applicable rules of the law of the state or of international law]”.

General discussion

131. The Working Group agreed in principle to avoid any conflict between the draft instrument and the Arrest Conventions. It was indicated that the Arrest Conventions provided uniform rules to a number of State parties and represented a delicate balance of various and complex interests.

132. A large number of delegations expressed a preference for the alternative draft text, set out above in paragraph 130, since it appeared to better and more clearly achieve the goal of avoiding any conflict with the Arrest Conventions, particularly given the number of complex issues and potential areas of conflict that could arise.

133. The view was also expressed that avoidance of a conflict with the Arrest Conventions should be considered not only in a jurisdictional sense, but also in relation to any determination on the merits of the claim for the arrest. In this respect, it was suggested that it might be possible to broaden the avoidance of conflicts beyond jurisdiction conflicts by substituting the word “chapter” with “instrument”. The view was also expressed that due attention should be paid to coordinating the draft provision with certain existing provisions regarding jurisdiction on actions relating to liability arising from the use or operation of a ship, such as article 7 of the European Council Regulation (EC) No. 44/2001.

Reference to national legislation

134. A number of delegations expressed preference for removing the brackets in the alternative text of draft article 73, thus referring both to national and international legislation. It was stated that States which did not adopt any international instrument relating to arrest had developed domestic rules on arrest, and that the draft instrument should also avoid interference with these domestic rules.

135. However, views were also expressed against referring to domestic legislation in draft article 73. It was suggested that the rationale for this provision should be to avoid conflicts between international instruments only. It was further stated that reference to domestic law could be interpreted as creating new domestic jurisdiction on arrest with unforeseeable consequences. There was some support for the suggestion that a solution to this problem could be found by adjusting the phrase in issue to read “pursuant to applicable rules of law”.

Conclusions reached by the Working Group

136. After discussion, the Working Group decided that:

- Draft article 73 should be maintained in the draft instrument;
- The alternative text of draft article 73 should replace the text contained in A/CN.9/WG.III/WP.32;
- The Secretariat should be requested to clarify the text of draft article 73 with regard to claims underlying the arrest based on the views outlined in the above paragraphs;
- The words “[of the law of the state or]” should be kept in brackets for further consideration.

Draft article 74

137. The Working Group was reminded that it had most recently considered draft article 74 at its fourteenth session (see A/CN.9/572, paras. 140-141). The Working Group considered the text of draft article 74, Variant A, as contained in document A/CN.9/WG.III/WP.32.

General discussion

138. It was suggested that, especially for the benefit of clarity in some languages the words “of courts” should be inserted after the words “the jurisdiction”. It was further suggested that clarification was needed as to whether draft article 74 was intended to cover measures available under certain national laws (e.g. “référéprovision”) the use of which might not always coextend to that of “protective” measure. However, it was also felt that such issues were better left to national legislation.

139. With a view to clarifying the notion of “provisional or protective measures”, it was suggested that a paragraph 2 should be inserted in draft article 74, containing a definition of provisional or protective measures, with the following text:

“[2. For the purpose of this article ‘provisional or protective measures’ means:

“(a) Orders for the preservation, interim custody, or sale of any goods which are the subject-matter of the dispute; or

“(b) An order securing the amount in dispute; or

“(c) An order appointing a receiver; or

“(d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or

“(e) An interim injunction or other interim order.]”

140. While support was expressed for the insertion of paragraph 2 in draft article 74, the view was also expressed that any attempt to define “provisional or protective measures” might entail numerous problems while not contributing to the clarity of the draft instrument. The Working Group was reminded of the work currently under way in UNCITRAL Working Group II on arbitration to define provisional measures.

141. It was suggested that draft article 74 should be merged with draft article 73 to clarify that the former provision referred only to protective measures of the shipper against the carrier for claims related to liability. However, it was also indicated that the first and the second sentence of draft article 74 related to different matters, the second sentence being intended to relate strictly to arrest of ships, and that the second sentence in draft article 74 should therefore be kept in a separate article. It was further suggested that the words “This article does not constitute” should be corrected by replacing them with the words “Nothing in chapter 15 constitutes”.

Conclusions reached by the Working Group

142. After discussion, the Working Group decided that:

- The text of the second sentence of draft article 74 should be corrected by replacing the phrase “This article does not constitute” with the phrase “Nothing in chapter 15 constitutes”;
- The text of draft article 74 should be retained for further consideration in light of the views expressed above, with particular regard to bringing the first sentence of the provision in line with draft article 73;
- The above-mentioned proposal for a paragraph 2 should be inserted in draft article 74 in square brackets for continuation of the discussion at a future session.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 79. Arrest and provisional or protective measures

General discussion

47. The Working Group was reminded that it had considered draft provisions on arrest and provisional or protective measures during its fourteenth (see A/CN.9/572, paras. 137 to 139) and fifteenth sessions (see A/CN.9/576, paras. 129 to 142).

Paragraph 1

48. It was suggested that the goal of ensuring that jurisdiction with regard to provisional and protective measures would not be affected by the jurisdiction provisions in the draft convention could be achieved and draft paragraph 79(1) could be simplified by deleting subparagraph (a) and by adding the phrase “including arrest” to the end of subparagraph (b). However, there was support for the view that this proposal would not fully address the relationship between the draft convention and the existing international instruments dealing with arrest, i.e. the International Convention Relating to the Arrest of Sea-Going Ships, 1952, and the International Convention on the Arrest of Ships, 1999 (the Arrest Conventions). It was observed that these instruments contained provisions not only regarding jurisdiction for arrest as a provisional or protective measure, but also with regard to jurisdiction on the merits of the case under the Arrest Conventions. There was support for the view that, whatever the treatment given to jurisdiction under the Arrest Conventions, it should not result in a broadening of the list of general bases for jurisdiction in actions against the carrier contained in draft article 75. It was suggested that the issue of jurisdiction regarding the merits of the arrest case should be considered as a matter of conflict of conventions and would be better dealt with in the chapter of the draft convention on final clauses.

49. The view was also expressed that the text of draft paragraph 79(1) contained in A/CN.9/WG.III/WP.56 would adequately address matters relating to the relationship between jurisdiction for the draft convention and for arrest as a provisional or protective measure. It was also suggested that article 21(2) of the Hamburg Rules could be considered in terms of an alternative approach, or that the matter could be entirely left to national law. Another view was expressed that draft article 79 could be moved in its entirety to the chapter on final clauses in the draft convention.

Conclusions reached by the Working Group regarding draft paragraph 79(1):

50. After discussion, the Working Group decided that:
- The text of draft paragraph 79(1) should be revised by deleting subparagraph (a) and by adding the phrase “including arrest” to the end of subparagraph (b); and
 - A separate provision on conflict of conventions should take into account the issue of the merits of the arrest case and should be placed in the chapter on final clauses in the draft convention.

Paragraph 2

51. It was observed that, in light of the differences among the various national laws, drafting an exhaustive list of provisional or protective measures would be a challenging task of uncertain result. It was therefore suggested that draft paragraph 79(2), containing such a list, should be deleted and that the definition of provisional or protective measures should be left to national law.

Conclusions reached by the Working Group regarding draft paragraph 79(2):

52. After discussion, the Working Group decided that:
- The text of draft paragraph 79(2) should be deleted.

[* * *]

Proposed revised text for chapter on jurisdiction***General discussion***

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

“Article 79. Provisional or protective measures

“Nothing in this Convention affects jurisdiction with regard to provisional or protective measures, including arrest. [A court in a State in which a provisional or protective measure was taken does not have jurisdiction to determine the case upon its merits unless

“(a) the requirements of this chapter are fulfilled; or

“(b) an international convention that according to its rules of application applies in that State so provides.]

[See also paragraphs 74, 75 and 84, A/CN.9/591 (16th Session of WG III) under General Discussion, Chapter 14 at p. 610]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 79. Arrest and provisional or protective measures

262. Although the view was expressed that retaining the text in square brackets in draft article 79 might effectively provide an extra ground of jurisdiction under the draft convention by including the place of arrest, the Working Group agreed to retain the text in square brackets and to delete the brackets.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 73. Arrest and provisional or protective measures

195. The Working Group agreed that the text of draft article 73 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 73. Arrest and provisional or protective measures**

221. The Working Group approved the substance of draft article 73 and referred it to the drafting group.

Concursus of actions [Suggested text; never inserted]

If an action has been instituted under this instrument by a cargo claimant in a place listed in articles 72 and 72 bis, any subsequent action under this instrument relating to the same occurrence shall at the petition of the defendant be moved to the place where the first action was instituted.

[Last suggested text: para. 143 of A/CN.9/576]

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]**Concursus—Concentration of suits in a single forum**

120. The question was raised whether the chapter on jurisdiction should ensure that multiple suits arising from the same incident should be concentrated into one single forum. While no specific agreement was reached on this point, it was suggested that the inclusion of the port of loading and the port of discharge as connecting factors in draft article 72 (see below, para. 128) could assist in providing an obvious and major point of commonality on which many cargo claimants would logically choose to base jurisdiction. Some preference was expressed for rules facilitating the concentration of suits in a single forum, rather than drafting a specific rule for such a purpose. It was also suggested that Brussels Regulation I contained a rule which might be instructive in this regard.

Conclusions reached by the Working Group

121. The Working Group did not reach specific agreement on this matter.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Issue 3: Concursus, suits in solidum, litis consortium and lis pendens (proposed new articles 74 bis, 74 ter and draft article 75)****Proposal for the insertion of proposed new article 74 bis. Concursus.**

143. The Working Group was reminded that it had most recently considered the issue of concursus, or the concentration of multiple suits in a single forum, at its fourteenth session (see A/CN.9/572, paras. 120-121). It was reiterated that in the case of major incidents involving a high number of cargo claims, the carrier could be potentially sued in numerous jurisdictions. It was further indicated that these jurisdictions could be geographically very dispersed due to the

interplay of the door-to-door regime of the draft instrument and the connecting factors to establish jurisdiction enumerated in draft article 72. Based on the consideration of this issue at the fourteenth session of the Working Group, it was therefore suggested that a provision on concursus should be introduced in the draft instrument to provide for removal of actions to the jurisdiction where the first action had been instituted. The following draft text was suggested for consideration by the Working Group:

“Article 74 bis

“If an action has been instituted under this instrument by a cargo claimant in a place listed in articles 72 and 72 bis, any subsequent action under this instrument relating to the same occurrence shall at the petition of the defendant be moved to the place where the first action was instituted.”

General discussion

144. It was indicated that under the suggested provision, removal of actions could be invoked in any incident involving more than one claim, and while there was some sympathy for the problem in the case of multiple claims, it was thought that this threshold was too low. It was also suggested that the word “occurrence”, while common in the field of collision law, lacked clarity in this context. It was further indicated that the draft provision left a number of issues open, such as, for instance, the definition of “first action”, and the interplay between the removal of actions and actions by the carrier for declarations of non-liability and counter-claims. It was suggested that the problem could be rendered less troublesome by allowing the adoption of an exclusive jurisdiction clause by the parties. The view was also expressed that the suggested mechanism for removal of actions could add to the litigation costs of the defendant since it could only be triggered by the first action, while reversing the mechanism to request subsequent plaintiffs to sue in the forum nominated by the defendant would be preferable.

145. It was further suggested that concursus of actions was a general problem of litigation dealt with in all national legislation, whose rules the draft instrument should respect. It was suggested that the obligation for courts to remove subsequent actions was worded too strongly, and could conflict with a number of principles relating to judicial discretion. It was further indicated that, given that the first action would govern subsequent actions under proposed new article 74 bis, it could be open to forum-shopping and similar tactical jurisdictional choices by the carrier. In addition, it was pointed out that the matter had been discussed in other international forums without reaching a consensus, and that even with a well-drafted provision, an international legal scheme for the removal of actions between States would still be needed.

146. After discussion, the Working Group decided that:

- A provision on concursus of actions should not be inserted in the draft instrument.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 72. Arrest and provisional or protective measures

219. In reference to draft article 72, subparagraph (a), in particular with respect to fulfilling “the requirements of this chapter”, it was observed that the court granting the provisional or protective measures would make a determination regarding its jurisdiction to determine a case

upon its merits in light of the provisions set out in chapter 14. There was support in the Commission for that view.

220. The Commission approved the substance of draft article 72 and referred it to the drafting group.

Article 71. Consolidation and removal of actions

1. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, the action may be instituted only in a court designated pursuant to both article 66 and article 68. If there is no such court, such action may be instituted in a court designated pursuant to article 68, subparagraph (b), if there is such a court.

2. Except when there is an exclusive choice of court agreement that is binding pursuant to article 67 or 72, a carrier or a maritime performing party that institutes an action seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum pursuant to article 66 or 68 shall, at the request of the defendant, withdraw that action once the defendant has chosen a court designated pursuant to article 66 or 68, whichever is applicable, where the action may be recommenced.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Proposal for the insertion of proposed new article 74 ter. Suits in solidum. Litis consortium.

147. The Working Group was reminded that it had considered the issue of whether the draft instrument should contain a provision on actions brought by cargo interests in solidum against the carrier and the maritime performing party at its fourteenth session (see A/CN.9/572, para. 149), and that it had also discussed the benefits of preventing the carrier from establishing jurisdiction by means of an action for declaration of non-liability (see A/CN.9/572, para. 118). Based on that discussion, the following draft text was proposed for consideration by the Working Group:

“Article 74 ter

“[1. If the cargo claimant institutes actions in solidum against the contracting carrier and the maritime performing party, this must be done in one of the places mentioned in article 72 bis, where actions can be instituted against the maritime performing party.]

“2. If the carrier or maritime performing party institutes an action under this instrument against the shipper or other cargo interest, then the claimant, at the petition of the defendant, must remove the action to one of the places referred to in articles 72 or 72 bis, at the choice of the defendant.”

New article 74 ter(1): Actions brought in solidum against the carrier and the maritime performing party

148. It was indicated that the draft instrument should not hinder the possibility of bringing suit against the carrier and the maritime performing party in the same forum, since this possibility might expedite the resolution of the dispute for the benefit of all parties involved. While the proposed text resolved the problem that the carrier and the maritime performing party may not have a common jurisdiction under draft articles 72 and 72 bis of the draft instrument by resorting to the places set out in proposed new article 72 bis, it was suggested that this matter could also be addressed by the introduction of ports as one of the connecting factors to establish jurisdiction. However, it was also felt that reference to ports as connecting factors to establish jurisdiction might not be fully in line with the “maritime plus” nature of the draft instrument (see, further, paras. 121 and 122 above). It was further suggested that the words “in solidum” should be deleted to extend the application of the provision to all actions brought jointly against the contracting carrier and the maritime performing party.

Conclusions reached by the Working Group

149. After discussion, the Working Group decided that:

- The proposed text for draft article 74 ter(1) should be inserted between square brackets in the draft instrument for continuation of the discussion at a future session.

New article 74 ter(2): Declaratory actions brought by the carrier and the maritime performing party

150. It was indicated that the proposed text for draft article 74 ter(2) was intended to prevent the carrier from seeking declaratory relief to circumvent the connecting factors used in the draft instrument to establish jurisdiction. However, it was also suggested that the provision should be limited to carrier actions for declaratory relief and that it should not prevent the carrier from instituting actions other than for declaratory relief, such as actions for the payment of freight, in the appropriate jurisdiction of its choosing. It was further suggested that the reference to the maritime performing party in draft article 74 ter(2) should be deleted, but the contrary view was also held. In addition, it was suggested that the proposed text should be clarified to indicate that subsequent actions should be removed exclusively to a jurisdiction among those indicated by the connecting factors enumerated in draft article 72.

151. The view was again expressed that, in absence of an established regime for the removal of actions between States, the proposed text for draft article 74 ter(2) might require additional clarification. In this context, it was indicated that the proposed text used language inspired, to some extent, from article 21 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (the “Hamburg Rules”). It was suggested that clarification was needed with respect to the possibility for the carrier to bring an action for declaratory relief in one of the jurisdictions established by the connecting factors under draft article 72, and for the cargo claimant to demand removal of such action to another of these jurisdictions

Conclusions reached by the Working Group

152. After discussion, the Working Group decided that:

- The proposed text for draft article 74 ter(2) should be inserted in the draft instrument for further consideration in light of the opinions expressed above, in particular, limiting its application to declaratory relief sought by the carrier or the maritime performing party.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Draft article 80. Consolidation and removal of actions

General discussion

53. The Working Group was reminded that it had previously considered a provision on consolidation and removal of actions at its fifteenth session (see A/CN.9/576, paras. 147 to 152). The Working Group heard that Variant C of draft paragraph 80(1) was the text agreed for further discussion in paragraph 149 of A/CN.9/576, and that Variants A and B of draft paragraph 80(1) set out two alternative texts from which the Working Group could choose. The text of draft article 80 proposed for consideration by the Working Group was a combination of Variants A and B of paragraph 1, and a modification of draft paragraph 80(2) as follows:

“Article 80. Consolidation and removal of actions

“[1. Any action against both the carrier and the maritime performing party arising out of the same occurrence must be instituted in a place designated under both article 75 and article 77. [If no place is specified in both articles, then such action must be instituted in one of the places designated under article 77.]]

“2. If the carrier or maritime performing party institutes an action that directly or indirectly reduces the rights of a person to select the forum under Articles 75 or 77, then the carrier or maritime performing party, at the request of the defendant, must withdraw the action and recommence it in one of the places designated under articles 75 or 77, whichever is applicable, at the choice of the defendant.”

Paragraph 1

54. The view was expressed that the square brackets around the whole of paragraph 1 should be deleted and the text of the paragraph retained. It was thought that the first sentence of paragraph 1 was uncontroversial since it was logical that if a claimant wished to sue a contracting carrier and a maritime performing party in a single action, that it would be required to do so in a court that had jurisdiction for both actions. There was general agreement in that regard.

55. It was felt that the second sentence of paragraph 1 that appeared in square brackets was more controversial, since it allowed an action against both a contracting carrier and a maritime performing party to take place in a jurisdiction designated only by draft article 77 when a single place could not be designated under both draft articles 75 and 77. A view was expressed that, in such a case, it was more important to protect the maritime performing party, and it was proposed that the square brackets around the second sentence should also be removed and the text retained. However, some doubt was expressed both with respect to subjecting the contracting carrier to the heads of jurisdiction under draft article 77 in this manner, and with

respect to the interaction between draft articles 76 and 80(1). For example, concern was expressed that it might be possible to circumvent an otherwise enforceable exclusive jurisdiction clause by suing both the contracting carrier and the maritime performing party in a draft article 77 jurisdiction.

Conclusions reached by the Working Group regarding draft paragraph 80(1):

56. After discussion, the Working Group decided that:

- The concerns raised with respect to the second sentence of draft paragraph 80(1) and the interaction of the entire paragraph with draft article 76 would be further considered in a subsequent draft of the provision.

Paragraph 2

57. The view was expressed that draft paragraph 80(2) was intended to provide a solution for those situations when a carrier instituted an action in an attempt to evade the heads of jurisdiction set out in draft articles 75 and 77. It was agreed that the intent of this provision was not to interfere with legitimate actions against the shipper, such as, for example, actions for freight or for damage caused to a ship by cargo. However, some doubt was expressed regarding the suggestion that draft paragraph 80(2) should be focussed solely on actions for declaratory relief intended to circumvent the heads of jurisdiction in draft articles 75 and 77. The view was expressed that draft paragraph 80(2) should also cover anti-suit injunctions sought in another forum in order to reduce a party's choice regarding where to bring suit. It was also suggested that the provision should confine itself to requiring the abusive action to be stayed or withdrawn, and that it might not be possible to require that it be recommenced in a draft article 75 or 77 jurisdiction, particularly if that recommencement were time-barred. In response to this potential problem, it was suggested that the claimant required to recommence an action pursuant to draft paragraph 80(2) could be granted additional time when faced with a time bar, but that this issue should be considered with respect to chapter 15 on time for suit.

58. A drafting suggestion was made to clarify the provision by deleting the phrase "that directly or indirectly reduces" and inserting the phrase "that merely aims at reducing", or similar language, in its stead.

Conclusions reached by the Working Group regarding draft paragraph 80(2):

59. After discussion, the Working Group decided that:

- The concerns raised above with respect to draft paragraph 80(2) would be further considered in a subsequent draft of the provision.

[* * *]

Proposed revised text for chapter on jurisdiction

General discussion

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised

text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

“Article 80. Consolidation and removal of actions

“1. Except when there is an exclusive choice of court agreement that is valid under article 76, if a single action is brought against both the carrier and the maritime performing party arising out of a single occurrence, then the action may be instituted only in a court designated under both articles 75 and 77. If no such court is available, the action must be instituted in a court designated under article 77(b) if such court is available.

“2. Except when there is an exclusive choice of court agreement that is valid under article 76, a carrier or a maritime performing party that institutes an action that [would affect] [merely aims at affecting] the rights of a person to select the forum under articles 75 or 77, must at the request of the defendant, withdraw that action and may recommence it in one of the courts designated under articles 75 or 77, whichever is applicable, as chosen by the defendant.

[See also paragraphs 74, 75 and 84, A/CN.9/591 (16th Session of WG III) under General Discussion, Chapter 14 at p. 610]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 80. Consolidation and removal of actions

263. With respect to the square brackets appearing in draft article 80(2), there was support for the proposal that, of the texts presented, the best text was the following compromise between the three alternative texts: “seeking a declaration of non-liability or any other action that would deprive a person of its right to select the forum under articles 75 or 77.” Two other issues mentioned for consideration by the Secretariat in future drafting were the possibility that the reference in draft article 80 to articles 76 or 81 might need to be adjusted if the option with respect to the partial “opt in” approach was taken, and that with respect to draft article 80(2), the Secretariat could consider clarifying that the cargo claimant must designate a forum to which the action must be removed, or there would be no removal. The Working Group approved both suggestions.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 74. Consolidation and removal of actions

196. The Working Group agreed that the text of draft article 74 as contained in A/CN.9/WG.III/WP.81 was acceptable, although the fate of the bracketed text in paragraphs 1

and 2 could only be determined following discussions on draft article 77 (see paragraph 205 below).

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 74. Consolidation and removal of actions

222. The Working Group approved the substance of draft article 74 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 73. Consolidation and removal of actions

221. The Commission approved the substance of draft article 73 and referred it to the drafting group.

Lis pendens [Deleted]

Variant A - Article 75.

1. *Where an action has been instituted in a court competent under article 72 or 73 or where judgement has been delivered by such a court, no new action may be started between the same parties on the same grounds unless the judgement of the court before which the first action was instituted is not enforceable in the country in which the new proceedings are instituted.*
2. *For the purpose of this chapter the institution of measures with a view to obtaining enforcement of a judgement is not to be considered as the starting of a new action;*
3. *For the purpose of this chapter, the removal of an action to a different court within the same country, or to a court in another country, in accordance with article 73, is not to be considered as the starting of a new action.*

[Last version before deletion: A/CN.9/WG.III/WP.32]

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Article 75

142. The Working Group considered the text of draft article 75, Variant A as contained in document A/CN.9/WG.III/WP.32. In reference to footnote 222 in A/CN.9/WG.III/WP.32, the Working Group heard that in keeping with the approach in the Hamburg Rules, Variant A contained a *lis pendens* provision in draft article 75, while Variant B did not, in keeping with the 1999 decision of the International Sub-Committee on Uniformity of the Law of Carriage by

Sea of the Comité Maritime International (CMI). The Working Group heard that the CMI had reviewed and endorsed that 1999 decision at its 38th International Conference in June 2004.

143. There was support for the suggestion that draft article 75 should be deleted, and hence that Variant B of chapter 15 should be accepted as a basis for future discussion, since a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter, and the existence of diverse *lis pendens* approaches in various jurisdictions throughout the world. The question was raised regarding what the effect would be if such a provision were omitted from the draft instrument, and the view was expressed that the *lis pendens* issue would be left to national law. In response, however, it was suggested that national law might not adequately treat the problem, since some jurisdictions did not have international *lis pendens* rules, and some might not recognize and enforce international *lis pendens* rulings. While there was support for the deletion of draft article 75, Variant A, the Working Group agreed to maintain the provision but to place it in square brackets pending further discussion.

Conclusions reached by the Working Group on draft article 75

144. After discussion, the Working Group agreed to place square brackets around draft article 75, Variant A, pending further discussion.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Draft article 75. *Lis pendens*.

153. The Working Group was reminded that it had most recently considered draft article 75 at its fourteenth session (see A/CN.9/572, paras. 142-144). The Working Group considered the text of draft article 75, Variant A, as contained in document A/CN.9/WG.III/WP.32.

General discussion

154. As discussed at the fourteenth session of the Working Group, it was suggested that draft article 75 of the draft instrument should be deleted, since a rule on *lis pendens* would be extremely difficult to agree upon, given the complexity of the subject matter and the existence of diverse approaches to *lis pendens* in the various jurisdictions. It was widely felt that the matter was better left to national laws, despite the desirability of a uniform provision regarding that issue.

155. After discussion, the Working Group decided that:

- Draft article 75 should be deleted from the draft instrument.

Article 72. Agreement after a dispute has arisen and jurisdiction when the defendant has entered an appearance

1. After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.
2. A competent court before which a defendant appears, without contesting jurisdiction in accordance with the rules of that court, has jurisdiction.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Article 75 bis

145. The Working Group considered the text of draft article 75 bis, Variant A as contained in document A/CN.9/WG.III/WP.32. There was support for the view that the circumstances described in this provision, where parties could agree on the choice of jurisdiction after a claim arose, differed markedly from those considered with respect to choice of jurisdiction clauses, which came into existence prior to any damage or loss arising. There was general agreement that the principle set out in draft article 75 bis, Variant A was acceptable, however, it was also observed that if the Working Group ultimately agreed on an exclusive jurisdiction provision, this draft article could become redundant. In addition, the following concerns were expressed regarding the clarity of the text in that draft article.

“an agreement”

146. Questions were raised regarding the form of agreement that would be acceptable pursuant to the draft provision, in particular, whether express agreement was necessary, or whether implicit agreement would be acceptable.

“made by the parties”

147. Clarification was also sought regarding whether the term “parties” referred to in the provision referred to parties to the contract or carriage, or whether it was intended to mean the parties to the dispute arising from the loss or damage. There was support for the view that the intention of the provision was that it should refer to the parties to the dispute arising from the loss or damage, rather than to the parties to the contract of carriage. The suggestion was made that this understanding be clarified in the text of the provision.

“after a claim under the contract of carriage has arisen”

148. A further question was raised regarding whether the agreement under the draft article could only be made after the institution of a proceeding with respect to the loss or damage, or whether it referred instead to the moment when the loss or damage had occurred. There was support for the view that the intention of the provision was to refer to agreements made after the loss or damage had arisen. A further suggestion was made that the relevant moment should be when the parties had knowledge of the loss or damage. The Working Group agreed to place this phrase in square brackets pending further discussion.

Concursus concerns

149. Some support was expressed for the view that the concursus problem discussed generally with respect to jurisdiction (see above, paras. 120 to 121) could also arise in respect of draft article 75 bis, in that claims could be proceeding with respect to the contracting carrier and the maritime performing parties at the same time, thus perhaps compounding the problem of agreement on jurisdiction. It was suggested that this problem should be borne in mind in future discussions.

Conclusions reached by the Working Group on draft article 75 bis

150. After discussion, the Working Group agreed to:

- Place square brackets around the phrase, “after a claim under the contract of carriage has arisen”, in order to indicate that further clarification could be necessary;
- Consider whether further clarifications were needed with regard to the form of the agreement necessary, and to the identity of the parties.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Issue 5: Agreement on jurisdiction following a dispute—Draft article 75 bis****Draft article 75 bis**

169. The Working Group next considered the text of draft article 75 bis as slightly modified from A/CN.9/WG.III/WP.32 following discussion at its fourteenth session (see A/CN.9/572, para. 150) by the addition of square brackets around the phrase “[after a claim under the contract of carriage has arisen,]”.

170. Support was expressed for the principle in this provision. There was support for the suggestion that the word “claim” should be deleted, and that the following phrase should be added after the word “parties”: “to the dispute under the contract of carriage after the dispute has arisen,” in order to ensure that it was clear that any agreement on jurisdiction should not be reached until after both parties had notice of the dispute. Further, it was observed that the word “agreement” in draft article 75 bis covered both express and implied agreement. It was suggested that this provision should be revisited once the Working Group has made its decision regarding exclusive jurisdiction clauses.

Conclusions reached by the Working Group regarding the draft article 75 bis

171. After discussion, the Working Group decided that:

- A provision along the lines of draft article 75 bis should be included in the draft instrument;
- The Secretariat should consider whether the text of draft article 75 bis should be modified by deleting the word “claim”, and by adding after the word “parties” the following phrase: “to the dispute under the contract of carriage after the dispute has arisen”.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Draft article 81. Agreement after dispute has arisen*****General discussion***

60. The Working Group was reminded that it had most recently considered a provision on agreement on jurisdiction arising after the dispute had arisen at its fifteenth session (see A/CN.9/576, paras. 169 to 171). There was general support for the text of this provision, provided that its text was reviewed for consistency in light of changes anticipated to other provisions in the chapter on jurisdiction.

Form requirements

61. A question was raised regarding whether the agreement made by the parties should be subject to form requirements similar to those set out in draft paragraph 76(1), where an agreement on choice of court was required to be evidenced in writing or by electronic means. Two views were expressed. One view was that the draft article should be amended to include form requirements similar to those in draft paragraph 76(1) on the basis that evidence of an agreement was necessary to protect the parties. It was suggested that where an agreement was concluded orally and a subsequent dispute arose as to whether a court had jurisdiction to hear the case, the lack of evidence as to what was agreed could further complicate the dispute between the parties.

62. The other view expressed was that form requirements should not be included since this would unnecessarily impede negotiations that often take place between the parties once a dispute has arisen. It was stated that in practice, negotiations were often entered into between the parties prior to commencing an action, and when negotiations were unsuccessful, parties might orally or informally agree where to litigate. It was also noted that such agreement could also be arrived at implicitly, through a party simply appearing in a court to defend an action. In addition, it was noted that even article 21(5) of the Hamburg Rules, which generally provide strong protection for parties, did not stipulate form requirements for agreements on jurisdiction after the dispute has arisen.

Additional clarifications

63. In response to a question raised, it was generally agreed that the draft article did not confer jurisdiction on a court where that court did not have jurisdiction in the first place. It was also clarified that the meaning of the words “after the dispute had arisen” referred to the period following a voyage when the damage had already occurred, but a court had not yet been seized with the claim.

Conclusions reached by the Working Group regarding draft article 81:

64. After discussion, the Working Group decided that:

- The text of draft article 81 should be retained as satisfactory and no form requirement should be added.

Proposed new draft paragraph 81(2)

65. It was proposed that the draft article 81 should become draft paragraph 81(1), and that the following text be incorporated into the draft convention as draft paragraph 81(2):

“Notwithstanding the preceding articles of this chapter, a court of a Contracting State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction.”

General discussion

66. With respect to proposed draft paragraph 81(2), general support was expressed for the text. The view was expressed that draft paragraph 81(2) was necessary because it was important for a defendant to be able to enter an appearance only for purposes of contesting the jurisdiction of the court. Moreover, it was thought to be logical for this paragraph to be placed as the second paragraph in the same draft article as draft article 81, so that it would make clear that the first paragraph, or former draft article 81, dealt with agreements on jurisdiction after the dispute had arisen but before a court was seized, and that the second paragraph dealt with disputes once a court was seized with the claim. The view was expressed that it was not obvious that where a defendant entered an appearance to contest jurisdiction, all courts would view the appearance in the same manner, but that the insertion of this paragraph could have a beneficial harmonizing effect in this regard.

67. The view was also expressed, however, that the draft article might be seen to interfere with local procedural law, and it was agreed that the draft paragraph should incorporate wording such as “in accordance with the law of”, or similar text that referred to local law, so as to ensure that local procedural law was respected. In response to a question, another clarification was made that it was intended that the court before which an appearance was entered was under no obligation to accept jurisdiction.

68. In response to a concern raised, it was clarified that the words “entered to contest the jurisdiction” did not prevent a defendant who was contesting jurisdiction of a court from also contesting the claim on its merits. Further, on the question of whether a court could assert jurisdiction once an appearance was entered even where it fell outside the scope of draft articles 75, 76 and 77, it was clarified that the answer would depend on local procedural rules.

Conclusions reached by the Working Group regarding proposed draft paragraph 81(2):

69. After discussion, the Working Group decided that:

- Draft article 81 should be renumbered as draft paragraph 81(1) and its title revised;
- The text of draft paragraph 81(2) set out above should be inserted into the draft convention; and
- Regard should be had in a future draft to the concerns raised regarding local procedural law.

[* * *]

Proposed revised text for chapter on jurisdiction

General discussion

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

“Article 81. Agreements after the dispute has arisen and jurisdiction when the defendant has entered an appearance

“Notwithstanding the preceding articles of this chapter:

“(a) After a dispute has arisen, the parties to the dispute may agree to resolve it in any competent court.

“(b) A competent court before which a defendant appears, without contesting the jurisdiction in accordance with the rules of that court, has jurisdiction over the parties.

[See also paragraphs 74, 75 and 84, A/CN.9/591 (16th Session of WG III) under General Discussion, Chapter 14 at p. 610]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 81. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance

264. There was approval for the suggestion to add the word “competent” before the word “court” in draft article 81(2).

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance

197. Support was expressed for the text of draft article 75 as currently drafted. It was noted that the words in paragraph 2 of draft article 75, “in a Contracting State” should be deleted as being otiose given that the definition of “competent court” in draft article 1(30) already included those words.

Conclusions reached by the Working Group regarding draft article 75:

198. The Working Group agreed that the text of draft article 75 as contained in A/CN.9/WG.III/WP.81 was acceptable subject to the deletion of the words “in a Contracting State”.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 75. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance

223. The Working Group approved the substance of draft article 75 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 74. Agreement after dispute has arisen and jurisdiction when the defendant has entered an appearance**

222. The Commission approved the substance of draft article 74 and referred it to the drafting group.

Article 73. Recognition and enforcement

1. A decision made in one Contracting State by a court having jurisdiction under this Convention shall be recognized and enforced in another Contracting State in accordance with the law of such latter Contracting State when both States have made a declaration in accordance with article 74.
2. A court may refuse recognition and enforcement based on the grounds for the refusal of recognition and enforcement available pursuant to its law.
3. This chapter shall not affect the application of the rules of a regional economic integration organization that is a party to this Convention, as concerns the recognition or enforcement of judgements as between member States of the regional economic integration organization, whether adopted before or after this Convention.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Issue 6: Recognition and enforcement****General discussion**

172. It was suggested that, given the decision of the Working Group to include in the draft instrument provisions with respect to jurisdiction, the inclusion of provisions on recognition and enforcement would be desirable in order to reinforce the likelihood that resort could predictably be had to the jurisdiction provisions. While there was support for this view, it was suggested that experience had shown in the context of other negotiations on international instruments that agreement was difficult to reach with respect to provisions on recognition and enforcement. There was support for the concern expressed that reaching consensus on provisions on recognition and enforcement in the context of the draft instrument would require a great deal of time, and that it would further encumber the draft instrument, which was already regulating matters in a large number of areas. In addition, it was said that provisions on recognition and enforcement were not considered a commercial necessity.

173. Another view was expressed that the cargo claimant, in choosing its jurisdiction pursuant to draft article 72, would be aware of the rules on recognition and enforcement applicable in the various possible jurisdictions, and could decide accordingly on which jurisdiction to choose for the greatest likelihood of enforcement. It was also observed that other

considerations should be taken into account before a decision is made on whether to include provisions on recognition and enforcement, such as whether or not the Working Group would include exclusive jurisdiction clauses, which could have an impact on recognition and enforcement provisions, and the pragmatic decision that the cargo claimant would often make to commence action in the jurisdiction where the defendant has sufficient assets. However, the view was expressed that this latter point was less relevant, since assets could be moved quickly from one jurisdiction to the next. Other concerns were expressed that if a rule with respect to recognition and enforcement were introduced with respect to jurisdiction, a similar rule would likely be necessary regarding arbitration, and that this could touch upon sensitive issues in the context of international arbitration rules.

174. It was also suggested that negotiation of rules on recognition and enforcement could be easier in the context of the draft instrument, since it dealt only with the narrow topic of “maritime plus” carriage of goods, rather than trying to find consensus on rules to cover the entire range of commercial matters, which had proven so difficult in other negotiations. In this context, it was suggested that provisions on enforcement in numerous other conventions already in existence with respect to maritime law, such as the Athens Protocol of 2002 (to the Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, 1974), might be instructive to the Working Group.

Conclusions reached by the Working Group regarding recognition and enforcement

175. After discussion, the Working Group decided that:

- While no decision had yet been made regarding whether or not to include in the draft instrument provisions on recognition and enforcement, the Working Group would examine any text proposed in order to assist it in making that decision.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Proposed new draft article 81 bis. Recognition and enforcement

70. It was proposed that the following text of a new draft article 81 bis be incorporated into the draft convention as draft paragraph 81(2):

“Article 81 bis. Recognition and enforcement

“1. A decision made by a court of one Contracting State that had jurisdiction under this Convention is entitled to recognition and enforcement in another Contracting State in accordance with the law of the Contracting State where recognition and enforcement are sought.

“2. This article does not require a Contracting State to recognize or enforce a decision from another Contracting State which is based on the application of the first sentence of article 76(4).”

General discussion

71. It was suggested that draft paragraph 2 was necessary since, in its absence, it was felt that draft paragraph 1 could be interpreted to mean that a court must enforce a judgment even though it might be contrary to local procedural rules. It was explained that the second

paragraph was intended to clarify that a State was not required by this provision to recognize or enforce a judgment that would not otherwise be enforceable under its national law.

Conclusions reached by the Working Group regarding proposed draft article 81 bis

72. After discussion, the Working Group decided that:

- Draft article 81 bis should be included in the draft convention as a basis for future discussion, subject to adjustments to the text necessary to accommodate drafting changes to the chapter on jurisdiction as a whole.

Proposed revised text for chapter on jurisdiction

General discussion

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

“Article 81 bis. Recognition and enforcement

“1. A decision made by a court of one Contracting State that had jurisdiction under this Convention is to be recognized and enforced in another Contracting State in accordance with the law of the Contracting State where recognition and enforcement are sought.

“2. This article does not apply to a decision rendered in another Contracting State that has jurisdiction under article 76(4).

[See also paragraphs 74, 75 and 84, A/CN.9/591 (16th Session of WG III) under General Discussion, Chapter 14 at p. 610]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 81 bis. Recognition and enforcement

265. The Working Group reiterated its view that the text of draft articles 81 bis (2) and (3) might need to be adjusted depending on what decision was made regarding the whole or partial reservation or “opt in” with respect to chapter 16. It was submitted that draft article 81 bis did not place an obligation on Contracting States to recognize and enforce judgments from other States but offered the possibility to do so subject to their national laws. The submission was accepted by the Working Group. Further, the Secretariat was requested to review the use of the terms “may” and “shall” in draft article 81 bis (1).

Conclusions reached by the Working Group regarding the provisions in chapter 16:

266. After discussion, the Working Group decided that:

- The Secretariat should make the adjustments to the provisions of chapter 16 as approved above in paragraphs 245 to 265.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 76. Recognition and enforcement**

199. Support was expressed for the text of draft article 76 as currently drafted. A concern was expressed that the requirement that a Contracting State “shall” recognize and enforce a decision made by a court having jurisdiction under the Convention could be too inflexible and should be changed to a less mandatory term such as “may”. In response, it was said that the provisions on recognition and enforcement were not harmonized in the draft convention, in particular with respect to the grounds for refusal of recognition and enforcement by a state under paragraph 2. It was observed that the intention of the draft article was mainly to provide a treaty obligation for those countries that required such an obligation, and on that basis, it was agreed that the word “shall” should be retained. However, it was recognized that the draft article also offered States the possibility to refuse to recognize and enforce judgements subject to their national laws.

200. It was suggested that the opening words in paragraph 2(c) of draft article 76 which refer to “If a court of that Contracting State”, could be too narrow and might suggest that only two states were concerned in the application of that paragraph when in some situations it might be necessary to give recognition in respect of decisions of a court in a third Contracting State. For that reason, it was suggested that paragraph 2(c) be redrafted along the following lines: “if a court of that or other Contracting State had exclusive jurisdiction”. It was also observed that the text of paragraph 2(c) would depend upon the outcome of the discussion on draft article 77.

Conclusions reached by the Working Group regarding draft article 76:

201. The Working Group agreed that the text of draft article 76 as contained in A/CN.9/WG.III/WP.81 was acceptable subject to a revision of paragraph 2(c) in accordance with the proposal made in paragraph 200 above, and with the Working Group’s decision regarding draft article 77.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 76. Recognition and enforcement**

224. The Working Group approved the substance of draft article 76 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 75. Recognition and enforcement**

223. It was observed that following the decision of the Working Group to proceed with a full “opt-in” approach as opposed to a “partial opt-in” approach to the chapter on jurisdiction (see A/CN.9/616, paras. 245-252), certain consequential changes to the draft Convention had been made. However, it was observed that draft article 75, subparagraph 2 (b), which had been inserted into the text to accommodate the “partial opt-in” approach, had not been deleted when that approach was not approved by the Working Group. A proposal was made to delete draft article 75, subparagraph 2 (b), in order to correct the text. The Commission agreed with that proposal.

224. With that correction, the Commission approved the substance of draft article 75 and referred it to the drafting group.

Article 74. Application of chapter 14

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]***Proposal for reservation or clause to “opt in” to the chapter***

246. It was proposed in the Working Group that, given the range of divergent views that were expressed during its sixteenth session with respect to the treatment and enforcement of choice of court clauses in the jurisdiction chapter of the draft convention, the Working Group should consider the adoption of a clause either allowing for a reservation to be taken by Contracting States to the entire chapter, or that a clause be adopted in the draft convention allowing Contracting States to specifically agree, or “opt in”, to be bound by the chapter on jurisdiction. The view was expressed that this approach would make it more likely that the draft convention would be widely accepted by Contracting States, and that a broader consensus on the chapter on jurisdiction could be reached.

247. In terms of specific drafting, it was suggested that a new provision could be drafted with a Variant A along the lines of: “Any state may make a reservation with respect to this chapter,” and a Variant B with text such as: “The provisions of this chapter will only apply to a Contracting State if that State makes a declaration to that effect.” Further, it was explained that by allowing for a reservation or an “opt in” clause to be taken to the chapter on jurisdiction, the existing provisions in paragraphs 4 and 5 of draft article 76, which allowed for Contracting States to allow choice of court agreements that met different conditions than the rest of the draft provision, could be deleted.

Partial “opt in” approach

248. The view was expressed that allowing for a reservation or “opt in” clause to the entire chapter on jurisdiction could be too extreme, and that a more flexible approach should be considered by the Working Group. It was said that certain States that might choose to become Contracting States of the draft convention might wish to retain draft article 76 in the text of the draft convention in order to give effect to choice of court clauses under conditions different from those set out elsewhere in draft article 76. It was suggested that this would be possible if the Working Group decided to include provisions allowing Contracting States to either “opt in” to the whole chapter excluding draft article 76, or to “opt in” to the entire chapter on jurisdiction, including draft article 76.

Views expressed on the two proposals

249. The Working Group proceeded to consider the two proposals as expressed above. There was strong support for allowing for a reservation or “opt in” clause to be provided for Contracting States in the draft convention with respect to the entire chapter on jurisdiction. A number of delegations that had originally expressed an interest during the sixteenth session in deleting the entire chapter on jurisdiction expressed their satisfaction with respect to this proposal and for the flexibility that it would grant to Contracting States.

250. Interest was also expressed in the partial “opt in” approach with respect to draft article 76. Delegations expressed their desire to see draft text setting out how this approach would operate prior to expressing their views on whether to adopt it or not. In particular, it was said to be important that the draft convention continue to allow for the recognition of choice of court agreements pursuant to draft article 76(4). In considering the partial reservation or “opt in” approach, the view was expressed that care would have to be taken with respect to consequential amendments that might be necessary to ensure the appropriate operation of draft article 81 bis on recognition and enforcement. This view was echoed with respect to consequential amendments that might be required to draft article 81 bis if the Working Group adopted the approach of providing for a reservation or “opt in” clause with respect to the entire chapter on jurisdiction, as well.

Reservation versus “opt in” approach

251. While no strong view was expressed in favour of or against the reservation or the “opt in” approach, it was suggested that the “opt in” approach might be easier for Contracting States to adopt, as it simply allowed States passively to allow the relevant provisions to remain inoperable rather than to take the positive act of making a reservation with respect to those provisions. The general view in the Working Group was that delegations preferred to review draft text outlining the complete and partial reservation and “opt in” approaches prior to expressing definitive views on those proposed approaches.

Conclusions reached by the Working Group regarding the whole and partial reservation or “opt in” approaches:

252. After discussion, the Working Group decided that:

- There was support in the Working Group for the inclusion in the draft convention of a reservation or an “opt in” clause for the whole of chapter 16;

- Interest was expressed in the reservation or partial “opt in” approach proposed with respect to draft article 76 and the recognition of choice of court agreements pursuant to draft article 76(4); and
- Draft text setting out in more detail the various approaches proposed should be prepared for the consideration of the Working Group, along with any necessary text on consequential adjustments to other provisions, such as draft article 81 bis.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 77. Application of chapter 15

202. It was explained that the Variants A, B and C, respectively, of draft article 77 corresponded to the options for the Working Group regarding the three alternatives to the application of chapter 15 to Contracting States that the Working Group had decided at its eighteenth session should be considered: a reservation approach, an “opt-in” approach and a “partial opt-in” approach (see A/CN.9/616, paras. 246 to 252).

203. There was very strong support in the Working Group for the “opt-in” approach of Variant B. Due to institutional reasons regarding competencies within a regional economic grouping, it was explained that if Variant A, the reservation approach, were chosen, the grouping would have to ratify the draft convention on behalf of its member States. It was thought that that approach could be very lengthy and could be subject to potential blockages in approval. However, it was agreed that Variant B, or the “opt-in” approach, would allow the member States of that grouping to ratify the draft convention independently, thus allowing for greater speed and efficiency in the ratification process, and avoiding the possibility that the chapter on jurisdiction could become an obstacle to broad ratification. Further, upon additional reflection since its eighteenth session, the Working Group was of the view that, while offering some advantages in terms of increased harmonization, the “partial opt-in” approach of Variant C was considered too complex an approach to retain in the text.

204. Having decided upon the retention of Variant B of draft article 77 and the deletion of Variants A and C, the Working Group next considered the alternative text in square brackets in Variant B. It was suggested that Contracting States should be allowed to opt in to the chapter on jurisdiction at any time, thus it was proposed that the text contained in both sets of square brackets be retained and the brackets deleted, and that the word “or” be inserted between the two alternatives. There was widespread approval for that proposal.

Conclusions reached by the Working Group regarding draft article 77:

205. The Working Group agreed that:

- Variant B of the text of draft article 76 as contained in A/CN.9/WG.III/WP.81 should be retained, and Variants A and C deleted;
- That the two sets of alternative text in Variant B should be retained and an “or” inserted between them, and the brackets that surrounded the text should be deleted; and
- That due to the adoption of Variant B of draft article 77:
 - o Paragraphs 3 and 4 of draft article 70 should be deleted;

- o Subparagraph 2(c) of draft article 76 should be deleted;
- o The phrase “or pursuant to rules applicable due to the operation of article 77, paragraph 2” should be deleted and the word “or” retained in draft articles 72 and 74(1) and (2).

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 77. Application of chapter 14

225. The Working Group approved the substance of draft article 77 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 76. Application of chapter 14

225. The Commission approved the substance of draft article 76 and referred it to the drafting group.

CHAPTER 15. ARBITRATION

General Discussion on the Chapter

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Arbitration

151. The Working Group proceeded to consider chapter 16 on arbitration contained in A/CN.9/WG.III/WP.32, consisting of Variant A and Variant B, the difference being the inclusion in Variant A of draft articles 78 and 80, respectively, on the seat of arbitration and on mandatory provisions relating to arbitration. With reference to footnote 225 in A/CN.9/WG.III/WP.32, the Working Group heard that in keeping with the approach in the Hamburg Rules, Variant A reproduced the arbitration provisions in the Hamburg Rules, while Variant B was in keeping with the 1999 decision of the International Sub-Committee on Uniformity of the Law of Carriage by Sea of the CMI. The Working Group heard that the CMI had reviewed that 1999 decision at its 38th International Conference in June 2004, and that it had agreed on the principle expressed in draft article 76, and while support had also been expressed regarding draft article 79, no overall consensus regarding the arbitration chapter had been achieved.

152. The Working Group heard a short report from the informal consultation group established for continuation of the discussion between sessions of the Working Group (see A/CN.9/552, para. 167, and paras. 11, 82 and 110 above). The Working Group heard that an exchange of views had taken place within the informal consultation group with respect to the inclusion of arbitration rules in the draft instrument, and regarding the various aspects that those rules might entail.

Relation with general international arbitration practice

153. It was noted that draft chapter 16 was incorporated from the Hamburg Rules, which were drafted in 1978, before the wide acceptance of uniform standards for international arbitration. It was suggested that the draft instrument should be aligned, in particular, to the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention), and that departures from these standards should be considered only in case of specific policy reasons. In this context, it was further stated that three points, in particular, needed careful consideration:

- The draft article 76 requirement of a written form for arbitration agreements might need to be coordinated with the current work of UNCITRAL on article 7 of the Model Law, which aimed at liberalizing the form requirement;
- The draft article 77 requirement of incorporation of the arbitration agreement in the transport document or electronic record might need to be coordinated with the general arbitration standard regarding incorporation by reference;
- Draft article 79, which might be interpreted as restricting the possibility of arbitration *ex aequo et bono* (in justice and fairness, i.e. overriding the strict rule of law, if necessary),

may need to be reconsidered in view of the fact that in some parts of the world, such arbitration is also being practiced in the field of maritime law.

General discussion

154. The view was expressed that the principle of freedom of arbitration was a concept deeply rooted in both the Model Law and New York Convention, and that it required that no provisions on arbitration should be included in the draft instrument. It was further expressed that arbitration clauses were widely used in the non-liner trade, and that any interference with the existing practice of freedom of arbitration would not be accepted by commercial parties. Further, it was said that the non-liner trade, which often incorporated the Hague-Visby Rules into their charter parties, would not be inclined to incorporate the draft instrument into future charter parties if the instrument contained rules on arbitration. In addition, it was expressed that arbitration procedures were essential to international trade, as were existing arbitration centres and rules on arbitration, such that including arbitration rules in the draft instrument could create commercial uncertainty. Support was expressed for this view.

155. However, it was also suggested that it would be beneficial to regulate in necessary detail matters relating to arbitration, possibly along the lines of the Hamburg Rules.

156. A third position was that the draft instrument should contain only basic provisions on arbitration so as not to disrupt the international arbitration regime, but so as to ensure the application of the mandatory provisions of the draft instrument. In particular, it was said that it should not be possible through simply choosing arbitration to circumvent the rules on jurisdiction that the Working Party had agreed were useful in preventing abuse in the draft instrument. Support was also expressed for this approach. Along these lines, it was suggested that the presence of an arbitration clause in a contract should not affect the claimant's right to litigate in places suggested in the draft instrument with one exception: if one of the places in which the claimant could initiate litigation was the place chosen for arbitration, the claimant could only arbitrate rather than litigate in that place. The claimant could choose to litigate in the other places.

Conclusions

157. After general discussion, the Working Group decided that:

- All of chapter 16 should be put in square brackets;
- The words “by agreement evidenced in writing” in draft article 76 should be put in square brackets;
- Draft article 79 should be put in square brackets;
- The Secretariat should be requested to explore the possible conflicts between the draft instrument and uniform international arbitration practice, as reflected in UNCITRAL instruments and model laws;
- Consideration should be given to the development of a formula to prevent the possibility that any mandatory rules of the draft instrument could be circumvented through resort to arbitration.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Arbitration—Chapter 16****General discussion**

176. The Working Group next considered draft chapter 16. The Working Group was reminded that it had most recently considered draft chapter 16 at its fourteenth session (see A/CN.9/572, paras. 151-157). The discussion at the fifteenth session was conducted on the basis of a note by the Secretariat (A/CN.9/WG.III/WP.45).

177. At its fourteenth session, the Working Group held a general discussion on the desirability of provisions on arbitration in the draft instrument. The view was expressed that parties should have complete freedom to conclude arbitration clauses and to rely on their application. However, concern was also expressed that recourse to arbitration might hinder the application of the rules of the draft instrument on exclusive jurisdiction. It was further suggested that the regime of the draft instrument should be in line with common trade practices in this field. It was also pointed out that the draft instrument should be in line with arbitration-related UNCITRAL instruments.

178. With a view to reconciling the above views, a proposal was made for a possible solution that would entail the deletion of draft chapter 16 on arbitration of the draft instrument, the application of chapter 15 on jurisdiction of the draft instrument to liner trade only, and the insertion in the draft instrument of a provision allowing the parties to refer any dispute to arbitration, as well as to agree on any jurisdiction, but only after the dispute had arisen. It was observed that this approach would preserve the existing practice in non-liner trade where recourse to arbitration under charter parties and charter party bills of lading was not uncommon, ensure uniformity of rules, and favour freedom of contract while preventing possible circumvention of jurisdiction rules under the draft instrument. It was further observed that, while in principle under this approach arbitration clauses contained in bills of lading would be unenforceable, specific exemptions should be foreseen for special liner trades.

Conclusions reached by the Working Group on draft chapter 16

179. After discussion, the Working Group decided that:

- A new draft of chapter 16 based on the suggestion expressed above should be submitted for the consideration of the Working Group at a future session.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Arbitration—Chapter 17****General discussion**

85. The Working Group was reminded that it had considered the chapter on arbitration during its fourteenth (see A/CN.9/572, paras. 151 to 157) and fifteenth sessions (see A/CN.9/576, paras. 176 to 179). It was recalled that during those sessions of the Working Group, two strong views were expressed. One view was that the principle of freedom of arbitration was deeply rooted and that existing arbitration instruments such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York

Convention) and the UNCITRAL Model Law on International Commercial Arbitration provided an adequate framework for arbitration, thus obviating the need for such a chapter in the draft convention. Another view was that arbitration should be available to the parties to a dispute, but that it should not be capable of being used by parties in order to circumvent the bases of jurisdiction set out in draft article 75 of the draft convention.

86. The substance of the proposal contained in A/CN.9/WG.III/WP.54 was explained to the Working Group. It was said that the proposal was intended as an effort to reach a compromise between the views expressed on arbitration during the fourteenth and fifteenth sessions. The main aspects of that compromise were said to be the deletion of the entire chapter on arbitration (see A/CN.9/WG.III/WP.54, para. 5(e)), and the addition in the draft convention of draft paragraph 78(2) (see A/CN.9/WG.III/WP.54, para. 5(b)), intended to ensure that the rules in the draft convention on jurisdiction could not be circumvented. An additional aspect of the proposal was to include a reference in draft article 81 to make effective any agreement made by the parties to refer a dispute that had arisen to arbitration. Finally, it was explained that the intention of the compromise was to preserve the status quo with respect to the use of arbitration in the maritime transport industry by providing minimal arbitration rules with respect to the liner industry, but providing for freedom of arbitration in the non-liner industry through the addition of draft article 81 bis ((see A/CN.9/WG.III/WP.54, para. 5(e)).

87. In addition, the comments expressed in A/CN.9/WG.III/WP.59 were explained by reference to the final paragraph of that document, which suggested that, in light of widespread reliance on arbitration by the maritime industry in general, the most appropriate solution in the draft convention would be the inclusion of a provision permitting the enforceability of arbitration agreements in contracts of carriage without qualification.

Unqualified freedom to arbitrate

88. There was support for the view that the draft convention should permit the untrammelled enforceability of arbitration agreements in contracts of carriage. It was stated that arbitration was an extremely popular form of dispute resolution throughout the world for disputes regarding contracts of carriage. Scepticism was expressed regarding whether it was necessary to safeguard the jurisdiction regime set out in the draft convention by reducing the freedom to arbitrate in the liner industry, which had never made broad use of arbitration, and, it was suggested, was unlikely to do so to thwart jurisdiction. In addition, caution was raised with respect to the possibility of over-regulating arbitration, thus affecting its effectiveness.

Arbitration provisions in the Hamburg Rules

89. The view was also expressed that the Working Group should consider the adoption of arbitration rules similar to those found in article 22 of the Hamburg Rules, and already included for consideration in the arbitration chapter in A/CN.9/WG.III/WP.32 and A/CN.9/WG.III/WP.56. One advantage of those rules was said to be that they were already the product of a compromise that took place during their negotiation. There was some support for this view. However, one difficulty with the approach in the Hamburg Rules was said to be that they reduced commercial certainty by allowing the arbitration to take place in one of a number of different possible locations. An advantage of the proposal in A/CN.9/WG.III/WP.54 was thought to be that it allowed for the resolution of the dispute either through arbitration at the specific location cited in the arbitration provision, or in a court in a location designated pursuant to draft article 75. However, it was also observed that the variety of potential locations

for arbitration could be seen as an advantage of the Hamburg Rules in terms of promoting the development of arbitration by providing for it in different locations, but with reference to the same set of rules.

The compromise proposal in A/CN.9/WG.III/WP.54

90. A number of delegations made clear that their starting position when arbitration had first been discussed during the fourteenth session of the Working Group had been in favour of unqualified freedom to arbitrate. However, these delegations had, in the spirit of compromise, come to support the proposal in A/CN.9/WG.III/WP.54, particularly due to its deference to the existing international arbitration regime, and to its maintenance of the status quo in regard to arbitration practices in the maritime transport industry. Some reservations were raised regarding whether the compromise proposal might in fact limit the development of arbitration in the liner trade, since commercial enterprises would not be likely to include an arbitration provision in a contract unless they could be certain of where the arbitration would take place, and that might not be possible if that choice were subject to the draft article 75 list. Ultimately, while a number of delegations suggested that further refinements in the drafting of the proposal were necessary, not the least in the face of the new provisions considered for the jurisdiction chapter, there was support for the proposal as a compromise intended to further the efforts of the Working Group and as a basis for future discussions.

Clarifications of the intended effect of the compromise proposal

91. A question was raised with respect to the interaction of draft subparagraphs 78(2)(a) and (b), and whether the claimant should be required to provide a short time period in which the carrier would have to decide whether to transfer the proceedings from the place in the arbitration clause to a place designated by draft article 75. In response to a question regarding which parties could be asserting a claim against the carrier under draft article 78(2)(a), it was suggested that this and other answers might best be addressed during the Working Group's consideration of the chapter on rights of suit, and perhaps the chapter on time for suit, both anticipated at its next session.

Suggested modifications to the compromise proposal

92. In addition to general adjustments to the proposal made necessary in light of changes under consideration for the jurisdiction provisions in the draft instrument, certain specific modifications to the proposal were suggested. In light of the thrust of the discussions in the Working Group with respect to jurisdiction and choice of court clauses under draft article 76, the view was expressed that exclusive arbitration clauses should be permissible and should be enforced on the same grounds as exclusive choice of court clauses. There was some support for the suggestion that the effect of an arbitration agreement on third parties to the contract of carriage should be made clear and should be harmonized, rather than being left to national law as in draft article 81 bis. A model for this approach was suggested to be draft article 83 of the draft convention. In response, concern was raised that creating rules regarding third parties could amount to impinging on the domain of the New York Convention regarding the enforceability of arbitration agreements. In addition, there was some support for the inclusion of a provision along the lines of draft article 85 of the current chapter on arbitration requiring an arbitrator to apply the rules of the draft convention. It was suggested in response that such a rule was unnecessary, since an arbitrator would look to the contract of carriage to decide which

rules to apply, and that inquiry would either lead the arbitrator to the draft convention or it would not.

93. Some specific drafting changes were suggested to the text. There was support for the view that the word “solely” in proposed draft article 81 bis should be placed in square brackets or be eliminated. A suggestion was also made that the bracketed text “[a jurisdiction or]” should be deleted in its entirety from draft article 81 bis, since jurisdiction clauses were not common in the non-liner industry, and the intention of the proposal was to preserve the status quo. Other views were expressed in favour of keeping the text and deleting only the square brackets. Support was expressed for the following alternate text intended to replace and clarify draft paragraph 78(2)(b):

“The carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if the person asserting the claim against a carrier institutes court proceedings in a place specified in the arbitration agreement.”

Conclusions reached by the Working Group regarding provisions on arbitration:

94. After discussion, the Working Group decided that:

- There was broad consensus for the compromise proposal presented in A/CN.9/WG.III/WP.54; and
- The proposal should form the basis for future work following modification in light of the discussion in the Working Group as noted above, and with respect to the anticipated revision of draft article 76 on jurisdiction.

Proposed revised text for chapter on arbitration

General discussion

95. The Working Group continued its discussions on the basis of the following text proposed by some delegations, to be placed in a new draft chapter on arbitration of the draft convention:

“Article 83. Arbitration agreements

“Subject to article 85, if a contract of carriage subject to this Convention includes an arbitration agreement, the following provisions apply:

“(a) The person asserting a claim against the carrier has the option of either:

“(i) commencing arbitral proceedings pursuant to the terms of the arbitration agreement in a place specified therein, or

“(ii) instituting court proceedings in any other place, provided such place is specified in article 75(a), (b) or (c);

“(b) If a person asserts a claim against a carrier, then the carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if that person institutes court proceedings in

“(i) a place specified in the arbitration agreement, or

“(ii) a court that would give effect under article 76 to an exclusive choice of court agreement specifying the place named in the arbitration agreement that is exclusive with respect to the action against the carrier.

“Article 84. Arbitration agreement in non-liner transportation

“Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the terms of this Convention apply by reason of:

“(a) the application of article 10¹, or

“(b) the parties’ voluntary incorporation of this Convention as a contractual term of a contract of carriage that would not otherwise be subject to this Convention.

“Article 85. Agreements for arbitration after the dispute has arisen

“Notwithstanding the provisions of this chapter and chapter 16, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.”

96. It was reiterated that proposed draft articles 83, 84 and 85 were aimed at reaching a compromise between those delegations that favoured the broadest application of the principle of freedom of arbitration in the draft convention and those delegations that felt that, while arbitration should be available to the parties to a dispute, it should not be used in order to circumvent the bases of jurisdiction as set out in draft article 75 of the draft convention. The Working Group was reminded that the goal of the draft provisions was to reflect the needs of practitioners with respect to the use of arbitration in the maritime transport industry by providing limited freedom of arbitration with respect to the liner industry, where arbitration was not frequent, while allowing broad freedom of arbitration in the non-liner industry, where arbitration was, on the contrary, the standard method of dispute resolution.

97. It was indicated that the new proposed draft amended the text contained in A/CN.9/WG.III/WP.54 by introducing a new draft subparagraph 83(b)(ii); by deleting the word “solely” in draft article 84, subject to review upon revision of draft article 10; by deleting the bracketed phrase “[a jurisdiction or]” in draft article 84, and by introducing new draft article 85, which created a separate article for a principle that had been reflected in paragraph 5(c) of A/CN.9/WG.III/WP.54. There was no discussion of the deletion of the bracketed phrase “[a jurisdiction or]”.

98. Some doubts were expressed with respect to the proposed draft text, particularly regarding concerns that it would result in forum-shopping and create a multiplicity of actions. In addition, some concerns were raised regarding proposed draft article 83, and the possibility that it could restrict access to arbitration in some circumstances. Overall, the spirit of compromise was reiterated, and support was expressed for the approach of the proposal, with some specific concerns outlined as discussed below.

New draft subparagraph 83(b)(ii)

99. It was indicated that there was a parallelism between exclusive choice of court agreements, on the one hand, and arbitration agreements, on the other hand, and that therefore

¹ The reference might be modified depending on the future revision of draft article 10 of the draft convention.

the two should be accorded similar treatment in the draft convention with respect to freedom of contract. Accordingly, it was indicated that the goal of the draft subparagraph 83(b)(ii) was to allow for arbitration agreements in those cases where an exclusive jurisdiction clause would be recognized under draft article 76 of the draft convention, relating to the recognition of exclusive choice of court clauses. It was observed that the effect of draft subparagraph 83(b)(ii) would be a further expansion of freedom of arbitration in the liner industry. Upon request for clarification, it was explained that draft subparagraph 83(b)(ii) required the existence of an arbitration agreement for its operation, and, in response, it was suggested that the text should be amended to specifically indicate so. It was further observed that draft subparagraph 83(b)(ii) applied only to claims against the carrier, while claims brought by the carrier were outside its scope.

100. Some hesitation was expressed regarding draft subparagraph 83(b)(ii), however, in light of another view that exclusive choice of court clauses and arbitration agreements had different natures and consequences, and that their treatment under the draft convention should reflect such differences. In particular, the link with draft article 76 was seen to be problematic in that it linked arbitration agreements with a State's decision whether or not to enforce exclusive choice of court agreements. An additional concern was expressed that draft subparagraph 83(b)(ii) might deprive the shipper of a reasonable place to protect its interests, especially in light of the higher costs of arbitration compared to court litigation. It was therefore suggested that subparagraph 83(b)(ii) should be deleted.

New York Convention and draft subparagraph 83

101. It was indicated that the effect of draft subparagraph 83 would be to allow courts, under certain conditions, to declare that, despite an arbitration agreement entered into in good faith, the arbitration agreement would not be binding on the parties. It was added that such outcome was not only unusual in modern trade law, but also contrary to basic arbitration principles as contained in a number of widely accepted texts such as the New York Convention, and in particular its article II (3), and the UNCITRAL Arbitration Model Law. It was added that, while the principle of respect of the arbitration agreement might tolerate certain deviations, such as in article 22(3) of the Hamburg Rules, these could not extend to preventing access to arbitration as envisaged under new draft article 83 without fundamentally affecting that principle. It was suggested that the Working Group should seek the opinion of UNCITRAL Working Group II (on arbitration) on the provisions of the draft convention relating to arbitration.

102. In response, it was indicated that for a number of reasons, the proposed text was not inconsistent with the New York Convention. It was further explained that the basic principle of the New York Convention did not require general recognition of all arbitration agreements, but only non-discrimination of arbitration agreements vis-à-vis jurisdiction clauses. It was added that, since arbitration agreements were allowed in the draft proposal exactly in the same cases where exclusive jurisdiction clauses would be recognized, that basic principle of the New York Convention was not affected by the proposed text. Furthermore, it was indicated that a restriction on the effectiveness of arbitration agreements was a consequence of maritime trade practice, which saw restrictions of freedom of arbitration in certain circumstances and trades.

Conclusions reached by the Working Group regarding revised provisions on arbitration:

103. After discussion, the Working Group decided that:

- The general approach of draft articles 83, 84 and 85 was supported as part of a compromise on jurisdiction and arbitration;
- Draft articles 83, 84 and 85 should be retained in a draft chapter on arbitration of the draft convention for future discussion;
- The chapeau of draft article 83 should be placed in square brackets pending clarification of the relation between draft article 83 and the New York Convention, and subject to the resolution of any potential conflict between the two instruments; and
- Draft subparagraph 83(b)(ii) of the draft convention should be placed in square brackets pending its next reading.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Arbitration — Chapter 17

267. The Working Group was reminded that it had most recently considered the topic of arbitration at its sixteenth session (see A/CN.9/591, paras. 85-103), and that it had previously considered the topic at its fourteenth (see A/CN.9/572, paras. 151-157) and fifteenth sessions (see A/CN.9/576, paras. 176-179).

268. The Working Group was reminded that, following the consideration of the topic of arbitration during its sixteenth session, a revised text for a new chapter on arbitration had been proposed (see A/CN.9/591, para. 95). Discussion on that proposal ensued in the Working Group at that same session, and it was decided that the general approach taken in those provisions was acceptable and should be retained for future consideration by the Working Group (see A/CN.9/591, paras. 96 to 103). It was further recalled that draft article 83 of that revised text provided for a claimant to commence either arbitral proceedings according to the terms of the arbitration agreement in the contract of carriage, or to institute court proceedings in any place, provided that such place was specified by draft article 75 of the draft convention. It was further recalled that the purpose of that approach was to ensure that, with respect to the liner trade, the right of the cargo claimant to choose the place of jurisdiction for a claim pursuant to draft article 75 was not circumvented by way of enforcement of an arbitration clause. In addition, the Working Group was reminded that it had attempted in that approach to limit interference with the right to arbitrate in the liner trade while protecting the cargo claimant, but that the intended approach in the non-liner trade was to allow for complete freedom to arbitrate, thus preserving the status quo in both trades.

269. At that time, it was noted that the approach of that revised text in paragraph 95 of A/CN.9/591, would in practice mean that an otherwise valid arbitration agreement might not be considered binding if the claimant chose to institute court proceedings elsewhere. This particular aspect of that revised text was felt to be possibly inconsistent with article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which generally recognized the binding nature of arbitration agreements and mandated courts to decline jurisdiction in respect of disputes which the parties had agreed to submit to arbitration. Therefore, it was suggested that the Working Group should seek the opinion of UNCITRAL Working Group II (Arbitration) on the provisions of the draft convention relating to arbitration (see A/CN.9/591, para. 101).

270. The Working Group was informed that the Secretariat had since facilitated consultations between experts that participated in the activities of both Working Groups with a view to devising ways to implement the approach taken by Working Group III at its sixteenth session in a manner that did not conflict with the New York Convention and the policies advocated by UNCITRAL in the field of arbitration. As a result of those consultations, the following text was proposed for consideration by the Working Group:

“CHAPTER 17. ARBITRATION

“Article 83. Arbitration agreements

“1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

“2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at one of the following locations:

“(a) Any place designated for that purpose in the arbitration agreement; or

“(b) Any other place situated in a State where any of the places specified in article 75, paragraph (a), (b) or (c), is located.

“3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if it is contained in a volume contract that clearly states the names and addresses of the parties and either

“(a) is individually negotiated; or

“(b) contains a prominent statement that there is an arbitration agreement and specifies the location within the volume contract of that agreement.

“4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

“(a) The place of arbitration designated in the agreement is situated in one of the places referred to in article 75, paragraphs (a), (b) or (c);

“[(b) The agreement is contained in the contract particulars of a transport document or electronic transport record that evidences the contract of carriage for the goods in respect of which the claim arises;]

“(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

“(d) Applicable law [for the arbitration agreement] permits that person to be bound by the arbitration agreement.

“5. The provisions of paragraphs 1, 2, 3, and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is null and void.

“Article 84. Arbitration agreement in non-liner transportation

“1. If this Convention has been incorporated by reference into a charterparty or other contract of carriage that is excluded from the application of this Convention pursuant to article 9, then the incorporation does not include this chapter unless it explicitly expresses the intent to incorporate this chapter.

“2. Nothing in this Convention affects the enforceability of an arbitration agreement in a charterparty or other contract of carriage that is excluded from the application of this Convention pursuant to article 9 if that agreement has been incorporated by reference into a transport document or electronic transport record issued under that charterparty or other contract of carriage and the provision in the transport document or electronic transport record that incorporates the agreement (i) identifies the parties to and date of the charterparty; and (ii) specifically refers to the arbitration clause.

“Article 85. Agreements for arbitration after the dispute has arisen

“Notwithstanding the provisions of this chapter and chapter 16, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.

“Article 85 bis. Application of Chapter 17

“Variant A

“The provisions of this chapter will apply only to a Contracting State if that State makes a declaration to this effect in accordance with Article XX [which will describe the formalities of the declaration process].

“Variant B

“A Contracting State may make a reservation in accordance with Article XX [which will describe the formalities of the reservation process] with respect to this chapter. ”

271. It was explained that under the above text the arbitration agreement itself would be considered to be binding, and the cargo claimant would not be allowed to disregard the arbitration agreement by filing suit at court. Instead, the text used the approach taken in article 22 of the Hamburg Rules to provide a mechanism to protect the cargo claimant from being denied its right to choose the place of jurisdiction by way of enforcement of an arbitration clause. Under the above text, the claimant was given the option to either commence arbitral proceedings according to the terms of the arbitration agreement in the contract of carriage, or in any place specified by draft article 75 of the draft convention. It was noted that in the past the Working Group had been reluctant to follow the approach taken in the Hamburg Rules, mainly because of concerns that moving arbitration proceedings away from the place of arbitration originally agreed might in practice render arbitration impracticable, in particular where the arbitration rules of the arbitral institution chosen by the parties did not accommodate the conduct of arbitration proceedings away from the arbitral institution's seat. It was observed, however, that in view of the objections that had been raised to the text tentatively agreed at the Working Group's sixteenth session, reverting to the approach taken in article 22 of the Hamburg Rules, with the adjustments contained in the text proposed in paragraph 270 above would, in balance, offer a better alternative for achieving the Working Group's policy objective of protecting the interests of the cargo claimant in a manner that respected the general principle of the binding nature of arbitration agreements. Problems that might arise from a request by the claimant that arbitration proceedings take place at a place other than the agreed place of

arbitration would be solved within the framework of the New York Convention and in the light of the case law that had interpreted its text.

272. By way of further explanation of the text proposed in paragraph 270 above, it was said that an attempt was made to align that text as closely as possible with the approach taken in the chapter of the draft convention on jurisdiction. In particular, it was noted that draft article 83(3) was intended to be the counterpart of draft article 76 with respect to volume contracts, and that draft article 83(4) was intended to parallel the approach of draft article 76 with respect to the binding effect of arbitration agreements on third parties to the contract of carriage. Further, Variants A and B of draft article 85 bis reflected the proposed reservation or “opt in” approaches to the chapter on arbitration that were also suggested with respect to the chapter on jurisdiction, and it was said that should the Working Group adopt the partial “opt in” approach to the chapter on jurisdiction, corresponding changes would be necessary with respect to this provision as well, since whatever choice the Working Group made with respect to the particular mechanism according to which chapter 16 would apply should also extend to chapter 17.

General discussion

273. Although some delegations reiterated their opposition to including any provisions in the draft convention on arbitration, it was pointed out that the reservation or “opt in” approach set out in draft article 85 bis should alleviate those concerns. While there was agreement in the Working Group that further reflection would be necessary on the revised text in paragraph 270 above, support was expressed for the compromise approach and the principles expressed therein to allow for as broad an approach to arbitration as possible in the liner trade, while at the same time ensuring that the rules establishing jurisdiction in claims against the carrier in draft article 75 were not circumvented. Support was again expressed for the principle that there should be broad ability to resort to arbitration in the non-liner trade. Certain specific observations were made as follows with respect to the specific text of the chapter under consideration.

[* * *]

Conclusions reached by the Working Group regarding chapter 17 on arbitration:

279. After discussion, the Working Group decided that:

- The draft text set out in paragraph 270 above represented a good compromise and acceptable grounds on which to continue discussions toward final drafting;
- Delegations would still have the right to comment further on the text pending further consideration of the new version presented during the session; and
- Although some suggested drafting changes did not receive sufficient support, such as the deletion of the phrase “against the carrier” in draft article 83(2), the Secretariat should prepare a revised version of the text, taking into account the above discussion and making any necessary drafting adjustments, particularly in light of any adjustment necessary with respect to a partial “opt in” approach.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Chapter 15. Arbitration

General comment

226. The Commission was reminded that the Working Group had agreed that, like chapter 14 on jurisdiction, chapter 15 on arbitration should be subject to an “opt-in” declaration system, as set out in draft article 80, such that the chapter would only apply to Contracting States that had made a declaration to that effect.

Article 75. Arbitration agreements

1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.
2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at:
 - (a) Any place designated for that purpose in the arbitration agreement; or
 - (b) Any other place situated in a State where any of the following places is located:
 - (i) The domicile of the carrier;
 - (ii) The place of receipt agreed in the contract of carriage;
 - (iii) The place of delivery agreed in the contract of carriage; or
 - (iv) The port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship.
3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if the agreement is contained in a volume contract that clearly states the names and addresses of the parties and either:
 - (a) Is individually negotiated; or
 - (b) Contains a prominent statement that there is an arbitration agreement and specifies the sections of the volume contract containing the arbitration agreement.
4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:
 - (a) The place of arbitration designated in the agreement is situated in one of the places referred to in subparagraph 2 (b) of this article;
 - (b) The agreement is contained in the transport document or electronic transport record;
 - (c) The person to be bound is given timely and adequate notice of the place of

arbitration; and

(d) Applicable law permits that person to be bound by the arbitration agreement.

5. The provisions of paragraphs 1, 2, 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is void.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Proposed revised text for chapter on arbitration

General discussion

95. The Working Group continued its discussions on the basis of the following text proposed by some delegations, to be placed in a new draft chapter on arbitration of the draft convention:

“Article 83. Arbitration agreements

“Subject to article 85, if a contract of carriage subject to this Convention includes an arbitration agreement, the following provisions apply:

“(a) The person asserting a claim against the carrier has the option of either:

“(i) commencing arbitral proceedings pursuant to the terms of the arbitration agreement in a place specified therein, or

“(ii) instituting court proceedings in any other place, provided such place is specified in article 75(a), (b) or (c);

“(b) If a person asserts a claim against a carrier, then the carrier may demand arbitration proceedings pursuant to the terms of the arbitration agreement only if that person institutes court proceedings in

“(i) a place specified in the arbitration agreement, or

“(ii) a court that would give effect under article 76 to an exclusive choice of court agreement specifying the place named in the arbitration agreement that is exclusive with respect to the action against the carrier.

[* * *]

96. It was reiterated that proposed draft articles 83, 84 and 85 were aimed at reaching a compromise between those delegations that favoured the broadest application of the principle of freedom of arbitration in the draft convention and those delegations that felt that, while arbitration should be available to the parties to a dispute, it should not be used in order to circumvent the bases of jurisdiction as set out in draft article 75 of the draft convention. The Working Group was reminded that the goal of the draft provisions was to reflect the needs of practitioners with respect to the use of arbitration in the maritime transport industry by providing limited freedom of arbitration with respect to the liner industry, where arbitration

was not frequent, while allowing broad freedom of arbitration in the non-liner industry, where arbitration was, on the contrary, the standard method of dispute resolution.

97. It was indicated that the new proposed draft amended the text contained in A/CN.9/WG.III/WP.54 by introducing a new draft subparagraph 83(b)(ii); by deleting the word “solely” in draft article 84, subject to review upon revision of draft article 10; by deleting the bracketed phrase “[a jurisdiction or]” in draft article 84, and by introducing new draft article 85, which created a separate article for a principle that had been reflected in paragraph 5(c) of A/CN.9/WG.III/WP.54. There was no discussion of the deletion of the bracketed phrase “[a jurisdiction or]”.

98. Some doubts were expressed with respect to the proposed draft text, particularly regarding concerns that it would result in forum-shopping and create a multiplicity of actions. In addition, some concerns were raised regarding proposed draft article 83, and the possibility that it could restrict access to arbitration in some circumstances. Overall, the spirit of compromise was reiterated, and support was expressed for the approach of the proposal, with some specific concerns outlined as discussed below.

New draft subparagraph 83(b)(ii)

99. It was indicated that there was a parallelism between exclusive choice of court agreements, on the one hand, and arbitration agreements, on the other hand, and that therefore the two should be accorded similar treatment in the draft convention with respect to freedom of contract. Accordingly, it was indicated that the goal of the draft subparagraph 83(b)(ii) was to allow for arbitration agreements in those cases where an exclusive jurisdiction clause would be recognized under draft article 76 of the draft convention, relating to the recognition of exclusive choice of court clauses. It was observed that the effect of draft subparagraph 83(b)(ii) would be a further expansion of freedom of arbitration in the liner industry. Upon request for clarification, it was explained that draft subparagraph 83(b)(ii) required the existence of an arbitration agreement for its operation, and, in response, it was suggested that the text should be amended to specifically indicate so. It was further observed that draft subparagraph 83(b)(ii) applied only to claims against the carrier, while claims brought by the carrier were outside its scope.

100. Some hesitation was expressed regarding draft subparagraph 83(b)(ii), however, in light of another view that exclusive choice of court clauses and arbitration agreements had different natures and consequences, and that their treatment under the draft convention should reflect such differences. In particular, the link with draft article 76 was seen to be problematic in that it linked arbitration agreements with a State’s decision whether or not to enforce exclusive choice of court agreements. An additional concern was expressed that draft subparagraph 83(b)(ii) might deprive the shipper of a reasonable place to protect its interests, especially in light of the higher costs of arbitration compared to court litigation. It was therefore suggested that subparagraph 83(b)(ii) should be deleted.

New York Convention and draft subparagraph 83

101. It was indicated that the effect of draft subparagraph 83 would be to allow courts, under certain conditions, to declare that, despite an arbitration agreement entered into in good faith, the arbitration agreement would not be binding on the parties. It was added that such outcome was not only unusual in modern trade law, but also contrary to basic arbitration principles as

contained in a number of widely accepted texts such as the New York Convention, and in particular its article II (3), and the UNCITRAL Arbitration Model Law. It was added that, while the principle of respect of the arbitration agreement might tolerate certain deviations, such as in article 22(3) of the Hamburg Rules, these could not extend to preventing access to arbitration as envisaged under new draft article 83 without fundamentally affecting that principle. It was suggested that the Working Group should seek the opinion of UNCITRAL Working Group II (on arbitration) on the provisions of the draft convention relating to arbitration.

102. In response, it was indicated that for a number of reasons, the proposed text was not inconsistent with the New York Convention. It was further explained that the basic principle of the New York Convention did not require general recognition of all arbitration agreements, but only non-discrimination of arbitration agreements vis-à-vis jurisdiction clauses. It was added that, since arbitration agreements were allowed in the draft proposal exactly in the same cases where exclusive jurisdiction clauses would be recognized, that basic principle of the New York Convention was not affected by the proposed text. Furthermore, it was indicated that a restriction on the effectiveness of arbitration agreements was a consequence of maritime trade practice, which saw restrictions of freedom of arbitration in certain circumstances and trades.

Conclusions reached by the Working Group regarding revised provisions on arbitration:

103. After discussion, the Working Group decided that:

- The general approach of draft articles 83, 84 and 85 was supported as part of a compromise on jurisdiction and arbitration;
- Draft articles 83, 84 and 85 should be retained in a draft chapter on arbitration of the draft convention for future discussion;
- The chapeau of draft article 83 should be placed in square brackets pending clarification of the relation between draft article 83 and the New York Convention, and subject to the resolution of any potential conflict between the two instruments; and
- Draft subparagraph 83(b)(ii) of the draft convention should be placed in square brackets pending its next reading.

[See also paragraphs 267-269 and 271-273, A/CN.9/616 (18th Session of WG III) under General Discussion, Chapter 15 at pp. 683 and 685]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

270. The Working Group was informed that the Secretariat had since facilitated consultations between experts that participated in the activities of both Working Groups with a view to devising ways to implement the approach taken by Working Group III at its sixteenth session in a manner that did not conflict with the New York Convention and the policies advocated by UNCITRAL in the field of arbitration. As a result of those consultations, the following text was proposed for consideration by the Working Group:

“CHAPTER 17. ARBITRATION

“Article 83. Arbitration agreements

“1. Subject to this chapter, parties may agree that any dispute that may arise relating to the carriage of goods under this Convention shall be referred to arbitration.

“2. The arbitration proceedings shall, at the option of the person asserting a claim against the carrier, take place at one of the following locations:

“(a) Any place designated for that purpose in the arbitration agreement; or

“(b) Any other place situated in a State where any of the places specified in article 75, paragraph (a), (b) or (c), is located.

“3. The designation of the place of arbitration in the agreement is binding for disputes between the parties to the agreement if it is contained in a volume contract that clearly states the names and addresses of the parties and either

“(a) is individually negotiated; or

“(b) contains a prominent statement that there is an arbitration agreement and specifies the location within the volume contract of that agreement.

“4. When an arbitration agreement has been concluded in accordance with paragraph 3 of this article, a person that is not a party to the volume contract is bound by the designation of the place of arbitration in that agreement only if:

“(a) The place of arbitration designated in the agreement is situated in one of the places referred to in article 75, paragraphs (a), (b) or (c);

“[(b) The agreement is contained in the contract particulars of a transport document or electronic transport record that evidences the contract of carriage for the goods in respect of which the claim arises;]

“(c) The person to be bound is given timely and adequate notice of the place of arbitration; and

“(d) Applicable law [for the arbitration agreement] permits that person to be bound by the arbitration agreement.

“5. The provisions of paragraphs 1, 2, 3, and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement to the extent that it is inconsistent therewith is null and void.

[* * *]

Draft article 83

274. The proposal was made to delete the phrase “against the carrier” in the chapeau of paragraph 2, since it was thought to be more in keeping with the nature of arbitration if a claim could be asserted by either party to the dispute. Support was expressed for this proposal. In response to a question regarding the operation of the word “binding” in the chapeau of draft article 83(3) and its intended operation with draft article 83(2), it was confirmed that the use of that term in that context was intended to completely prohibit “exclusive” arbitration agreements

in the liner trade. It was proposed that in the case where the carrier took the initiative to have recourse to arbitration at the place designated by the draft convention, the other party could nonetheless determine that the proceedings would take place at one of the places specified in draft article 75(a), (b) or (c).

275. Concern was also expressed with respect to draft article 83(4) regarding the conditions under which third parties to arbitration agreements in contracts of carriage would be bound. It was thought that subparagraph (d) was problematic, in that it provided that one of the conditions for a third party to be bound by the arbitration agreement was that the “applicable law” permitted that party to be so bound. In particular, it was thought that the phrase “applicable law” was too vague, in that it did not specify whether it was the procedural law or the law chosen by the arbitration itself, and that a more precise term should be used, such as the law of the contract of carriage, or the law of the arbitration proceedings, or the law of the State in which the arbitration proceedings took place. It was noted that a similar discussion had taken place in the Working Group regarding the law applicable to binding a third party in the case of choice of court provisions in a volume contract in draft article 76(3)(d) (see para. 259 above), and doubt was expressed whether a decision could be reached in respect of this similar provision in the arbitration chapter, since it was thought to be more controversial than the provision in the jurisdiction chapter. The Working Group was therefore encouraged to refrain from making any specific reference about the applicable law in this regard. It was also stated that a third party should be bound by an arbitration clause only if it had agreed to it.

[* * *]

279. After discussion, the Working Group decided that:

- The draft text set out in paragraph 270 above represented a good compromise and acceptable grounds on which to continue discussions toward final drafting;
- Delegations would still have the right to comment further on the text pending further consideration of the new version presented during the session; and
- Although some suggested drafting changes did not receive sufficient support, such as the deletion of the phrase “against the carrier” in draft article 83(2), the Secretariat should prepare a revised version of the text, taking into account the above discussion and making any necessary drafting adjustments, particularly in light of any adjustment necessary with respect to a partial “opt in” approach.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 78. Arbitration agreements

207. The view was expressed that draft article 78(1) and (2), as currently drafted, could create uncertainty in the use of arbitration in the liner trade and could lead to forum shopping. It was suggested that it would be preferable to give full effect to an arbitration agreement, even though arbitrations were not common in the liner trade, and that the inclusion of subparagraph 2(b) would create uncertainty and lead to forum shopping in that trade. There was some sympathy for that view expressed in the Working Group, but it was acknowledged that there had been thorough discussion of these aspects in past sessions, and that the text of paragraphs 1

and 2 had been agreed upon by the Working Group as part of a compromise approach (see A/CN.9/616, paras. 267 to 273; see A/CN.9/591, paras. 85 to 103).

208. The Working Group was reminded of the goal to create in the arbitration chapter provisions that paralleled those of the jurisdiction chapter so as to avoid any circumvention of the jurisdiction provisions by way of the use of an arbitration clause, and thereby protect cargo interests. In regard to subparagraph 4(b), currently in square brackets in the text, it was proposed that it should receive the same treatment as that granted the same text in draft article 70(2)(b), that is, that the text should be retained and the square brackets around it deleted. There was agreement in the Working Group for that proposal.

209. It was suggested that subparagraph 4(b) should only apply to negotiable transport documents and electronic transport records, since they were subject to reliance. It was proposed that drafting adjustments should be made so as to ensure that non-negotiable transport records and electronic transport documents were not included in subparagraph 4(b). That suggestion was not taken up by the Working Group.

210. The view was expressed that the reference to “applicable law” in subparagraph 4(d) was too vague and that, in the interest of ensuring uniform application of the draft convention, it would be better to specify which law was meant. One possibility, it was said, might be to reinsert the words “for the arbitration agreement” which had appeared in earlier versions of the text. In response it was explained that, after many consultations with experts in the fields of maritime law and commercial arbitration, the Secretariat had arrived at the conclusion that it would be preferable to include only a general reference to “applicable law” in subparagraph 4(d), without further qualification. There was no uniformity in the way domestic laws answered the question as to which law should be looked at in order to establish the binding effect of arbitration clauses on parties other than the original parties to a contract. In some jurisdictions, that issue was regarded as a matter of procedural law, whereas in other jurisdictions that question was treated as a substantive contract law question. Different answers might therefore be given, depending on the forum before which the question might be adjudicated in the course, for instance, of an application to set aside an arbitral award or to recognize and enforce a foreign award. It was explained that, in light of those considerations, harmonization of the law in the draft convention on a point that had repercussions well beyond the confines of maritime law, would have been far too difficult, and that the decision was made to retain the more flexible concept of “applicable law”.

Conclusions reached by the Working Group regarding draft article 78:

211. The Working Group agreed that the text of draft article 78 as contained in /CN.9/WG.III/WP.81 was acceptable, subject to the deletion of the square brackets surrounding subparagraph 4(b) and the retention of the text therein.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 78. Arbitration agreements

226. It was observed that following the decision of the Working Group to amend the definition of “transport document” (see above, paras. 113 to 114), it might be necessary to amend the text of paragraph 4(b) in similar fashion to that agreed with respect to draft article

70(2)(b). There was support for that suggestion, subject to the caveat that the drafting group should consider carefully whether such a change was recommended, since paragraph 4(b) must in any event ensure that it referred to the transport document or electronic transport record regarding the goods in respect of which the claim arose.

227. Subject to that possible amendment, the Working Group approved the substance of draft article 78 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 77. Arbitration agreements

227. It was observed that there might be inconsistencies in the terminology used in the draft Convention in terms of describing the party instituting a claim, which was described variously as “the person asserting a claim against the carrier” (draft art. 77, para. 2), the “claimant” (draft arts. 18 and 50, para. 5), and the “plaintiff” (draft arts. 68 and 70). There was support in the Commission for the suggestion that such terms be reviewed and standardized, to the extent advisable. In particular, it was noted that in chapters 14 and 15 the term “person asserting a claim against the carrier” should be used rather than the term “plaintiff” or “claimant”, in order to exclude cases where a carrier had instituted a claim against a cargo owner.

228. Subject to making appropriate changes to the terminology used to refer to the claimant, the Commission approved the substance of draft article 77 and referred it to the drafting group.

Article 76. Arbitration agreement in non-liner transportation

1. Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the provisions of this Convention apply by reason of:

- (a) The application of article 7; or
- (b) The parties’ voluntary incorporation of this Convention in a contract of carriage that would not otherwise be subject to this Convention.

2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

- (a) Identifies the parties to and the date of the charter party or other contract excluded from the application of this Convention by reason of the application of article 6; and
- (b) Incorporates by specific reference the clause in the charter party or other contract that contains the terms of the arbitration agreement.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Proposed revised text for chapter on arbitration*****General discussion***

95. The Working Group continued its discussions on the basis of the following text proposed by some delegations, to be placed in a new draft chapter on arbitration of the draft convention:

[* * *]

“Article 84. Arbitration agreement in non-liner transportation

“Nothing in this Convention affects the enforceability of an arbitration agreement in a contract of carriage in non-liner transportation to which this Convention or the terms of this Convention apply by reason of:

“(a) the application of article 10, or

“(b) the parties’ voluntary incorporation of this Convention as a contractual term of a contract of carriage that would not otherwise be subject to this Convention.

[* * *]

96. It was reiterated that proposed draft articles 83, 84 and 85 were aimed at reaching a compromise between those delegations that favoured the broadest application of the principle of freedom of arbitration in the draft convention and those delegations that felt that, while arbitration should be available to the parties to a dispute, it should not be used in order to circumvent the bases of jurisdiction as set out in draft article 75 of the draft convention. The Working Group was reminded that the goal of the draft provisions was to reflect the needs of practitioners with respect to the use of arbitration in the maritime transport industry by providing limited freedom of arbitration with respect to the liner industry, where arbitration was not frequent, while allowing broad freedom of arbitration in the non-liner industry, where arbitration was, on the contrary, the standard method of dispute resolution.

97. It was indicated that the new proposed draft amended the text contained in A/CN.9/WG.III/WP.54 by introducing a new draft subparagraph 83(b)(ii); by deleting the word “solely” in draft article 84, subject to review upon revision of draft article 10; by deleting the bracketed phrase “[a jurisdiction or]” in draft article 84, and by introducing new draft article 85, which created a separate article for a principle that had been reflected in paragraph 5(c) of A/CN.9/WG.III/WP.54. There was no discussion of the deletion of the bracketed phrase “[a jurisdiction or]”.

98. Some doubts were expressed with respect to the proposed draft text, particularly regarding concerns that it would result in forum-shopping and create a multiplicity of actions. In addition, some concerns were raised regarding proposed draft article 83, and the possibility that it could restrict access to arbitration in some circumstances. Overall, the spirit of compromise was reiterated, and support was expressed for the approach of the proposal, with some specific concerns outlined as discussed below.

[* * *]

Conclusions reached by the Working Group regarding revised provisions on arbitration:

103. After discussion, the Working Group decided that:

- The general approach of draft articles 83, 84 and 85 was supported as part of a compromise on jurisdiction and arbitration;
- Draft articles 83, 84 and 85 should be retained in a draft chapter on arbitration of the draft convention for future discussion;
- The chapeau of draft article 83 should be placed in square brackets pending clarification of the relation between draft article 83 and the New York Convention, and subject to the resolution of any potential conflict between the two instruments; and
- Draft subparagraph 83(b)(ii) of the draft convention should be placed in square brackets pending its next reading.

[See also paragraphs 267-269 and 271-273, A/CN.9/616 (18th Session of WG III) under General Discussion, Chapter 15 at pp. 683 and 685]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

270. The Working Group was informed that the Secretariat had since facilitated consultations between experts that participated in the activities of both Working Groups with a view to devising ways to implement the approach taken by Working Group III at its sixteenth session in a manner that did not conflict with the New York Convention and the policies advocated by UNCITRAL in the field of arbitration. As a result of those consultations, the following text was proposed for consideration by the Working Group:

“CHAPTER 17. ARBITRATION

[* * *]

“Article 84. Arbitration agreement in non-liner transportation

“1. If this Convention has been incorporated by reference into a charterparty or other contract of carriage that is excluded from the application of this Convention pursuant to article 9, then the incorporation does not include this chapter unless it explicitly expresses the intent to incorporate this chapter.

“2. Nothing in this Convention affects the enforceability of an arbitration agreement in a charterparty or other contract of carriage that is excluded from the application of this Convention pursuant to article 9 if that agreement has been incorporated by reference into a transport document or electronic transport record issued under that charterparty or other contract of carriage and the provision in the transport document or electronic transport record that incorporates the agreement (i) identifies the parties to and date of the charterparty; and (ii) specifically refers to the arbitration clause.

[* * *]

Draft article 84

276. It was observed that draft article 84 differed substantially from the version previously considered at the sixteenth session of the Working Group (see A/CN.9/591, para. 95). It was explained that draft article 84 was intended to preserve traditional resort to arbitration in charterparties in the non-liner trade, but to ensure the inclusion in that category of those situations where the draft convention was incorporated by reference. It was noted that paragraph 2 of draft article 84 had been redrafted from the previous version, but that the intention had been to keep the provision substantially the same, except for slightly limiting the circumstances under which a bill of lading issued pursuant to a charterparty could contain an arbitration clause. In particular, the revised approach was attempting to deal with a particular problem by allowing bills of lading issued pursuant to a charterparty to incorporate the charterparty's arbitration clause.

277. While the intended operation of this provision was thought to be helpful, there was support for the suggestion that paragraph 1 of draft article 84 should be deleted, as it was seen as a material rule that could affect the interpretation of such incorporation by reference, and could be used as a mechanism to affect charterparties, which were, in any event, intended to be outside of the scope of the draft convention. Further it was suggested that the phrase "or jurisdiction" should be added after the phrase "enforceability of an arbitration" in order to cover the limited number of cases where charterparties incorporated litigation rather than arbitration, and that the phrase "parties to and date of" should be deleted from subparagraph 2(i). As a result of concerns that paragraph 2 set out conditions that could have the unwanted effect of establishing conditions that restricted the use of arbitration clauses in the non-liner trade, it was suggested that the text following the second instance of the phrase "or other contract of carriage" should be deleted.

[* * *]

Conclusions reached by the Working Group regarding chapter 17 on arbitration:

279. After discussion, the Working Group decided that:

- The draft text set out in paragraph 270 above represented a good compromise and acceptable grounds on which to continue discussions toward final drafting;
- Delegations would still have the right to comment further on the text pending further consideration of the new version presented during the session; and
- Although some suggested drafting changes did not receive sufficient support, such as the deletion of the phrase "against the carrier" in draft article 83(2), the Secretariat should prepare a revised version of the text, taking into account the above discussion and making any necessary drafting adjustments, particularly in light of any adjustment necessary with respect to a partial "opt in" approach.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 79. Arbitration agreement in non-liner transportation**

212. A drafting suggestion was made that where reference in draft article 79(1) was made to "article 7", consideration should also be given to making reference to "article 6, paragraph 2".

213. Some potential difficulties were noted in the text of subparagraphs 2(a) and (b) as they currently appeared in A/CN.9/WG.III/WP.81. While there were difficulties understanding the whole of paragraph 2, subparagraph 2(a) raised questions regarding how a claimant would know that the terms of the arbitration clause were the same as those in the charterparty once arbitration had started. In addition, concerns were cited regarding subparagraph 2(b) regarding the specificity of the prerequisites in order to bind a third party to the arbitration agreement, since those prerequisites might not meet with practical concerns and current practice. While it was suggested that the whole of paragraph 2 be placed in square brackets pending further consultations with experts, it was agreed that the provision should be identified for further consideration by some other means, such as perhaps by means of a footnote in the text.

Conclusions reached by the Working Group regarding draft article 79:

214. The Working Group agreed that:

- The text of draft article 79(1) should be retained as contained in A/CN.9/WG.III/WP.81, with consideration of possible additional references to article 6(2); and
- Further consultations should be had regarding the operation of draft article 79(2).

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 79. Arbitration agreement in non-liner transportation

228. It was observed that the Working Group had in its previous session, agreed to seek further consultation regarding the operation of draft article 79(2) (see footnote 199 and A/CN.9/642, paras. 213 and 214). The Working Group was advised that such consultations had taken place and that the view was that paragraph 2(a) was not logical in light of industry practice, and that it should be deleted. There was support for that suggestion.

229. A further question was raised whether the reference in draft article 2(b)(i) should be to draft article 6 rather than 7, and it was agreed that the drafting group would consider the matter.

230. Subject to the deletion of paragraph 2(a) and to that possible amendment to paragraph 2(b)(i), the Working Group approved the substance of draft article 79 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 78. Arbitration agreement in non-liner transportation

229. It was observed that draft article 78, paragraph 2, was unclear in that it referred to the “arbitration agreement” in the chapeau, in subparagraph 2 (a) and elsewhere throughout chapter 15, but it referred to the “arbitration clause” in subparagraph 2 (b). It was also noted that some lack of clarity could result from different interpretations given to the terms “arbitration agreement” and “arbitration clause” in different jurisdictions. In response, it was noted that UNCITRAL instruments attempted to maintain consistent usage of terminology, such that

“arbitration agreement” referred to the agreement of the parties to arbitrate, whether prior to a dispute or thereafter, in accordance with a provision in a contract or a separate agreement, whereas the “arbitration clause” referred to a specific contractual provision that contained the arbitration agreement.

230. By way of further explanation, it was observed that paragraph 1 of draft article 78 was not intended to apply to charterparties and that paragraph 2 of the provision was intended to include bills of lading into which the terms of a charterparty had been incorporated by reference. Further, the reference in draft article 78, subparagraph 2 (b), was intended to include as a condition that there be a specific arbitration clause and that reference to the general terms and conditions of the charterparty would not suffice.

231. In order to clarify the provision, it was suggested that paragraph 2 could be redrafted along the following lines:

“2. Notwithstanding paragraph 1 of this article, an arbitration agreement in a transport document or electronic transport record to which this Convention applies by reason of the application of article 7 is subject to this chapter unless such a transport document or electronic transport record:

“(a) Identifies the parties to and the date of the charterparty or other contract excluded from the application of this Convention by reason of the application of article 6; and

“(b) Incorporates by reference and specifically refers to the clause in the charterparty or other contract that contains the terms of the arbitration agreement.”

232. With clarification along those lines, the Commission approved the substance of draft article 78 and referred it to the drafting group.

Article 77. Agreement to arbitrate after a dispute has arisen

Notwithstanding the provisions of this chapter and chapter 14, after a dispute has arisen the parties to the dispute may agree to resolve it by arbitration in any place.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]

Proposed revised text for chapter on arbitration

General discussion

95. The Working Group continued its discussions on the basis of the following text proposed by some delegations, to be placed in a new draft chapter on arbitration of the draft convention:

[* * *]

“Article 85. Agreements for arbitration after the dispute has arisen

“Notwithstanding the provisions of this chapter and chapter 16, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.”

96. It was reiterated that proposed draft articles 83, 84 and 85 were aimed at reaching a compromise between those delegations that favoured the broadest application of the principle of freedom of arbitration in the draft convention and those delegations that felt that, while arbitration should be available to the parties to a dispute, it should not be used in order to circumvent the bases of jurisdiction as set out in draft article 75 of the draft convention. The Working Group was reminded that the goal of the draft provisions was to reflect the needs of practitioners with respect to the use of arbitration in the maritime transport industry by providing limited freedom of arbitration with respect to the liner industry, where arbitration was not frequent, while allowing broad freedom of arbitration in the non-liner industry, where arbitration was, on the contrary, the standard method of dispute resolution.

97. It was indicated that the new proposed draft amended the text contained in A/CN.9/WG.III/WP.54 by introducing a new draft subparagraph 83(b)(ii); by deleting the word “solely” in draft article 84, subject to review upon revision of draft article 10; by deleting the bracketed phrase “[a jurisdiction or]” in draft article 84, and by introducing new draft article 85, which created a separate article for a principle that had been reflected in paragraph 5(c) of A/CN.9/WG.III/WP.54. There was no discussion of the deletion of the bracketed phrase “[a jurisdiction or]”.

[* * *]

Conclusions reached by the Working Group regarding revised provisions on arbitration:

103. After discussion, the Working Group decided that:

- The general approach of draft articles 83, 84 and 85 was supported as part of a compromise on jurisdiction and arbitration;
- Draft articles 83, 84 and 85 should be retained in a draft chapter on arbitration of the draft convention for future discussion;
- The chapeau of draft article 83 should be placed in square brackets pending clarification of the relation between draft article 83 and the New York Convention, and subject to the resolution of any potential conflict between the two instruments; and
- Draft subparagraph 83(b)(ii) of the draft convention should be placed in square brackets pending its next reading.

[See also paragraphs 267-269 and 271-273, A/CN.9/616 (18th Session of WG III) under General Discussion, Chapter 15 at pp. 683 and 685]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

270. The Working Group was informed that the Secretariat had since facilitated consultations between experts that participated in the activities of both Working Groups with a view to devising ways to implement the approach taken by Working Group III at its sixteenth session in a manner that did not conflict with the New York Convention and the policies advocated by UNCITRAL in the field of arbitration. As a result of those consultations, the following text was proposed for consideration by the Working Group:

“CHAPTER 17. ARBITRATION

[* * *]

“Article 85. Agreements for arbitration after the dispute has arisen

“Notwithstanding the provisions of this chapter and chapter 16, after a dispute has arisen, the parties to the dispute may agree to resolve it by arbitration in any place.

[* * *]

Conclusions reached by the Working Group regarding chapter 17 on arbitration:

279. After discussion, the Working Group decided that:

- The draft text set out in paragraph 270 above represented a good compromise and acceptable grounds on which to continue discussions toward final drafting;
- Delegations would still have the right to comment further on the text pending further consideration of the new version presented during the session; and
- Although some suggested drafting changes did not receive sufficient support, such as the deletion of the phrase “against the carrier” in draft article 83(2), the Secretariat should prepare a revised version of the text, taking into account the above discussion and making any necessary drafting adjustments, particularly in light of any adjustment necessary with respect to a partial “opt in” approach.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 80. Agreements for arbitration after the dispute has arisen**

215. The Working Group agreed that the text of draft article 80 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 80. Agreements for arbitration after the dispute has arisen**

231. The Working Group approved the substance of draft article 80 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 79. Agreement to arbitrate after the dispute has arisen**

233. A question was raised regarding how draft article 79 would be applied to a Contracting State that had opted in to the application of chapter 15 on arbitration, but had opted out of the application of chapter 14 on jurisdiction. In response, it was observed that the likely interpretation would be that the reference to chapter 14 would simply have no meaning, but that

its inclusion in the text would not cause any harm. However, it was also observed that it would be unlikely that a Contracting State would opt into chapter 15 but opt out of chapter 14, as the two chapters were intended to be complementary so that, while the arbitration provisions did not change the existing arbitration regime, they would nonetheless prevent circumvention of the jurisdiction provisions through resorting to arbitration.

234. The Commission approved the substance of draft article 79 and referred it to the drafting group.

Article 78. Application of chapter 15

The provisions of this chapter shall bind only Contracting States that declare in accordance with article 91 that they will be bound by them.

[See also paragraphs 267-269 and 271-273, A/CN.9/616 (18th Session of WG III) under General Discussion, Chapter 15 at pp. 683 and 685]

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

270. The Working Group was informed that the Secretariat had since facilitated consultations between experts that participated in the activities of both Working Groups with a view to devising ways to implement the approach taken by Working Group III at its sixteenth session in a manner that did not conflict with the New York Convention and the policies advocated by UNCITRAL in the field of arbitration. As a result of those consultations, the following text was proposed for consideration by the Working Group:

“CHAPTER 17. ARBITRATION

[* * *]

“Article 85 bis. Application of Chapter 17

“Variant A

“The provisions of this chapter will apply only to a Contracting State if that State makes a declaration to this effect in accordance with Article XX [which will describe the formalities of the declaration process].

“Variant B

“A Contracting State may make a reservation in accordance with Article XX [which will describe the formalities of the reservation process] with respect to this chapter. ”

[* * *]

Draft article 85 bis

278. It was noted that draft article 85 bis setting out the reservation and “opt in” alternatives for the application of the chapter on arbitration was not linked to similar provisions in chapter

16 on jurisdiction, since every State would have complete freedom to decide on the application of chapter 17, but that the choice on whether or not to adopt chapter 16 would be made by some States in a joint fashion.

Conclusions reached by the Working Group regarding chapter 17 on arbitration:

279. After discussion, the Working Group decided that:

- The draft text set out in paragraph 270 above represented a good compromise and acceptable grounds on which to continue discussions toward final drafting;
- Delegations would still have the right to comment further on the text pending further consideration of the new version presented during the session; and
- Although some suggested drafting changes did not receive sufficient support, such as the deletion of the phrase “against the carrier” in draft article 83(2), the Secretariat should prepare a revised version of the text, taking into account the above discussion and making any necessary drafting adjustments, particularly in light of any adjustment necessary with respect to a partial “opt in” approach.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 81. Application of chapter 16

216. The Working Group was reminded that it had decided previously to take an approach to the application of chapter 16 to Contracting States parallel to the approach that it had taken with respect to the application of chapter 15 (see A/CN.9/616, paras. 268 and 272 to 273). It was recalled that the purpose of adopting a parallel approach to that of the jurisdiction chapter was to ensure that, with respect to the liner trade, the right of the cargo claimant to choose the place of jurisdiction for a claim pursuant to jurisdiction provisions was not circumvented by way of enforcement of an arbitration clause. The Working Group agreed that Variant B of draft article 81 should be retained, and Variant A deleted, and that, in keeping with its earlier decision regarding draft article 77, both sets of alternative text in Variant B of draft article 81 should be retained and the word “or” inserted between the two phrases.

217. A further proposal was made that the ability to opt in to chapter 16 should be tied to opting in to the chapter on jurisdiction as well, but it was confirmed that, while perhaps desirable, that approach would not be possible due to the differing competencies for the two subject matters as between a major regional economic grouping and its Member States.

Conclusions reached by the Working Group regarding draft article 81:

218. The Working Group agreed that:

- Variant B of the text of draft article 81 as contained in A/CN.9/WG.III/WP.81 should be retained, and Variant A deleted; and
- The two sets of alternative text in Variant B should be retained and an “or” inserted between them, and the brackets that surrounded the text should be deleted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 81. Application of chapter 15

232. The Working Group approved the substance of draft article 81 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 80. Application of chapter 15

235. The Commission approved the substance of draft article 80 and referred it to the drafting group.

CHAPTER 16.

VALIDITY OF CONTRACTUAL TERMS

Article 79. General provisions

1. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:
 - (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;
 - (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or
 - (c) Assigns a benefit of insurance of the goods in favour of the carrier or a person referred to in article 18.
2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:
 - (a) Directly or indirectly excludes, limits or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or
 - (b) Directly or indirectly excludes, limits or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(a) Title

204. As a matter of drafting, it was suggested that the title of the draft article should be revised to reflect more accurately the contents of the provision, which did not deal with “limits of contractual freedom” in general, but dealt with clauses limiting or increasing the level of liability incurred by the various parties involved in the contract of carriage.

(b) Paragraph 17.1

(i) Subparagraph 17.1 (a)

205. The discussion focused on the words “or increase” in square brackets in paragraph 17.1. With a view to ensuring a balanced and even treatment of the shipper and the carrier under the draft instrument, the view was expressed that the traditional solution allowing the carrier to increase its liability should be extended to the shipper. In response, a widely shared view was expressed that, while the possibility for the carrier to increase its liability should be recognized, as it was under the Hague Rules, the shipper should be protected against clauses that might increase its liability, particularly in contracts agreed on standard terms. It was generally felt that, in examining the balance of rights and obligations between the shipper and the carrier, it should be borne in mind that, with the notable exception of certain very large shippers, a shipper would typically have less bargaining power and should thus be protected. Another view

was expressed that paragraph 17.1 should not at all address the shipper, the controlling party, or the consignee. In response to a question regarding the possibility for the carrier to increase its liability under CMR, it was explained that such an increase was not necessary, in view of the higher limit of liability under CMR.

206. With respect to the liability incurred by the controlling party, the view was expressed that further discussion would be needed regarding clauses limiting or extending such liability. It was suggested that the liability of agents or employees of the contractual parties might also need to be envisaged.

207. A proposal was made that special treatment should be given under draft article 17 to competitively negotiated contracts between shippers and carriers. It was stated that parties to such contracts (which were described as “sophisticated parties”) should have freedom to negotiate terms of their own choosing. Should these parties be allowed to negotiate clauses to increase or decrease their liability among themselves, such clauses should not affect third parties.

208. In response to that proposal on the exclusion of certain “competitively negotiated contracts between sophisticated parties”, several major concerns were expressed. One concern was based on what was described as the “near impossibility” of a clear definition. While the Hague and Hague-Visby Rules made it relatively easy to distinguish between matters included in and excluded from the conventions because the distinguishing element was the traditional bill of lading, such distinguishing element was lost in the draft instrument, which was intended to apply to “contracts for the carriage of goods [by sea]”. Consequently, clear definitions should be provided in the draft instrument in order to circumscribe the exact scope of any exclusion. It was pointed out that a “volume” contract, also referred to as an “ocean transportation contract” or “OTC”, had few distinctive characteristics when compared to a carriage contract. Expressions such as “contract of affreightment”, “volume contract”, “tonnage contract” and “quantity contract”, were also used and, depending on the legal system, appeared to be treated as synonymous. The characteristics of such contracts were: that the carrier undertook to perform a “generic” obligation (i.e. a generally defined duty which later needs to be further specified) to carry a specified quantity of goods; that no ships were as yet nominated in the contract; that the cargo consisted of a large quantity which was to be carried in several ships over a certain period of time; that the freight was calculated on the basis of an agreed unit or as a lump sum; and that the risk of delay was borne by the carrier. The volume contract consequently had many of the characteristics of a voyage charter-party. However, the individual shipments pursuant to such a contract would be mandatorily governed by the Hague or Hague-Visby Rules. This was said to contradict the allegations by the supporters of the exclusion of such contracts from the scope of the draft instrument, that under current practice, no small shipper was ever forced into a so-called “service contract” (which would then be an adhesion contract), and that this practice would not change under the draft instrument if service contracts were excluded from its scope of application. The fundamental difference was that in the present situation, such contracts could not be imposed on small shippers because of the compulsory application of the Hague Rules to the individual shipments. Were the scope of the draft instrument to be reduced in the proposed manner, that protection would be lost and the parties would be faced with the situation that prevailed in the 19th century.

209. A second concern was that the exclusion of individual shipments performed pursuant to a volume contract from the scope of the draft instrument would constitute a legal revolution,

and would undermine the ambit of the draft instrument to such an extent as to make it virtually non-existent in certain trades. The proposed exclusion was described as a first step towards the effective abolition of the Hague Rules regime, which was put in place to protect cargo interests. In that context, it was recalled that, for example, it had been said that 80 to 85 per cent of United States container trade was presently performed under volume contracts.

210. A third concern was expressed with regard to the application of national legislation. It was stated that the exclusion of service contracts from the scope of the draft instrument might create a competitive advantage for ocean carriers as opposed to non-vessel operating carriers (NVOCC) where national legislation, for example, would allow an “individual ocean common carrier” to enter into a “service contract” or “ocean transportation contract”, but would not allow an NVOCC (a freight forwarder acting as principal) to do so. Thus, the draft instrument would significantly change the legal situation with regard to competition in certain large domestic markets. It was stated that this should not be the purpose of an international convention, and that this secondary effect of the proposed exclusion would be highly detrimental to freight-forwarding interests.

211. A fourth concern was expressed with respect to the creation of a possibility of opting out of the draft instrument. It was stated that the proposal envisaged the draft instrument to apply by default, i.e. if the sophisticated parties did not decide otherwise. This amounted to creating an opting-out possibility. It was stated that any opting-out or opting-in provision would constitute a fundamental change in the philosophy on which most international conventions on maritime carriage of goods were based.

212. In response to those concerns, it was indicated that a proposal for a draft provision excluding “competitively negotiated contracts between sophisticated parties” would be made available to the Secretariat before the next session of the Working Group. The above-mentioned concerns would be borne in mind when drafting that proposal. It was pointed out that the proposal, while innovative, was not as revolutionary as might be feared, since it was based on analogy between service contracts and charter-parties, and it would simply amplify the current exclusion of charter-parties from the scope of the Hague and Hague-Visby Rules. Interest in the proposal for the exclusion of competitively negotiated contracts was expressed.

213. After discussion, the Working Group decided to maintain the text of subparagraph 17.1(a) in the draft instrument, including the words “or increase” in square brackets, for continuation of the discussion at a future session, possibly on the basis of one or more new proposals.

(ii) Subparagraph 17.1 (b)

214. The Working Group found the substance of subparagraph 17.1(b) to be generally acceptable. It was decided that the square brackets around that provision should be removed.

(iii) Subparagraph 17.1 (c)

215. The Working Group found the substance of subparagraph 17.1 (c) to be generally acceptable.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]**Issue 7: Should a “one-way” or a “two-way” mandatory approach be adopted in draft article 88?**

45. The Working Group next considered the text of draft article 88 as it appeared in A/CN.9/WG.III/WP.32, with the addition of the words “[maritime]” before the words “performing party” in paragraphs 1 and 2, and of square brackets around the words “[, the shipper, the controlling party, or the consignee under this Instrument]” at the end of paragraph 1. The issue was discussed whether a “one-way” or a “two-way” mandatory approach should be adopted in draft article 88.

46. Support was expressed for the adoption of the “one-way” mandatory approach in draft article 88. Under this approach, the contractual decrease of liability of the carrier and of the other parties mentioned in the draft article would not be possible, while its increase would be allowed. It was indicated that this approach assumed that the shipper should be provided with protection inspired by principles akin to those of consumer protection. It was suggested that in paragraph 1 the words “[, or increase]” should be deleted and the square brackets around the words “or” should be removed.

47. It was further indicated that the “one-way” mandatory approach was compatible with the freedom for the shipper to increase its liability limits. However, the view was also expressed that it should not be possible for the parties to increase the obligations of the shipper. In this line, it was suggested that the position of the shipper regarding its liability should be better clarified in the individual relevant provisions. Moreover, it was suggested that a provision should be inserted in the draft instrument to prevent the shipper from decreasing its obligations.

48. Some support was also expressed in favour of the “two-way” mandatory approach, according to which no contractual change in the liability of the parties would be allowed. It was suggested that this approach better reflected the current economic balance between carriers and shippers, while the adoption of the “one-way” mandatory approach was described as providing shippers with unnecessary protection. However, it was also pointed out that at the international level the “two-way” mandatory approach had been adopted only in the Convention on the Contract for the International Carriage of Goods by Road, 1956 (the “CMR Convention”) with questionable results, as this provision prevented competition among carriers to the detriment of their customers.

Conclusions reached by the Working Group on issue 7

49. After discussion, the Working Group decided that:

- In draft article 88(1) the words “[, or increase]” should be deleted and the square brackets around the words “or” should be removed.

Issue 8: Which parties should be covered under draft article 88?

50. It was suggested that further attention should be dedicated to the determination of the parties covered under the draft article. It was indicated that, for instance, the draft text made no reference to the consignor while referring to the consignee. It was also indicated that consideration should be given to the possibility of extending the protection granted by the article to all performing parties in light of the multimodal nature of the draft instrument.

However, in this respect, it was also indicated that non-maritime performing parties did not fall under the scope of application of the instrument. Finally, it was suggested that the reference to maritime performing parties would be necessary to ensure that the carrier would not escape liability by invoking the exclusive liability of the maritime performing parties.

Conclusions reached by the Working Group on issue 8

51. After discussion, the Working Group decided that:

- The square brackets around the word “maritime” in draft article 88(1) and (2) should be removed;
- The square brackets around the last phrase of draft article 88(1) should be retained for continuation of the discussion at a future session.

[* * *]

Proposed redraft of article 88

74. The Working Group first considered the proposed text for draft article 88 (see para. 52 above). As previously noted, paragraph 1 of draft article 88 dealt with the mandatory provisions of the draft instrument regarding the carrier and the maritime performing party, and paragraph 2 of draft article 88 concerned the mandatory provisions of the draft instrument with respect to cargo interests.

Redraft of article 88, paragraph 1—Mandatory provisions regarding the carrier and the maritime performing party

75. General support was expressed in the Working Group for the principles enunciated in the redraft of article 88(1). It was observed that, while the provision at paragraph (c) duplicated the current state of the law, paragraphs (a) and (b) represented a slightly new approach in maritime transport law. In effect, pursuant to paragraph (a), the carrier was prohibited from redefining its obligations under the draft instrument by excluding or limiting them, while paragraph (b) prevented the carrier from excluding or limiting its liability for breaching an obligation under the draft instrument. It was said that paragraph (a) preventing a redefinition by the carrier of its obligations was intended to prevent the carrier from circumventing its obligations by doing indirectly what it could not do directly.

76. Certain drafting issues were raised in the Working Group. The question was raised why the language in the chapeau of the redraft of article 88(1) had deleted the phrase “any contractual stipulation”, which had appeared in A/CN.9/WG.III/WP.32, and replaced it in the redraft with “any provision”. In response, it was said that no substantive change had been intended by this, and that this change could be further considered by the Working Group. A preference was also noted that the phrase “if and to the extent it is intended” which appeared in A/CN.9/WG.III/WP.32 be reinserted into the redraft of article 88(1). Further, it was suggested that reference should be made in paragraph (a) to draft articles 10, 11 and 12 of the draft instrument that set out the obligations of the carrier. Further, the question was raised whether the ability of the parties to agree that certain obligations of the carrier were performed on behalf of the shipper, the controlling party or the consignee pursuant to draft article 11(2) could be said to contradict the redraft of article 88(1), particularly given that provision’s reference to maritime performing parties. By way of explanation, it was noted that reference was made to maritime performing parties in the redraft of article 88(1) in order to regulate “Himalaya

clauses”, which could exempt or reduce the liability of a maritime performing party by extending to maritime performing parties certain contractual benefits that they would not otherwise enjoy. Another suggestion made was that the phrase “breach of an obligation” in paragraph (b) could be replaced with “breach of a provision”.

Conclusions reached by the Working Group on the redraft of article 88(1)

77. After discussion, the Working Group decided that:

- The proposed redraft of article 88(1) should be retained for continuation of the discussion at a future session in light of the considerations expressed above. Proposed article 88, paragraph 2—Mandatory provisions with respect to cargo interests

78. Support was expressed in the Working Group for the provision proposed as draft article 88(2), and the view was expressed that the proposal reflected the discussion on this topic in the Working Group (see above, paras. 45 to 51). It was thought that, since the proposed redraft of article 88(1) set out mandatory provisions with respect to the carrier and the maritime performing party, in order to be consistent, the draft instrument should also provide mandatory provisions regarding cargo interests. It was suggested that to ensure true equality of treatment in this regard, there was no reason to prohibit a shipper from increasing its responsibilities, and a deletion of the phrase “[or increases]” in paragraphs (a) and (b) was encouraged.

79. Another view was that mandatory provisions should only exist in the draft instrument when truly necessary, and it was suggested that if the purpose of such provisions was to protect small shippers, paragraph 2 should be deleted in its entirety. The view was also expressed that there should not be absolutely equal treatment for carriers and shippers with respect to the mandatory provisions concerning them, since carriers had the advantage of limited liability under the draft instrument, and since paragraph 1 was intended to protect small shippers, but paragraph 2 was intended to protect small carriers and other cargo interests. It was further observed that chapter 7 of the draft instrument contained the obligations of the shipper pursuant to the draft instrument, and the suggestion was made that any treatment of whether those obligations should be mandatory, such as, for example, the draft article 25 obligation to safely stow the goods, should be dealt with on an article-by-article basis in that chapter, rather than in a general provision such as that proposed in article 88(2). There was support for the suggestion that proposed article 88(2) should be deleted. However, the contrary view was expressed: that it was more convenient from a drafting perspective to have a general provision like proposed article 88(2) than to proceed with an article-by-article examination of the shipper’s obligations. The suggestion was made that proposed article 88(2) should be kept in the text in square brackets until the Working Group had examined the obligations of the shipper in chapter 7 and had decided whether it was more convenient to deal with the mandatory obligations of the shipper in an article-by-article approach or by means of a general provision.

Conclusions reached by the Working Group on proposed article 88(2)

80. After discussion, the Working Group decided that:

- Proposed article 88(2) should be retained in square brackets for further discussion following an examination of the shipper’s obligations in chapter 7 of the draft instrument.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]**Draft article 94 regarding the validity of certain contractual stipulations**

146. The Working Group was reminded of the content of draft article 94, which dealt with the mandatory nature of the draft convention with respect to the obligations and liabilities of the carrier or maritime performing party in paragraph 1, and in paragraph 2, the obligations and liabilities of the shipper, the consignor, the consignee, the controlling party, the holder and the documentary shipper referred to in draft article 34.

A/CN.9/WG.III/WP.56 or A/CN.9/WG.III/WP.61 version

147. The Working Group first considered the general question of whether it preferred the text of draft article 94 as set out in A/CN.9/WG.III/WP.56 or that set out in A/CN.9/WG.III/WP.61. The general view held was that the substance of both versions of the text was intended to be the same, but that the drafting of the text as found in paragraph 46 of A/CN.9/WG.III/WP.61 was clearer and was therefore preferable.

Draft paragraph 94(2)

148. The Working Group was reminded of the content of draft paragraph 94(2), which was in square brackets in both A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.61, and which dealt specifically with the possible mandatory nature of the draft convention with respect to the obligations and liabilities of the shipper, consignor, consignee, controlling party, holder or documentary shipper referred to in draft article 34. The issues raised in this context for consideration by the Working Group were whether or not to retain the whole of the text of draft paragraph 94(2), and if so, whether to delete or to maintain the phrases “[or increases]” in subparagraphs (a) and (b) thereof.

149. It was suggested that draft paragraph 94(2) should be deleted in its entirety, since it was thought that, pursuant to commercial law, mandatory provisions were necessary only to protect certain parties, such as those with insufficient bargaining power, and the view was expressed that the parties included in draft paragraph 94(2) were not in need of such protection. Other reasons were cited for the deletion of draft paragraph 94(2), such as the view that the necessity for mandatory provisions to protect the shipper and other parties should be assessed on an article by article basis, rather than by way of a general provision such as that of draft paragraph 94(2). Some support was expressed both for this latter view and for the deletion of draft paragraph 94(2) in its entirety.

150. The Working Group also heard the view that draft paragraph 94(2) should be retained, and the square brackets surrounding it should be deleted, since, it was suggested that this provision was an appropriate counterweight to balance the similar provision in draft paragraph 94(1) established with respect to the obligations and liabilities of the carrier. It was also suggested that not only did shippers and carriers deserve protection under the draft convention, but that consignees did, too, and that such consignees needed to be able to rely on the standards for shippers and carriers set out in the draft convention, without risking deviation from those standards. The view was also expressed that maintaining certain mandatory provisions in the draft convention also assisted with overall smooth and safe operations for the carriage of goods.

151. With regard to the phrase “[or increases]” which appeared in subparagraphs (a) and (b) of draft paragraph 94(2), the view was expressed that it should be deleted, at least in the case of

subparagraph (b), since it was not possible to increase the current unlimited level of the shipper's liability in the draft convention. However, the contrary view was also expressed that the phrase should be maintained in the text and the square brackets deleted in order to protect shippers who were already exposed to unlimited fault-based liability from possible exposure to unlimited strict liability, due to contractual stipulations changing the standard for shipper's obligations from fault-based liability to strict liability. Some support was expressed for each of these perspectives.

152. It was suggested that consideration of draft paragraph 94(2) should be suspended until the Working Group had considered draft chapter 8 on shipper's obligations later in the session. While caution was expressed that this course of action would not resolve all of the outstanding issues with respect to draft paragraph 94(2) since its operation was not limited to shippers, it was thought that reviewing draft chapter 8 could nonetheless be of assistance in this regard.

Conclusions reached by the Working Group regarding draft article 94:

153. After discussion, the Working Group decided that:

- The text of draft paragraph 94(1) could be maintained in the draft convention as it appeared in paragraph 46 of A/CN.9/WG.III/WP.61; and
- Draft paragraph 94(2) would be maintained as it appeared in paragraph 46 of A/CN.9/WG.III/WP.61 for the moment, and that consideration of its text would be resumed following the Working Group's consideration of draft chapter 8 on shipper's obligations.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

Draft article 88. General provisions

155. The Working Group was reminded that its most recent consideration of draft article 88 on the validity of contractual terms was at its seventeenth session (see A/CN.9/594, paras. 146 to 153). The Working Group proceeded to consider draft article 88 as contained in A/CN.9/WG.III/WP.81.

Paragraph 1

156. The Working Group was in agreement that draft paragraph 1 should be approved as drafted.

Paragraph 2

157. A suggestion was made that paragraph 2, concerning exclusions or limitations in the contract of carriage to the obligations and liabilities of shippers, should be drafted in similar fashion to paragraph 1 in order to act as a counter-balance to that provision, which concerned exclusions or limitations in the contract of carriage to the obligations and liabilities of carriers. By way of explanation regarding how a shipper's obligations might still be increased despite the fact that there was currently no limit on a shipper's liability in the draft convention, it was

noted that a shipper's liability might, for example, be increased from one based on negligence to one of strict liability.

158. While there were some suggestions to delete the paragraph completely, there was agreement in the Working Group to keep the paragraph in the text and to remove the square brackets surrounding it.

159. Some doubts were raised with respect to the word “or increases” which appeared in square brackets in subparagraphs (a) and (b). If the obligations of the shipper being referred to in paragraph 2 were limited to those set out in the draft convention, it was thought that the references to “or increases” should be kept and the brackets deleted. However, if the obligations referred to additional obligations outside of the draft convention, it was said that the references to “or increases” should be deleted from the text. Since, generally speaking, the view of the Working Group was that shippers in the case of this paragraph needed greater protection, as the paragraph related to contracts of carriage other than a volume contract, there was support for the view to retain the references to “or increases” and to delete the square brackets surrounding them. However, it was thought that further consideration should be given to the possibility of confusion regarding which obligations were being referred to, and possible adjustments should be made to the text to clarify the issue, if necessary.

Conclusions reached by the Working Group regarding draft paragraph 2

160. After discussion, the Working Group decided that:

- The text of draft paragraph 2 should be retained in the draft convention as drafted; and
- The text in square brackets “or increases” should be retained and the brackets removed.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 82. General provisions

233. A concern was expressed that paragraph 2 of draft article 82 had a mandatory effect on the shipper and consignee that was considered to be unsatisfactory. In particular, a shipper would be prohibited by that provision from agreeing on an appropriate limitation on its liability, and it was thought that such an agreement should be allowed pursuant to the draft convention.

234. Subject to the deletion of the references to the “consignor” in draft paragraph 2 in keeping with its earlier decision (see above, paras. 21 to 24), the Working Group approved the substance of draft article 82 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 81. General provisions

236. It was observed that the liability of the shipper for breach of its obligations under the draft Convention was not subject to a monetary ceiling, unlike the carrier's liability, which was limited to the amounts set forth in draft articles 61 and 62. In order to achieve a greater balance of rights and obligations between carriers and shippers, it was suggested that draft article 81 should at least allow the parties to the contract of carriage to agree on a limit to the liability of the shipper, which was currently not possible. For that purpose, the following amendments were proposed to paragraph 2 of the draft article:

“2. Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

“(a) Directly or indirectly excludes, reduces or increases the obligations under this Convention of the shipper, consignee, controlling party, holder or documentary shipper; or

“(b) Directly or indirectly excludes, reduces or increases the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of any of its obligations under this Convention.

“The contract of carriage may, however, provide for an amount of limitation of the liability of the shipper, consignee, controlling party, holder or documentary shipper for breach of obligations, provided that the claimant does not prove that the loss resulting from the breach of obligations was attributable to a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.”

237. It was explained that during the preparation of the draft Convention, the Working Group had not been able to agree on a formula or method for limiting the liability of the shipper. However, because draft articles 61 and 62 provided for a limitation of the carrier's liability, the carrier was in fact placed in a more favourable condition than the shipper. The proposed amendments would provide some remedy for that situation by allowing contractual limitation of the shipper's liability. The word “limits” in both subparagraph 2 (a) and subparagraph 2 (b) of draft article 81, it was suggested, should be replaced with the word “reduces” in order to better accommodate the freedom of contract envisaged by the additional subparagraph contained in that proposal. The additional text also reproduced some language from draft article 63 in order to set forth the conditions under which a contractual limitation of the shipper's obligations would not be enforceable, which mirrored the conditions under which the carrier would lose the benefit of limitation of liability under the draft Convention. That addition, it was stated, should be sufficient to address possible concerns that exculpatory clauses to the benefit of the shipper might deprive the carrier of any redress in the event that a shipper's reckless conduct (for instance, failure to provide information as to the dangerous nature of the goods) caused injury to persons or damage to the ship or other cargo.

238. There was support for that proposal, which was said to improve the balance of rights and obligations between carriers and shippers. It was said that in contrast with the carrier, whose liability was always based on fault, the shipper was exposed to instances of strict liability, for instance by virtue of draft articles 32 and 33. The notion of unlimited strict liability, however, was said to be unusual in many legal systems. Since it had not been possible for the Working Group to establish a limitation for the shipper's liability, the draft Convention should at least

allow the parties to do so by contract. That possibility, it was further said, would enable shippers to obtain liability insurance under more predictable terms.

239. There were however strong objections to the proposed amendments. It was noted that the proper way for shippers and carriers to derogate from the provisions of the draft Convention that governed their mutual rights and obligations was by agreeing on deviations in a volume contract under draft article 82. It was noted, however, that even in the context of draft article 82, there were a number of provisions of the draft Convention from which the parties could not deviate. Those so-called “super-mandatory” provisions included, for instance, the carrier’s obligations under draft article 15 and the shipper’s obligations under draft articles 30 and 33. If freedom of contract was subject to limits even in the case of individually negotiated volume contracts, there were stronger reasons for freedom of contract to be excluded in routine cases to which the additional protection envisaged in draft article 82 did not apply.

240. It was also pointed out that, in practice, shippers were protected against excessive claims by the fact that their liability was limited to the amount of damage caused by their failure to fulfil their obligations under the draft Convention. As a matter of legislative policy, however, shippers should not be allowed to disclaim liability in those instances where the draft Convention imposed liability on shippers, since the breach of some of the shipper’s obligations, in particular where dangerous goods were involved, might cause or contribute to damage to third parties or put human life and safety in jeopardy. At times when most general cargo in liner transportation was delivered to the carrier in closed containers, the risks involved in improper handling of dangerous goods due to misinformation by shippers could not be overestimated. The safety of shipping required strict compliance by shippers with their obligations to provide adequate information about the cargo to the carrier.

241. There was also criticism of the proposed amendment from the viewpoint of the balance of interests it purported to achieve. It was also observed that it would be wrong to assume that the carrier was always in a stronger position vis-à-vis the shipper. A significant volume of shipping was nowadays arranged by large multinational corporations or intermediaries and they were often in a position to impose their terms on carriers. Draft article 82 provided the mechanism for commercially acceptable deviations, subject to a number of conditions and compliance with some basic obligations as a matter of public policy. There was some sympathy in respect of the search for mechanisms that might allow for some contractual relief for small shippers. However, many years of discussion of possible statutory limitation of the shipper’s liability had been unsuccessful, both in the Working Group and during previous attempts, such as the negotiation of the Hamburg Rules. Offering the possibility of contractual limitation, in turn, was said to be insufficient in practice, since small shippers would seldom be in a position to obtain individually negotiated transport documents.

242. Having considered all the views that were expressed, the Commission decided to approve draft article 81 and refer it to the drafting group.

Article 80. Special rules for volume contracts

1. Notwithstanding article 79, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations and liabilities than those imposed by this Convention.
2. A derogation pursuant to paragraph 1 of this article is binding only when:
 - (a) The volume contract contains a prominent statement that it derogates from this Convention;
 - (b) The volume contract is (i) individually negotiated or (ii) prominently specifies the sections of the volume contract containing the derogations;
 - (c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and
 - (d) The derogation is neither (i) incorporated by reference from another document nor (ii) included in a contract of adhesion that is not subject to negotiation.
3. A carrier's public schedule of prices and services, transport document, electronic transport record or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.
4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 14, subparagraphs (a) and (b), 29 and 32 or to liability arising from the breach thereof, nor does it apply to any liability arising from an act or omission referred to in article 61.
5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraph 2 of this article, apply between the carrier and any person other than the shipper provided that:
 - (a) Such person received information that prominently states that the volume contract derogates from this Convention and gave its express consent to be bound by such derogations; and
 - (b) Such consent is not solely set forth in a carrier's public schedule of prices and services, transport document or electronic transport record.
6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.

[9th Session of WG III (A/CN.9/510) ; referring to A/CN.9/WG.III/WP.21]

8. Freedom of contract (draft article 17)

62. It was observed that the resolution of the issues identified in the commentary to draft articles 3.3 and 3.4 (in respect of exclusion of charter parties, contracts of affreightment, volume contracts and similar agreements) would impact on the practical effect of draft article

17 which set out the limits of contractual freedom. Several different positions were taken on the question whether charterparties and similar agreements should be covered by the draft instrument. A strong view taken in the Working Group was that the exclusion of charterparties was appropriate as it reflected the traditional approach. It was noted however that draft article 3.3 went beyond the traditional approach in attempting to exclude also contracts of affreightment and similar agreements. It was suggested that it would be appropriate for sophisticated parties to have freedom of contract to agree to the terms that might apply and, in particular, on the liability provisions that would apply as between themselves. It was thus suggested that the best approach would be that the draft instrument would not apply in principle to charterparties but that parties to such agreements would be free to agree to its application as between themselves. Such an agreement to submit a charterparty to the draft instrument would not bind third parties that did not consent to be bound. Another suggestion was that the exclusion of charterparties from the scope of the draft instrument should be drafted so as not to discriminate between carriers. It was further suggested that the exclusion of charterparties should be drafted so as to make it clear that slot and space-charter agreements were also excluded. After discussion, there was general agreement that charterparties and similar type agreements such as slot-charter agreements and space-charter agreements should be excluded from the scope of the draft instrument.

63. The Working Group considered whether or not it was necessary to define expressly what was meant by the term “charterparty”. In that respect, it was noted that a definition was very important given that the exclusion in draft article 3.3.1 referred to charterparties “or similar agreements”. It was said that without defining a charterparty it would be difficult to know what was meant by such “similar agreements”. Against the inclusion of a definition of charterparty it was noted that the term had not been defined in either the Hague, Hague-Visby or Hamburg Rules and that this had not caused any significant difficulties in practice. However, it was said that given the broader coverage of the draft instrument, a definition was needed. Following discussion, views were expressed in favour of the inclusion of a definition of charterparty for the sake of clarity. In this respect it was noted that the proposed definitions set out in paragraphs 39 and 41 of A/CN.9/WG.III/WP.21 could provide a useful starting point.

64. In respect of 17.2(a) which allowed the carrier and the performing party to exclude or limit liability for loss or damage to goods where the goods were live animals, there was wide support that this provision was appropriate. In support of the provision, it was argued that this was a traditional exception, with both the Hague and Hague-Visby Rules excluding live animals from the definition of goods. It was noted that trade in live animals represented only a very small trade. However, a concern was raised against allowing the carrier to exclude or limit the liability for loss or damage to live animals. It was suggested that a better approach would be to simply exclude carriage of live animals altogether from the draft instrument rather than allowing exclusion of liability. Overall, bearing these concerns in mind, the Working Group generally agreed that the carriage of live animals should be exempt from the coverage of the draft instrument.

65. After considering the exclusion of charter parties from the scope of application of the draft instrument, the Working Group considered in a preliminary fashion the phenomenon of individually negotiated transport agreements as opposed to transport contracts concluded on standard terms. It was stated that the practice of individualized transport agreements (in practice referred to by expressions such as volume contracts or transport service contracts) had

developed in different industries that shipped goods internationally and with shippers of different sizes. Such contracts typically resulted from careful negotiations which addressed matters such as the volume of goods to be transported (expressed in absolute or relative terms), the period over which the goods would be transported, various service terms, price, as well as liability issues. Such individually negotiated contracts varied in their focus, for example, in that some specifically dealt with liability issues while others did not pretend to modify the generally applicable liability regime.

66. It was suggested that such contractual arrangements should be considered by the Working Group with a view to giving them a treatment that was different from other transport contracts. Such contracts would include the following special features: they would be covered by the draft instrument but its provisions would not be mandatory with respect to them; the draft instrument, including the liability provisions would apply fully except to the extent the parties specifically agreed otherwise; derogations from the otherwise mandatory regime would have to be individually negotiated and could not be established by standard terms; third parties, including the consignee (the holder of the bill of lading or the person entitled to take delivery of the goods on another basis) would be bound by such individually negotiated terms only if, and only to the extent that, they specifically agreed to them (for example, by becoming a party to the individually negotiated contract); such agreement by third persons would have to be specific and could not be expressed by standard terms; when such an individually negotiated contract was in the nature of a “framework contract” pursuant to which individual shipments were effected, the individual shipments would be subject to the terms of the framework contract, but if a separate contract document (such as a bill of lading or a sea way bill) entitling a third person to take delivery of the goods were issued, the terms of the framework contract would not be binding on the third person, except if the third party specifically agreed.

67. Suggestions were made that contracts receiving special treatment in the draft instrument (whether they were to be excluded from the scope of application of the draft instrument, such as charter parties, or to be able to agree specifically to deviate from one or more of the mandatory provisions) should be defined in the draft instrument. Broad support was expressed for defining those contracts under which parties would have the flexibility to agree specifically to deviate from one or more of the mandatory provisions. The definition of such contracts contained in paragraph 42 of the note by the Secretariat (A/CN.9/WG.III/WP.21) was suggested as a basis for discussion. No firm view emerged as to the appropriateness of defining charter parties.

68. In some countries individually negotiated contracts (such as volume contracts or transport services contracts) were subject to regulatory regimes, which, for instance, required that these contracts be filed with the regulatory agency which had some supervisory prerogatives. While such regulatory regimes had features that were irrelevant for the current discussion, some of them might serve as an inspiration in finding an appropriate definition of such contracts for the draft instrument.

69. A concern was expressed that the so-called “individually negotiated contracts in liner trade” were difficult to define and could cover a broad range of contracts, which could open the door for widespread evasion of the draft instrument and thus dilute the strength of this new regime. It was further pointed out that a distinction should be made between those contracts and individual shipments made thereunder.

70. The Working Group took note of those views and proposals and, while not reaching any conclusions, agreed that it would be worthwhile to consider at a future session these individually negotiated contracts, their description or definition and their treatment in the draft instrument.

[14th Session of WG III (A/CN.9/572) ; referring to A/CN.9/WG.III/WP.32]

Ocean Liner Service Agreements (draft article xx)

97. It was recalled that the Working Group had agreed that the third issue in its analysis of freedom of contract would concern the application of the draft instrument to Ocean Liner Service Agreements (OLSAs) (see A/CN.9/WG.III/WP.42 and A/CN.9/WG.III/WP.34, paras. 18-29 and 34-35), previously introduced at its twelfth session (see A/CN.9/544, para. 78).

Presentation of the proposal

98. The Working Group heard an introduction of the provision on OLSAs, which would be presumptively covered by the draft instrument, but which would be allowed to derogate from some of its terms under certain conditions. It was further said that OLSAs would further the goals of the draft instrument by providing a flexible market-driven solution which would also satisfy future needs in the industry. It was suggested that draft article xx, as contained in document A/CN.9/WG.III/WP.42, aimed at achieving a careful balance between the interests of shippers, carriers and intermediaries, as well as protecting weaker parties. It was added that these goals were achieved, in particular, by adopting the principles of equality of treatment of non-vessel and vessel operating carriers, transparency regarding the derogation, freely and mutually negotiated derogation, objectivity, automatic application of the draft instrument absent express derogation, and the protection of third parties.

General discussion

99. The Working Group considered the OLSA proposal, noting that the main effect of the proposed provision was to allow carriers to derogate from the draft instrument, which would represent a major exception to the mandatory regime of the draft instrument. It was said that this could be of particular concern, given the large amount of trade that OLSAs would cover. It was suggested that OLSAs could be defined broadly as volume contracts for the future carriage of a certain quantity of goods over a certain period of time in a series of shipments in the liner trade, a well-known feature of the industry.

100. Some general concerns regarding OLSAs were expressed. It was suggested that it should not be possible for parties to OLSAs to contract out of certain mandatory provisions of the draft instrument. It was also stated that the introduction of a special regime for OLSAs could create market competition-related problems. However, it was suggested that trade practice demonstrated that both carriers and shippers under OLSAs could gain commercial advantages by derogating from the standard liability regime, and, further, that most cargo claims were made by third parties who would be unaffected by any such derogation between OLSA parties. Concerns were also expressed regarding the protection of small shippers with weak bargaining power who could be subject to potential abuse by carriers through OLSAs. However, it was said that in the current trade practice, small shippers generally preferred to resort to rate agreements, which were not contracts of carriage but which guaranteed a

maximum rate without specifying volume, rather than committing to volume contracts, and that the attractiveness of rate agreements combined with market forces would minimize any potential exposure to abuses by carriers under the proposed OLSA regime. Broad support was expressed for the inclusion of OLSA provisions in the draft instrument, subject to these and other concerns.

Definition of OLSA

101. It was suggested that the definition of OLSAs in draft paragraphs (2) and (3) of draft article xx was excessively detailed. It was said in response that the detail was intended to ensure that any derogation from the draft instrument was not casual or inadvertent. It was further observed that the requirement regarding the provision of a “service not otherwise mandatorily required” was rather vague and could potentially be subject to abuse by carriers wishing to circumvent the mandatory provisions of the draft instrument in the absence of some test regarding the significance of the additional service. Further concerns were expressed regarding the use of the term “mutually negotiated”, which could give rise to evidentiary difficulties on the effective freedom of contract of the parties. There was some support for a proposal that this difficulty could be addressed by placing on the carrier the burden of proving the shipper’s actual consent. However, in response, it was suggested that the very nature of OLSAs meant that the parties to them were experienced professionals capable of understanding the significance of their acts without further procedural safeguards.

Jurisdiction

102. One aspect of the OLSA proposal was that, in the interests of commercial certainty, the binding choice of forum provision in OLSAs should be extended to third parties who received written notice, provided that a number of conditions were met, such as the existence of a reasonable connection to the forum selected (see A/CN.9/WG.III/WP.34, para. 35, and A/CN.9/WG.III/WP.42, note 3). Concerns were raised regarding this proposal, given the proposed application of the jurisdiction provision to third parties not privy to the agreement, the sensitivity of the issue, and the appropriateness of dealing with it in an international instrument, particularly given jurisprudence on the extension of jurisdiction clauses to third parties. Multimodal transport

103. Concerns were raised regarding the effects of the proposed OLSA regime on the multimodal transport network system. It was suggested that the proposed text did not affect the intended operation of the network system in article 8 of the draft instrument, as contractual agreements could not derogate from the mandatory liability provisions of unimodal transport conventions. However, it was also observed that the draft article on OLSAs did not specify the relationship of the contractual regime towards mandatory domestic law, which could result in ambiguity.

Conclusions reached by the Working Group on draft article xx

104. After discussion, the Working Group decided that:

- It was not opposed to the inclusion of a provision on OLSAs in the draft instrument, subject to the clarification of issues relating to the scope of application of the draft instrument to volume contracts generally;
- Particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should

be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA;

- Optimum placement of an OLSA provision within the draft instrument should also be considered;
- The original proponents of the OLSA proposal were invited to work with other interested delegations on refining the OLSA definition.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Issue 1: Should OLSAs be included within the scope of application of the draft instrument as volume contracts, the inclusion of which would be determined by the character of the individual shipments thereunder?

14. The Working Group considered whether it was acceptable that OLSAs be treated as a type of volume contract in the draft instrument, which would be regulated as part of the general scope of application provisions. It was suggested that the draft instrument would not apply to volume contracts unless the draft instrument would apply to individual shipments thereunder. It was also suggested that those volume contracts that were subject to the draft instrument could derogate from certain of its provisions, provided that certain additional conditions aimed at protecting the parties to the volume contract were met.

15. Support was expressed for this approach to OLSAs in the draft instrument. One advantage of the approach was said to be that it separated the issue of scope of application of the draft instrument from the issue of derogation from certain of the specific provisions of the draft instrument. Another advantage was said to be that the concept of “volume contracts” was preferable to that of OLSAs, as it was a broader and more universal concept. Some concerns were raised about the complexity of the scheme, and about potential confusion thereunder. Other concerns were raised that particularly careful drafting would be necessary to avoid the increased breadth of the concept of volume contracts resulting in the inadvertent inclusion in the draft instrument of some contracts of carriage in the non-liner trade. A question was raised regarding whether the “future carriage of goods in a series of shipments” as appeared in draft article 4 of A/CN.9/WG.III/WP.44 was the same concept as volume contracts, or whether it was broader. In addition, questions were raised regarding how an individual shipment would be classified if it were made pursuant to a contract of carriage in which the carrier agreed to use a liner service, but instead used a non-liner service.

Conclusions reached by the Working Group regarding Issue 1

16. After discussion, the Working Group decided that:

- Issue 1 should be answered in the affirmative; and that
- An informal drafting group should be requested to make adjustments to the provisions on the scope of application based on the views outlined in the paragraphs above.

Issue 2: Under what conditions should it be possible to derogate from the provisions of the draft instrument?

17. It was suggested that the following four conditions should be met before it would be possible for a volume contract, or individual shipments thereunder, to derogate from the draft instrument:

- The contract should be [mutually negotiated and] agreed to in writing or electronically;
- The contract should obligate the carrier to perform a specified transportation service;
- A provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities should be set forth in the contract and may not be incorporated by reference from another document; and
- The contract should not be [a carrier's public schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract.

18. While a view was expressed that no derogation from the provisions of the draft instrument should be allowed under any conditions, there was support for derogation to be allowed in some circumstances. The view was expressed that the four conditions outlined in the paragraph above were not of sufficient clarity or sufficiently differentiated from other contracts to enable identification of the specific situations in which derogation should be allowed. Other views emphasized that the intention of having to meet the conditions outlined prior to being allowed to derogate from the draft instrument was to avoid a situation where the volume contract could be abused to the detriment of one of the parties to it. It was suggested that this goal was achieved through the combined effect of the conditions set out in the paragraph above that there be mutual agreement to known terms of the contract. Some doubt was expressed whether it was necessary that this agreement be in writing.

Conclusions reached by the Working Group regarding Issue 2

19. After discussion, the Working Group decided that:

- The derogation scheme suggested could form the basis for further discussion, but that the informal drafting group should be requested to take into account the views outlined in the paragraphs above in its consideration of the necessary conditions required for derogation from the draft instrument.

Issue 3: Should there be mandatory provisions of the draft instrument from which derogation should never be allowed, and if so, what were they?

20. The view was expressed that in its discussions with respect to article 14 of the draft instrument, the Working Group had considered and discarded the concept of overriding obligations in the draft instrument. Concern was expressed that establishing provisions of the draft instrument from which derogation was not possible would be tantamount to recreating this concept. It was further suggested that if the parties to a volume contract of the nature being considered were sufficiently protected to derogate from the provisions of the draft instrument, they should be entitled to negotiate all aspects of the agreement, including matters such as seaworthiness.

21. There was support for the contrary view that under no circumstances should derogation be allowed from certain provisions of the draft instrument, particularly those relating to seaworthiness under draft article 13. Some concerns were raised regarding the implications of never permitting a derogation from the seaworthiness obligations, particularly regarding any provisions of the draft instrument which could be connected to seaworthiness, such as limitations on liability. While a view was expressed that prohibiting derogation from the seaworthiness obligations would not affect the rules with respect to limitations on liability, it was suggested that the overall implications arising from treating the seaworthiness obligations in this manner would require further consideration.

22. More generally, it was suggested that obligations relating to maritime safety should not be open to derogation under the draft instrument, but support was also expressed for the contrary view that safety issues should instead be left to public law. It was noted that certain provisions pertaining to the obligations of the shipper, such as those pursuant to draft articles 25 and 27, and to the draft article 26 obligation of the carrier to provide information to the shipper upon request, were considered to have safety implications, and were thus open to consideration for similar treatment.

Conclusions reached by the Working Group regarding Issue 3

23. After discussion, the Working Group decided that:

- The seaworthiness obligation should be a mandatory provision of the draft instrument from which derogation was not allowed;
- The informal drafting group should be requested to take into account the views outlined in the paragraphs above in its consideration of this issue.

Issue 4: Should a derogation from the provisions of the draft instrument that is applicable as between the carrier and the shipper extend to third parties to the contract who had expressly consented to be bound, and under what conditions?

24. The Working Group next considered whether a derogation from the draft instrument that was applicable as between the carrier and the shipper should extend to third parties to the contract who had expressly consented to be so bound. There was support for the view that the meaning of the phrase “expressly consented” was ambiguous, and that it would be difficult to adequately protect the interests of third parties absent greater specificity. An example raised in this regard was the commercially feasible situation where one party might purport to consent to a derogation on behalf of all of its buyers. Concern was also raised regarding whether the requirement was one of express consent to be bound by the volume contract in general, or by the specific derogation from the draft instrument. It was thought by some that express consent by the third party to the specific derogation should be required. The general view was that, should such a provision be agreed to by the Working Group, careful drafting would be necessary to adequately enunciate the key requirement that the third party had expressly consented to be bound by the contractual derogation.

25. Support was expressed for the suggestion that a provision along the lines of draft article 5, as it appeared in A/CN.9/WG.III/WP.44, provided sufficient protection to third parties entitled to rights under the contract of carriage, and that no additional provision to protect third parties was required with respect to derogation from the draft instrument by the parties to a volume contract. However, there was also support for the view that draft article 5 was

inadequate for the protection of third parties in this particular context, and that a separate but carefully crafted provision was required. It was suggested that the primary purpose of such a provision in the draft instrument was to limit the ability of the parties to a volume contract to derogate from the provisions of the draft instrument and to avoid binding third parties to that derogation unless they expressly so consented. It was suggested that failure to include such a provision in the draft instrument would leave the matter to national law, resulting in a situation where third parties might only derive rights from the contract. It was further suggested that this situation could thus create the risk in some jurisdictions that third parties could be unprotected and could be bound by contractual derogations from the draft instrument to which they had not agreed. A view was expressed that draft article 5 in A/CN.9/WG.III/WP.44 could be adjusted to deal with these various concerns, thus eliminating the need for an additional provision. It was further suggested that to do otherwise would establish two different regimes for third parties, depending on whether they derived their rights pursuant to a charter party or from a volume contract.

26. Additional concerns were expressed regarding how a derogation that bound a third party to a volume contract might affect that party's rights with respect to choice of forum in jurisdiction or arbitration clauses. It was agreed that this issue should be discussed when the Working Group considered the chapters on jurisdiction and arbitration. Another issue was raised with respect to the agreement expressed by the Working Group at its fourteenth session that a documentary approach should be used for the identification of third parties whose rights should be protected pursuant to the draft instrument (see A/CN.9/572, paras. 91, 94 and 96). It was suggested that this decision was made only with respect to the more general provisions regarding the scope of application for the protection of third parties, and not with respect to the specific situation of the protection of rights of third parties to volume contracts (for further discussion of the documentary approach, see paras. 35 to 44 below.)

27. General agreement was expressed with several of the concerns noted in the above paragraphs regarding binding third parties to contractual derogations from the draft instrument absent their express consent. However, support was expressed for the suggestion that a broader, more commercial approach should be taken to the issue, and that third parties should automatically be bound to contractual derogations as they should have no greater rights than the original parties to the contract. It was also suggested that the Working Group should consider the commercial context, for example, where third parties were not truly strangers to the contracting parties, but where they could be different members of the same corporate group.

Conclusions reached by the Working Group regarding Issue 4

28. After discussion, the Working Group decided that:

- A provision allowing for third parties to a volume contract to expressly agree to be bound by derogations from the draft instrument agreed to as between the parties to the contract should be included in the draft instrument;
- The informal drafting group should draft a provision in this regard for consideration by the Working Group, taking into account the views outlined in the paragraphs above.

[* * *]

Proposed draft article 88a**Draft article 88a(1)**

81. The Working Group next considered proposed draft article 88a(1) (see para. 52 above).

General discussion

82. As a basis for continuation of the discussion at a future session, and subject to possible drafting adjustments in light of the debate, support was expressed for the principle set out in proposed draft article 88a(1), and for its general structure to allow for derogations from the draft instrument under certain conditions. It was observed that proposed draft article 88a(1) had been very delicately drafted, with a view to balancing the need to ensure agreement regarding the derogation in issue with a need to maintain a measure of commercial pragmatism. The view was expressed that this was achieved in proposed article 88a(1) by requiring the volume contract to contain a prominent statement that it derogated from the draft instrument, and that either the volume contract was individually negotiated under paragraph (a) or, under paragraph (b), that it prominently specified the sections of the volume contract containing the derogations. It was thought that, while drafting adjustments were required, this approach provided an appropriate structure for protecting the parties to the contract without making the conditions of protection so onerous as to be commercially impractical.

83. Some concern was expressed regarding the use of the word “or” between paragraphs (a) and (b) of proposed article 88a(1), since it was thought that an appropriate condition for this derogation was that all such volume contracts would be “individually negotiated”. It was suggested that the proposed article could name some indicators to be examined when deciding whether a contract was individually negotiated, such as, for example, the relative bargaining power of the parties. The view was expressed that paragraph (b) should be placed in square brackets, or that it could be deleted entirely in order to require all volume contracts derogating from the draft instrument to be individually negotiated. However, the view was also expressed that this paragraph was of great importance in some jurisdictions, where small shippers were virtually economically compelled to conclude volume contracts, and often on standard terms. Given the danger that these standard terms could pose in terms of hiding derogations from the obligations in the draft instrument, it was thought that paragraph (b) provided practical and indispensable protection for small shippers faced with such standard terms. Another advantage of keeping paragraph (b) in proposed draft article 88a(1) was said to be that, while negotiations regarding the specific obligations of the contract were clearly within the contemplation of paragraph (a) of the provision, paragraph (b) was needed to encompass those situations where the obligations of the contract and the derogations from the draft instrument were accepted and not negotiated, but where the negotiation focused instead on the price to be paid for freight.

84. Other drafting suggestions were raised with respect to proposed article 88a(1). Some doubts were expressed regarding the meaning of the word “prominent”, which appeared twice in proposed article 88a(1), and it was thought that the meaning of this term could be clarified. Another suggestion was that proposed article 88a(1) could specifically include in its language that it was “subject to paragraph 5” of proposed article 88a(1).

Conclusions reached by the Working Group on proposed draft article 88a(1)

85. After discussion, the Working Group decided that:

- Proposed draft article 88a(1) would be retained in the text of the draft instrument as a basis for continuation of the discussion at a future session, subject to possible drafting adjustments in light of the above discussion.

Draft article 88a(2) and (3)

86. It was suggested that the requirement that the derogations from the draft instrument should be set forth in the contract of carriage contained in draft article 88a(2) was superfluous, since draft article 88a(1) already mandated that the derogations should be prominent in the contract. However, it was also indicated that the two provisions differed in scope, since draft article 88a(1) required that all the derogations, and the provisions affected by the derogations, should be contained exclusively in the contract of carriage and should be brought to the attention of the other contracting party, while draft article 88a(2) prevented the incorporation of derogations in the contract of carriage by reference.

87. The view was expressed that draft article 88a(3) required further clarification with respect to the relation between the transport document, as defined in draft article 1(k), and the contract of carriage. It was suggested that the word “is” in draft article 88a(3) should be replaced by the words “does not provide evidence of” or a similar expression to signify that the transport document should not be used to evidence the contract of carriage. It was indicated that a definition of the volume contract should be inserted in the draft instrument. It was also proposed that draft article 88a(3) should be divided into two separate sentences, with the deletion of the connector “but”.

88. A concern was expressed that the reference to documents incorporated by reference in the second sentence of draft article 88a(3) could lead to the insertion of derogations to the draft instrument in the incorporated documents. However, it was observed that draft article 88a(2) mandated that all derogations should be contained in the contract of carriage. The view was expressed that draft article 88a(3) should not be inserted in the draft instrument unless it would set conditions for derogations. In response, it was suggested that shippers in certain countries, while being fully aware of the needs of effective contract drafting, felt the need to be protected by a provision along the lines of draft article 88a(3).

Conclusions reached by the Working Group on proposed draft article 88a(2) and (3)

89. After discussion, the Working Group decided that:

- The proposed draft text for article 88a(2) and (3) should be retained for continuation of the discussion at a future session in light of the considerations expressed above.

Draft article 88a(4)

90. It was indicated that draft article 88a(4) was necessary in view of the contractual approach adopted in the definition of the scope of application of the draft instrument. It was further observed that draft article 88a(4) reflected the decision that only those terms of a volume contract regulating shipments falling under the scope of application of the draft instrument would be subject to derogation (see above, para. 52).

91. It was suggested that a reference to draft article 88a(5) should be inserted in draft article 88a(4). It was also suggested that the words “any shipment” should be substituted for the word “shipments” to emphasize that the provision applied to the terms that regulated each of the shipments, effected under a volume contract, that fell under the scope of application of the draft

instrument. However, it was also observed that the use of the words “any shipment” could generate misunderstanding since only some terms of the volume contract might be subject to the draft instrument, for example in the case of a volume contract that mixes international and domestic shipments.

Conclusions reached by the Working Group on proposed draft article 88a(4)

92. After discussion, the Working Group decided that:

- The proposed draft text for article 88a(4) would be used as a basis for continuation of the discussion at a future session in light of the considerations expressed above.

Draft article 88a(5)

Effects on other international transport agreements

93. A concern was expressed that under the “network system” for multimodal carriage adopted in the draft instrument, draft article 88a(5) might introduce in the contract of carriage derogations also to international transport agreements not relating to maritime transport, and that this result would conflict with mandatory rules of international law. However, it was pointed out that draft article 8 of the draft instrument was not a conflict of conventions provision, but rather reflected a policy decision to allow certain provisions of other international instruments to apply to land carriage under the draft instrument. In response, it was indicated that only selected provisions of other international agreements would be applicable to the contract of carriage under the draft instrument, and that the proposed text of draft article 88a(5) would allow derogation from these selected provisions in a volume contract. There was general agreement that the point needed further clarification in the text of draft article 88a(5) or of draft article 8.

Relation with other paragraphs of draft article 88a

94. It was suggested that the chapeau of draft article 88a(5) should also contain reference to paragraph 4 of draft article 88a.

Liability for intentional or reckless behaviour

95. It was suggested that the reference in draft article 88a(5)(a) to draft article 19 of the draft instrument should be placed in a separate paragraph and expanded upon to prevent the parties to a volume contract from reducing their liability for any intentional or reckless behaviour.

Non-derogable obligations

96. It was suggested that a reference to draft article 13(1)(c) should be inserted in draft article 88a(5)(a). It was indicated that the provision in draft article 13(1)(c) with respect to the cargoworthiness of a ship constituted an important aspect of the duty of seaworthiness, and that therefore the insertion of a reference to this provision would be in line with the rationale of draft article 88a(5)(a). However, the view was also expressed that, unlike the duties in draft article 13(1)(a) and (b), the duty in draft article 13(1)(c) was not a public policy and general security issue and that therefore its application should be left to the freedom of the parties.

97. It was indicated that the brackets around the proposed bracketed text in draft article 88a(5)(a) should be removed to clarify that a derogation would not be possible for the articles enumerated in draft article 88a(5)(a) with respect to both the regime and the level of liability. It

was also suggested that a reference to the provisions of the draft instrument on jurisdiction and arbitration should be inserted in draft article 88a(5)(b).

98. It was further suggested that the Working Group should give further consideration to the list of non-derogable provisions enumerated in draft article 88a(5), with a view to including in this list other obligations, such as the draft article 35 signature requirement.

Conclusions reached by the Working Group on proposed draft article 88a(5)

99. After discussion, the Working Group decided that:

- The proposed draft text for article 88a(5) would be used as a basis for continuation of the discussion at a future session, bearing in mind the drafting suggestions expressed above on the inclusion of other articles of the draft instrument and to the provisions of the draft instrument on jurisdiction and arbitration;
- The relationship between draft article 88a(5) and the other paragraphs in draft article 88 should be clarified, as well as the interaction of draft article 88a(5) with the provisions of other international transport instruments;
- The possibility of inserting in a separate paragraph of draft article 88a(5) a reference to liability for intentional or reckless behaviour should be the object of further discussion at a future session.

Draft article 88a(6)

100. It was generally felt that the chapeau of paragraph 6 of draft article 88a should refer not only to paragraph 1 but to all other paragraphs of draft article 88a. As a matter of drafting, it was also suggested that the words “any other party” in proposed draft article 88a(6)(b) should be replaced by the words “any party other than the shipper”.

Draft article 88a(6)(b). Protection of third parties.

101. It was observed that the proposed text of draft article 88a(6)(b) represented a compromise position between, on the one hand, excluding the application of contractual derogations to the draft instrument to third parties and, on the other hand, applying these contractual stipulations to third parties without limitation. It was added that this compromise position reflected a delicate balance between the intended goals to protect third parties and to adopt a commercially practical provision. It was suggested that requesting consent to be bound by the terms of a volume contract derogating from the draft instrument would provide sufficient safeguards to third parties. However, the view was also expressed that the consent of third parties to be bound by the terms of a volume contract derogating from the draft instrument was not necessary since third parties such as consignees would wilfully acquire rights under the contract of carriage, and a special regime should be envisaged only in the case of issuance of negotiable transport documents, possibly along the lines of draft article 77 of the draft instrument.

Express consent

102. Concerns were expressed with respect to the meaning of the words “express consent” in proposed draft article 88a(6)(b). The view was expressed that the words “express consent” should not be defined in the draft instrument. It was further suggested that clarifications were needed to ensure that the consent would be expressed directly and individually by the third

party to avoid that the third party would automatically become bound by derogations consented to on its behalf. Broad support was expressed for the notion that consent by third parties should be both express and individual, without being unduly cumbersome for carriers. The need to consult domestic industries regarding this paragraph was expressed during the discussion. However, the view was also expressed that a suitable mechanism should accommodate those cases when numerous individuals would be affected as third parties by the execution of a volume contract, such as when the volume contract that spanned several years was concluded.

103. It was suggested that the second part of proposed draft article 88a(6)(b) needed clarification with respect to the possibility for the third party to consent expressly to be bound by the derogating terms of the volume contract in a transport document. It was indicated that, for example, the handwritten expression of such consent on the front of a transport document should be considered valid for the purposes of proposed draft article 88a(6)(b).

Conclusions reached by the Working Group on proposed draft article 88a(6)

104. After discussion, the Working Group decided that:

- The proposed text for draft article 88a(6) should be used as a basis for continuation of the discussion at a future session in light of the views expressed above;
- The suggestion to insert a reference to paragraphs (1) to (5) of draft article 88a in the chapeau of draft article 88a(6) should be considered in the text to be prepared by the Secretariat.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]

Draft article 95. Special rules for volume contracts

154. The Working Group was reminded that during its sixteenth session, it had requested the Comité Maritime International to prepare an explanatory document on the treatment of volume contracts in the draft convention to further illustrate the legal and practical implications (see A/CN.9/591, paras. 221 and 244), and that such a document had been prepared in response to that request (A/CN.9/WG.III/WP.66). The Working Group was also reminded of previous work that had taken place during its fifteenth session (see A/CN.9/576, paras. 52 to 104) with respect to the drafting of provisions on volume contracts, which had resulted in the current carefully crafted compromise text in A/CN.9/WG.III/WP.56. Finally, it was also noted that slightly revised text for the provisions on volume contracts was presented for the consideration of the Working Group in A/CN.9/WG.III/WP.61 (see para. 49), but that the slightly revised text was intended only as improved drafting, except where otherwise indicated (see A/CN.9/WG.III/WP.61, paras. 49 to 61).

Draft paragraph 95(1)

155. Notwithstanding the broad agreement on the approach to freedom of contract in volume contracts achieved by the Working Group during its fifteenth session, some concerns were reiterated regarding the possible abuse of volume contracts to derogate from the provisions of the draft convention, particularly in cases where volume contracts could involve a large amount of trade. Concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention, and the view was expressed that a

preferable approach would be instead to list specific provisions that could be subject to derogation. Another view was expressed that the combination of the paragraphs 1 and 5 of draft article 95, and of the definition of volume contracts in draft article 1 had addressed earlier concerns regarding sufficient protection for the contracting parties. An additional concern was expressed that while, generally, some freedom of contract was desirable and that volume contracts as such were not necessarily objectionable, it was possible that draft paragraph (1)(b) did not provide sufficient protection for the parties to such contracts.

156. Overall, strong support was expressed in the Working Group both for the volume contract regime in the draft convention in general, and for the redrafted text of draft paragraph 95(1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. The view was expressed that the volume contract framework provided a sufficient balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing adequate protection for contracting parties.

Conclusions reached by the Working Group regarding draft paragraph 95(1):

157. After discussion, the Working Group decided that:

- Draft paragraph 95(1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61 was accepted, both in terms of approach and improved drafting.

Draft paragraph 95(4)—Non-derogable provisions

158. The Working Group next considered the issue of whether it was desirable to include in the volume contract regime of the draft convention a provision containing a list of absolutely mandatory provisions from which there could be no derogation regardless of any agreement, such as that set out in draft paragraph 95(4) in paragraph 49 of A/CN.9/WG.III/WP.61.

159. Some concern was raised regarding the inclusion of such a provision in the draft convention, since it was felt that it could be used in the later interpretation of the draft convention to reintroduce the notion of overriding obligations that had been carefully avoided in the drafting of the provisions. The view was that the doctrine of overriding obligations could be used in some jurisdictions to override the provisions in the draft convention on the apportionment of liability when there were multiple causes for loss or damage, and that this would be a highly unsatisfactory outcome. Further, the view was expressed that a provision such as draft paragraph 95(4) would have little practical effect regardless of its inclusion, since it was thought that it would have to include provisions that were clearly mandatory and not capable of being subject to derogation. Another view was expressed that full contractual freedom should be available to the parties to a volume contract, such that the only obligation from which there could be no derogation should be liability for intentional and reckless conduct.

160. However, strong support was expressed for the inclusion of a provision listing the mandatory provisions from which there could never be derogation pursuant to the volume contract regime in the draft convention. The view was expressed that even if there were a danger that the doctrine of overriding obligations could be resurrected with respect to the draft convention, it would be more dangerous to leave the list of absolutely mandatory provisions to be ascertained by judicial interpretation of the draft convention. Further, it was felt that including a provision such as draft paragraph 95(4) was an important part of the overall

compromise intended to provide sufficient protection for contracting parties under the volume contract framework.

List of provisions in draft paragraph 95(4)

161. The Working Group also considered which provisions should be included in the list set out in draft paragraph 95(4). Some views were expressed that only provisions with a public policy or public order component worthy of protection should be maintained in the list in draft paragraph 95(4) as, for example, the draft article 16 seaworthiness obligation and the dangerous goods provision in draft article 33. Some doubts were expressed whether the draft article 30 obligation of the shipper to provide information and instructions belonged on the list in draft paragraph 95(4). Further concerns were expressed as to whether the text referring to draft article 66 was worded as clearly as it could be. While it was thought that parties should not be able to derogate from liability for intentional acts, the articulation of that prohibition was not clear in the text of draft paragraph 95(4), and could require refined drafting. Some suggestions were made to expand the list of provisions that appeared in draft paragraph 95(4), for example, by including draft articles 11, 13, 14(1) and 17. Finally, there was support for the view that all of the references currently in draft paragraph 95(4) as set out in A/CN.9/WG.III/WP.61 should be kept in the text, and the square brackets removed.

Conclusions reached by the Working Group regarding draft paragraph 95(4):

162. After discussion, the Working Group decided that:

- The text of draft paragraph 95(4) should be maintained in the draft convention as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61;
- The square brackets that appear in draft paragraph 95(4) should be removed and the references contained in them retained; and
- The reference to draft article 66 should be maintained and appropriately clarified.

Draft paragraph 95(5)(b)

163. The Working Group considered the modified text of draft paragraph 95(5)(b), on the conditions under which third parties could consent to be bound by the terms of a volume contract, as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. It was explained that the first sentence of draft paragraph 95(5)(b) aimed at establishing the principle that third parties would not be bound by the terms of a volume contract under the draft convention unless they expressly consented to be bound by those terms. It was also explained that the second sentence of draft paragraph 95(5)(b) dealt with matters relating to the proof of such express consent, and, in particular, aimed at avoiding that the acceptance of a document containing standard provisions could be interpreted as amounting to express consent to be bound by the terms of a volume contract that derogated from the draft convention.

164. While it was suggested that the second sentence of draft paragraph 95(5)(b) should be deleted as unnecessary in light of its first sentence, strong support was expressed for the retention of such second sentence as it provided an important safeguard to third parties by defining the minimum requirements for such consent.

165. In response to a query, it was indicated that third parties that did not express their consent to be bound by the terms of a volume contract pursuant to draft article 95 would receive protection under the general regime of the draft convention, and would not be bound by

the terms of the volume contract that derogated from the draft convention. It was further indicated that, for example, when a volume contract limited the carrier's liability for an amount lower than the one set forth in the draft convention, the third party that had not expressed its consent to be bound by the terms of that contract would not be bound by the lower limitation level therein and would be able to recover the loss to the full amount allowed under the limitation level established by the draft convention. It was suggested, however, that the consequence of an absence of express consent by a third party to the terms of a volume contract should be made explicit in the text of the draft article.

166. Concerns were expressed that the second sentence of draft paragraph 95(5)(b), on the requirements for the third parties to be bound by a volume contract, could give rise to difficulties of interpretation. It was suggested that the draft provision should more clearly state the two requirements contained therein, i.e., the existence of an obligation of the original party to inform the third party regarding the derogations from the draft convention; and that it was not sufficient for the requirement of express consent that it be set forth in a carrier's public schedule of prices and services, transport document, or electronic transport record.

167. It was further suggested that draft paragraph 95(5)(b) should not allow a party that caused the failure of express consent by the third party, for example, by failing to notify the third party of the derogations from the draft convention, to benefit from its own failure by invoking those provisions of the draft convention that would have been displaced by the derogation. It was further explained that, for instance, in a case when the parties to a volume contract had agreed to a limitation of liability for the loss of the goods higher than the one in the draft convention, and the carrier had omitted to inform the third party of that derogation, the carrier should not be able to invoke the lower limit set forth in the draft convention but should be held to the terms agreed in the volume contract, despite the lack of third party consent.

Conclusions reached by the Working Group regarding draft paragraph 95(5)(b):

168. After discussion, the Working Group decided that:

- The policies underlying draft paragraph 95(5)(b), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, were acceptable; and
- The Secretariat should prepare a new draft of draft paragraph 95(5)(b) taking into account the views expressed above.

Draft paragraph 95(5)(c)

169. The Working Group considered next the appropriateness of the text of draft paragraph 95(5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, which placed the burden of proof that a derogation from the draft convention had been validly made on the party invoking the derogation set forth in the volume contract. It was explained that the scope of the draft provision had been expanded in comparison with the same provision contained in the last sentence of draft paragraph 95(6)(b) of A/CN.9/WG.III/WP.56 so as to extend the rule on the burden of proof to any party claiming the benefit of the derogation. Support was expressed for the new text of draft paragraph 95(5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61.

Conclusions reached by the Working Group regarding draft paragraph 95(5)(c):

170. After discussion, the Working Group decided that:

- Draft paragraph 95(5)(c), as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61, was accepted.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]

General remarks

154. In accordance with its earlier decision to consider all provisions affecting the scope of application of the draft convention at the current session, the Working Group proceeded to consider the provisions in chapter 19 (Validity of contractual terms) of the draft convention, together with the definition of “volume contracts” (article 1, paragraph 2), once the Working Group had had sufficient time to study and consult on proposals that had been submitted by some delegations on the issue of freedom of contract under the draft convention (joint proposals by Australia and France contained in documents A/CN.9/612 and A/CN.9/WG.III/WP.88).

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Draft article 89 – Special rules for volume contracts

161. The Working Group noted that the text that appeared in draft article 89 was the result of extensive negotiations that had taken place since the Working Group’s twelfth session (Vienna, 6-17 October 2003), and reflected, with some drafting adjustments, a compromise that had been achieved at the seventeenth session of the Working Group (New York, 3-13 April 2006).

162. There was wide support within the Working Group for the notion of freedom of contract and the need to incorporate in the draft convention provisions that took into account commercial reality, in particular the growing use of volume contracts. There was support for the view that shippers were not exposed to any significant risk of being deprived from the protection afforded by the draft convention since shippers were free to enter into volume contracts and negotiate their terms or, alternatively, to ship goods under a transport document fully covered by the draft convention. The choice between one or the other option was within each shipper’s commercial judgement. However, there was strong support for the proposition that, while generally desirable in the case of parties with equal bargaining power, unlimited freedom of contract might in other cases deprive the weaker party, typically small shippers, of any protection against unreasonable unilateral conditions imposed by carriers. It was further said that, as presently drafted, draft article 89, when read in conjunction with the definition of volume contracts in draft article 1, paragraph 2, did not afford the desirable level of protection. The Working Group was reminded that the history of the law of carriage of goods by sea was the history of the gradual introduction of mandatory rules on liability, which nowadays could be found in various international conventions regulating different modes of carriage. As the draft convention was said to be the only international instrument to contain provisions that offered considerable scope for freedom of contract, the Working Group was urged to consider proposals to remedy that situation.

163. Those proposals as contained in A/CN.9/WG.III/WP.88 and A/CN.9/612 included essentially three elements. Firstly, the definition of volume contracts in draft article 1, paragraph 2, should be amended so as to provide for a minimum period and a minimum quantity of shipments, or at least require such shipments to be “significant”. Secondly, the substantive condition for the validity of a volume contract (that is, that it should be

“individually negotiated”), and the formal condition for validity of derogations (that the derogation should be “prominently” specified), as provided in draft article 89, paragraph 1, should be made cumulative, rather than alternative, so as to make it clear that both parties to the contract must expressly consent to the derogations. Thirdly, the list of matters on which no derogation was admitted, which currently included only the carrier’s obligation to keep the ship seaworthy and properly crew the ship (art. 16(1)), and the loss of the right to limit liability (art. 64), should be expanded so as to cover draft article 17 (basis of the carrier’s liability), draft article 62 (limits of liability), draft article 30 (basis of the shipper’s liability to the carrier), chapter 5 (obligations of the carrier); and draft articles 28 to 30, and 33 (obligations of the shipper). There were various expressions of support for the proposition that, even if the Working Group were not to accept all of those elements, at least a revision of the definition of volume contracts should be considered, so as to narrow down its scope of application and protect smaller shippers, in view of the potentially very wide share of international shipping that might, in practice, be covered by the current definition of volume contracts. Failure to do so, it was said, might mean that the draft convention would be devoid of practical significance.

164. At that stage, the Working Group was reminded of its past deliberations on the matter and the evolution of the treatment of freedom of contract under the draft convention. It was pointed out that special rules for volume contracts and the extent of freedom of contract that should be afforded thereunder had been under consideration by the Working Group for a number of years. Following the approach taken in previous maritime instruments, the draft convention had been originally conceived as a body of law incorporating essentially mandatory rules for all parties. Thus, the initial version of the draft convention had provided, in relevant part that “any contractual stipulation that derogates from this instrument is null and void, if and to the extent that it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee” (A/CN.9/WG.III/WP.21, article 17.1).

165. At the twelfth session of the Working Group (Vienna, 6-17 October 2003), however, it had been suggested that more flexibility should be given to the parties to so-called “Ocean Liner Service Agreements” in the allocation of their rights, obligations and liabilities, and that they should have the freedom to derogate from the provisions of the draft convention, under certain circumstances (A/CN.9/WG.III/WP.34, paras. 18-29). It was proposed that such freedom should be essentially granted whenever one or more shippers and one or more carriers entered into agreements providing for the transportation of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agreed to pay a negotiated rate and tender a minimum volume of cargo (A/CN.9/WG.III/WP.34, para. 29).

166. At that session, there was broad agreement that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis. It was considered that such contracts would include those that, in practice, were the subject of extensive negotiation between shippers and carriers, as opposed to transport contracts that did not require (or where commercial practices did not allow for) the same level of variation to meet individual situations. The latter generally took the form of contracts of adhesion, in the context of which parties might need the protection of mandatory law. The Working Group agreed, however, that the definition of the scope of freedom of contract and the

types of contracts in which such freedom should be recognized needed further consideration (A/CN.9/544, paras. 78-82).

167. The Working Group considered a revised proposal on freedom of contract under “Ocean Liner Service Agreements” (A/CN.9/WG.III/WP.42) at its fourteenth session Working Group (Vienna, 29 November-10 December 2004). At that time, the Working Group heard a number of concerns regarding freedom of contract under Ocean Liner Service Agreements. In particular, it was suggested that it should not be possible for parties to OLSAs to contract out of certain mandatory provisions of the draft instrument. It was also stated that the introduction of a special regime for OLSAs could create market competition-related problems. Concerns were also expressed regarding the protection of small shippers with weak bargaining power who could be subject to potential abuse by carriers through OLSAs. However, it was also said that in current trade practice, small shippers generally preferred to resort to rate agreements, which were not contracts of carriage but which guaranteed a maximum rate without specifying volume, rather than committing to volume contracts, and that the attractiveness of rate agreements combined with market forces would minimize any potential exposure to abuses by carriers under the proposed OLSA regime. Broad support was expressed for the inclusion of OLSA provisions in the draft instrument, subject to these and other concerns (A/CN.9/572, paras. 99-101). The Working Group concluded its deliberations at that stage by deciding that it was not opposed to the inclusion of a provision on OLSAs in the draft instrument, subject to the clarification of issues relating to the scope of application of the draft instrument to volume contracts generally. The Working Group further decided that particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA. Lastly, the Working Group invited the original proponents of the OLSA proposal to work with other interested delegations on refining the OLSA definition (A/CN.9/572, para. 104).

168. The Working Group reverted to the matter of freedom of contract under “Ocean Liner Service Agreements” at its fifteenth session (New York, 18-28 April 2005). The Working Group was then informed of the outcome of the consultations that had taken place pursuant to the request made at its fourteenth session. It was then suggested that since “Ocean Liner Service Agreements” were a type of volume contract, adjustments could be made to the provisions in A/CN.9/WG.III/WP.44 and to draft articles 88 and 89 in order to subsume OLSAs into the existing approach to volume contracts in the scope of application of the draft instrument. The Working Group concurred with that suggestion (A/CN.9/576, paras. 12, and 14-16). The Working Group then proceeded to consider manners of addressing the concerns that had been expressed at its earlier session, as regards the conditions under which it should be possible to derogate from the provisions of the draft convention. While a view was expressed that no derogation from the provisions of the draft convention should be allowed under any conditions, there was support for derogation to be allowed in some circumstances. The Working Group generally accepted that the following four conditions should be met before it would be possible for a volume contract, or individual shipments thereunder, to derogate from the draft instrument: (a) the contract should be [mutually negotiated and] agreed to in writing or electronically; (b) the contract should obligate the carrier to perform a specified transportation service; (c) a provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities should be set forth in the contract and may not be incorporated by reference from another document; and (d) the contract should not be [a carrier’s public

schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract (A/CN.9/576, paras. 17-19). The Working Group proceeded to consider the question as to whether there should be mandatory provisions of the draft convention from which derogation should never be allowed, and if so, what were they. In this respect, the Working Group decided that the seaworthiness obligation should be a mandatory provision of the draft instrument from which derogation was not allowed (A/CN.9/576, paras. 17-19).

169. The Working Group last considered the matter of volume contracts at its seventeenth session (New York, 3-13 April 2006), on the basis of a revised version of the draft convention (A/CN.9/WG.III/WP.56) and amending proposals that had been made following informal consultations (A/CN.9/WG.III/WP.61). At that session, some concerns were reiterated regarding the possible abuse of volume contracts to derogate from the provisions of the draft convention, particularly in cases where volume contracts could involve a large amount of trade. Concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention, and the view was expressed that a preferable approach would be instead to list specific provisions that could be subject to derogation. Another view was expressed that the combination of paragraphs 1 and 5 of draft article 95, and of the definition of volume contracts in draft article 1 had addressed earlier concerns regarding sufficient protection for the contracting parties. An additional concern was expressed that while, generally, some freedom of contract was desirable and that volume contracts as such were not necessarily objectionable, it was possible that draft paragraph (1)(b) did not provide sufficient protection for the parties to such contracts (A/CN.9/594, para. 155). Overall, however, strong support was expressed in the Working Group both for the volume contract regime in the draft convention in general, and for the redrafted text of draft paragraph 95(1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. The view was expressed that the volume contract framework provided an appropriate balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing adequate protection for contracting parties (A/CN.9/594, para. 156). The Working Group next considered the issue of whether it was desirable to include in the volume contract regime of the draft convention a provision containing a list of absolutely mandatory provisions from which there could be no derogation regardless of any agreement, such as that set out in draft paragraph 95(4) in paragraph 49 of A/CN.9/WG.III/WP.61. Some concern was raised regarding the inclusion of such a provision in the draft convention, since it was felt that it could be used in the later interpretation of the draft convention to reintroduce the notion of overriding obligations that had been carefully avoided in the drafting of the provisions. However, strong support was expressed for the inclusion of a provision listing the mandatory provisions from which there could never be derogation pursuant to the volume contract regime in the draft convention. It was felt that including a provision such as draft paragraph 95(4) was an important part of the overall compromise intended to provide sufficient protection for contracting parties under the volume contract framework (A/CN.9/594, para. 160). As regards which provisions should be included in such a list, it was agreed that all of the references in the then draft paragraph 95(4) as set out in A/CN.9/WG.III/WP.61 should be kept in the text (A/CN.9/594, para. 161).

170. The text that appeared in draft article 89, therefore, was said to be the result of a carefully crafted compromise that had involved extensive negotiations over a number of

sessions of the Working Group. There were several expressions of sympathy for the concerns that had been expressed in connection with the treatment of freedom of contract under the draft convention. However, the prevailing view within the Working Group was that the current text of draft article 89 reflected the best possible consensus solution to address those concerns in a manner that preserved a practical and commercially meaningful role for party autonomy in volume contracts. There was wide agreement within the Working Group that it would be highly unlikely that the Working Group would be in a position to build an equally satisfactory consensus around a different solution, and the Working Group was strongly urged not to make attempts in that direction at such a late stage of its deliberations.

171. It was also noted that a number of delegations that currently advised against revisiting draft article 89 had shared at least some of those concerns and had been originally inclined towards a stricter regime for freedom of contract. While those delegations did not regard draft article 89 in all respects as an ideal solution, it was said that their major concern, namely the protection of third parties, had been satisfactorily addressed by the provisions of paragraph 5 of the draft article. Furthermore, the use of the words “series of shipments” in the definition of volume contracts in draft article 1, paragraph 2, provided additional protection against the risk of unilateral imposition of standard derogations from the draft convention, since occasional or isolated shipments would not qualify as “volume contract” under the draft convention.

Conclusions reached by the Working Group regarding draft article 89

172. After extensive consideration of the various views expressed, the Working Group rejected the proposal to reopen the previously-agreed compromise and approved the text of draft article 89 that had previously been accepted in April 2006 (see A/CN.9/594, paras. 154 to 170).

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Further comment on draft article 89 volume contracts

279. Regret was expressed by a delegation that there was insufficient time on the agenda to consider further draft article 89 on volume contracts, and the definition of volume contracts in draft article 1(2). Concern on that point was reiterated that the volume contract provisions in the draft convention allowed for too broad a derogation from the mandatory provisions of the draft convention. An express reservation to the provisions on volume contracts was made by that delegation, as was a wish for further consideration of the matter, which that delegation did not recognize as being the subject of a consensus.

280. The Working Group took note of that statement. It was observed that the issue of volume contracts had been considered during the third reading of the draft convention at its last session (see A/CN.9/621, paras. 161 to 172), and that the topic was not on the agenda for the current session of the Working Group.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 83. Special rules for volume contracts

Summary of earlier deliberations

235. The Working Group was reminded of its past deliberations on the matter and the evolution of the treatment of freedom of contract under the draft convention. It was pointed out that special rules for volume contracts and the extent to which they should be allowed to derogate from the draft convention had been under consideration by the Working Group for a number of years. Following the approach taken in previous maritime instruments, the draft convention had been originally conceived as a body of law incorporating essentially mandatory rules for all parties. Thus, the initial version of the draft convention had provided, in relevant part that “any contractual stipulation that derogates from this instrument is null and void, if and to the extent that it is intended or has as its effect, directly or indirectly, to exclude, [or] limit [, or increase] the liability for breach of any obligation of the carrier, a performing party, the shipper, the controlling party, or the consignee” (A/CN.9/WG.III/WP.21, article 17.1).

236. At the twelfth session of the Working Group (Vienna, 6-17 October 2003), however, it had been suggested that more flexibility should be given to the parties to so-called “Ocean Liner Service Agreements” in the allocation of their rights, obligations and liabilities, and that they should have the freedom to derogate from the provisions of the draft convention, under certain circumstances (A/CN.9/WG.III/WP.34, paras. 18-29). It was proposed that such freedom should be essentially granted whenever one or more shippers and one or more carriers entered into agreements providing for the transportation of a minimum volume of cargo in a series of shipments on vessels used in a liner service, and for which the shipper or shippers agreed to pay a negotiated rate and tender a minimum volume of cargo (A/CN.9/WG.III/WP.34, para. 29). At that session, there was broad agreement that certain types of contracts either should not be covered by the draft instrument at all, or should be covered on a non-mandatory, default basis. It was considered that such contracts would include those that, in practice, were the subject of extensive negotiation between shippers and carriers, as opposed to transport contracts that did not require (or where commercial practices did not allow for) the same level of variation to meet individual situations. The latter generally took the form of contracts of adhesion, in the context of which parties might need the protection of mandatory law. The Working Group agreed, however, that the definition of the scope of freedom of contract and the types of contracts in which such freedom should be recognized needed further consideration (A/CN.9/544, paras. 78-82).

237. The Working Group considered a revised proposal on freedom of contract under “Ocean Liner Service Agreements” (A/CN.9/WG.III/WP.42) at its fourteenth session Working Group (Vienna, 29 November-10 December 2004). At that time, the Working Group heard a number of concerns regarding freedom of contract under Ocean Liner Service Agreements. In particular, it was suggested that it should not be possible for parties to OLSAs to contract out of certain mandatory provisions of the draft instrument. It was also stated that the introduction of a special regime for OLSAs could create market competition-related problems. Concerns were also expressed regarding the protection of small shippers with weak bargaining power who could be subject to potential abuse by carriers through OLSAs. However, it was also said that in current trade practice, small shippers generally preferred to resort to rate agreements, which were not contracts of carriage but which guaranteed a maximum rate without specifying volume, rather than committing to volume contracts, and that the attractiveness of rate agreements combined with market forces would minimize any potential exposure to abuses by carriers under the proposed OLSA regime. Broad support was expressed for the inclusion of

OLSA provisions in the draft instrument, subject to these and other concerns (A/CN.9/572, paras. 99-101). The Working Group concluded its deliberations at that stage by deciding that it was not opposed to the inclusion of a provision on OLSAs in the draft instrument, subject to the clarification of issues relating to the scope of application of the draft instrument to volume contracts generally. The Working Group further decided that particular care should be dedicated to the definition of OLSAs and to the protection of the interests of small shippers and of third parties, and that further consideration should be given to examining which provisions, if any, of the draft convention should be of mandatory application in an OLSA. Lastly, the Working Group invited the original proponents of the OLSA proposal to work with other interested delegations on refining the OLSA definition (A/CN.9/572, para. 104).

238. The Working Group reverted to the matter of freedom of contract under “Ocean Liner Service Agreements” at its fifteenth session (New York, 18-28 April 2005). The Working Group was then informed of the outcome of the consultations that had taken place pursuant to the request made at its fourteenth session. It was then suggested that since “Ocean Liner Service Agreements” were a type of volume contract, adjustments could be made to the provisions in A/CN.9/WG.III/WP.44 and to draft articles 88 and 89 in order to subsume OLSAs into the existing approach to volume contracts in the scope of application of the draft instrument. The Working Group concurred with that suggestion (A/CN.9/576, paras. 12, and 14-16). The Working Group then proceeded to consider manners of addressing the concerns that had been expressed at its earlier session, as regards the conditions under which it should be possible to derogate from the provisions of the draft convention. While a view was expressed that no derogation from the provisions of the draft convention should be allowed under any conditions, there was support for derogation to be allowed in some circumstances. The Working Group generally accepted that the following four conditions should be met before it would be possible for a volume contract, or individual shipments thereunder, to derogate from the draft instrument: (a) the contract should be [mutually negotiated and] agreed to in writing or electronically; (b) the contract should obligate the carrier to perform a specified transportation service; (c) a provision in the volume contract that provides for greater or lesser duties, rights, obligations, and liabilities should be set forth in the contract and may not be incorporated by reference from another document; and (d) the contract should not be [a carrier’s public schedule of prices and services,] a bill of lading, transport document, electronic record, or cargo receipt or similar document but the contract may incorporate such documents by reference as elements of the contract (A/CN.9/576, paras. 17-19). The Working Group proceeded to consider the question as to whether there should be mandatory provisions of the draft convention from which derogation should never be allowed, and if so, what were they. In this respect, the Working Group decided that the seaworthiness obligation should be a mandatory provision of the draft instrument from which derogation was not allowed (A/CN.9/576, paras. 17-19).

239. The Working Group considered the matter of volume contracts again at its seventeenth session (New York, 3-13 April 2006), on the basis of a revised version of the draft convention (A/CN.9/WG.III/WP.56) and amending proposals that had been made following informal consultations (A/CN.9/WG.III/WP.61). At that session, some concerns were reiterated regarding the possible abuse of volume contracts to derogate from the provisions of the draft convention, particularly in cases where volume contracts could involve a large amount of trade. Concerns were raised that it could be seen as inconsistent to have such broad freedom of contract to derogate from a mandatory convention, and the view was expressed that a

preferable approach would be instead to list specific provisions that could be subject to derogation. Another view was expressed that the combination of paragraphs 1 and 5 of draft article 95, and of the definition of volume contracts in draft article 1 had addressed earlier concerns regarding sufficient protection for the contracting parties. An additional concern was expressed that while, generally, some freedom of contract was desirable and that volume contracts as such were not necessarily objectionable, it was possible that draft paragraph (1)(b) did not provide sufficient protection for the parties to such contracts (A/CN.9/594, para. 155). Overall, however, strong support was expressed in the Working Group both for the volume contract regime in the draft convention in general, and for the redrafted text of draft paragraph 95(1) as it appeared in paragraph 49 of A/CN.9/WG.III/WP.61. The view was expressed that the volume contract framework provided an appropriate balance between necessary commercial flexibility to derogate from the draft convention in certain situations, while nonetheless providing adequate protection for contracting parties (A/CN.9/594, para. 156). The Working Group next considered the issue of whether it was desirable to include in the volume contract regime of the draft convention a provision containing a list of absolutely mandatory provisions from which there could be no derogation regardless of any agreement, such as that set out in draft paragraph 95(4) in paragraph 49 of A/CN.9/WG.III/WP.61. Some concern was raised regarding the inclusion of such a provision in the draft convention, since it was felt that it could be used in the later interpretation of the draft convention to reintroduce the notion of overriding obligations that had been carefully avoided in the drafting of the provisions. However, strong support was expressed for the inclusion of a provision listing the mandatory provisions from which there could never be derogation pursuant to the volume contract regime in the draft convention. It was felt that including a provision such as draft paragraph 95(4) was an important part of the overall compromise intended to provide sufficient protection for contracting parties under the volume contract framework (A/CN.9/594, para. 160). As regards which provisions should be included in such a list, it was agreed that all of the references in the then draft paragraph 95(4) as set out in A/CN.9/WG.III/WP.61 should be kept in the text (A/CN.9/594, para. 161).

240. The last time that the Working Group had discussed matters related to volume contracts had been at its nineteenth session (New York, 16-27 April 2007), when it considered a proposal for amendments to the provisions dealing with volume contracts that included essentially three elements (see A/CN.9/WG.III/WP.88 and A/CN.9/612). Firstly, it was proposed to amend the definition of volume contracts in draft article 1, paragraph 2, as it appeared in A/CN.9/WG.III/WP.81, so as to provide for a minimum period and a minimum quantity of shipments, or at least require such shipments to be “significant”. Secondly, it was proposed that the substantive condition for the validity of a volume contract (that is, that it should be “individually negotiated”), and the formal condition for validity of derogations (that the derogation should be “prominently” specified), as provided in draft article 89, paragraph 1, as it appeared in A/CN.9/WG.III/WP.81, should be made cumulative, rather than alternative, so as to make it clear that both parties to the contract must expressly consent to the derogations. Thirdly, it was proposed that the list of matters on which no derogation was admitted, which currently included only the carrier’s obligation to keep the ship seaworthy and properly crew the ship (art. 16(1)), and the loss of the right to limit liability (art. 64), should be expanded so as to cover draft article 17 (basis of the carrier’s liability), draft article 62 (limits of liability), draft article 30 (basis of the shipper’s liability to the carrier), chapter 5 (obligations of the carrier); and draft articles 28 to 30, and 33 (obligations of the shipper).

241. At that time, there were various expressions of support for the proposition that, even if the Working Group were not to accept all of those elements, at least a revision of the definition of volume contracts should be considered, so as to narrow down its scope of application and protect smaller shippers, in view of the potentially very wide share of international shipping that might, in practice, be covered by the current definition of volume contracts (A/CN.9/616, para. 163). However, the prevailing view within the Working Group was that the text of what was then draft article 89 reflected the best possible consensus solution to address those concerns in a manner that preserved a practical and commercially meaningful role for party autonomy in volume contracts (A/CN.9/616, para. 170). It was at that time noted that a number of delegations that advised against revisiting the matter had shared at least some of the concerns expressed by those who proposed amendments and had been originally inclined towards a stricter regime for freedom of contract. While those delegations did not regard the draft provisions on the matter in all respects as an ideal solution, it was said that their major concern, namely the protection of third parties, had been satisfactorily addressed by the provisions of paragraph 5 of what was then draft article 89. Furthermore, the use of the words “series of shipments” in the definition of volume contracts in draft article 1, paragraph 2, provided additional protection against the risk of unilateral imposition of standard derogations from the draft convention, since occasional or isolated shipments would not qualify as “volume contract” under the draft convention (A/CN.9/616, para. 171).

242. After extensive consideration of the various views expressed, the Working Group rejected the proposal to reopen the previously-agreed compromise and approved the text of draft article 89 that had previously been accepted in April 2006, as it appeared in A/CN.9/WG.III/WP.81 (A/CN.9/616, para. 171).

Deliberations at the present session

243. The Working Group noted from its earlier deliberations that its agreement to allow the parties to volume contracts to derogate from the draft convention, under certain conditions, had been consistently reiterated every time the Working Group had discussed the issue in the past. Nevertheless, in the interest of obtaining a broader consensus in support of the issue of freedom of contract, the following revised text of draft article 83 was proposed by a number of delegations:

“Article 83. Special rules for volume contracts

“1. Notwithstanding article 82, as between the carrier and the shipper, a volume contract to which this Convention applies may provide for greater or lesser rights, obligations, and liabilities than those imposed by this Convention.

“2. A derogation pursuant to paragraph 1 is binding only when:

“(a) The volume contract contains a prominent statement that it derogates from this Convention;

“(b) The volume contract is (i) individually negotiated or

(ii) prominently specifies the sections of the volume contract containing the derogations;

“(c) The shipper is given an opportunity and notice of the opportunity to conclude a contract of carriage on terms and conditions that comply with this Convention without any derogation under this article; and

“(d) The derogation is not (i) incorporated by reference from another document or (ii) included in a contract of adhesion that is not subject to negotiation.

“3. A carrier’s public schedule of prices and services, transport document, electronic transport record, or similar document is not a volume contract pursuant to paragraph 1 of this article, but a volume contract may incorporate such documents by reference as terms of the contract.

“4. Paragraph 1 of this article does not apply to rights and obligations provided in articles 15, paragraphs (1)(a) and (b), 30 and 33 or to liability arising from the breach thereof, nor does paragraph 1 of this article apply to any liability arising from an act or omission referred to in article 64.

“5. The terms of the volume contract that derogate from this Convention, if the volume contract satisfies the requirements of paragraphs 1 and 2 of this article, apply between the carrier and any person other than the shipper provided that:

“(a) Such person received information that prominently states that the volume contract derogates from this Convention and gives its express consent to be bound by such derogations; and

“(b) Such consent is not solely set forth in a carrier’s public schedule of prices and services, transport document, or electronic transport record.

“6. The party claiming the benefit of the derogation bears the burden of proof that the conditions for derogation have been fulfilled.”

244. It was stated that the proposal provided additional explicit protection to shippers, with the intention that the amended text would address the concerns expressed by some during the previous sessions of the Working Group (see, for example, A/CN.9/642, paras. 279-280; and A/CN.9/621, paras. 161-172). In light of the many competing interests that were balanced as part of the attempts to clarify the concepts expressed in draft article 83 in A/CN.9/WG.III/WP.101, there was strong support for the view that, at such a late stage of its deliberations, it would be highly unlikely that the Working Group would be in a position to build an equally satisfactory consensus around a different solution. The Working Group was strongly urged not to take that direction and not to revert to proposals that in that past had failed to gain broad support, since that might in turn result in a failure to find sufficient support for the improved text, with its expanded protection for shippers. With respect to the contents of the proposal, the following explanations were provided:

- paragraph 1 had been split into two paragraphs with the chapeau of the former text of draft article 83 constituting paragraph 1 of the proposal;
- paragraph 2 of the proposal enumerated the cumulative preconditions for a derogation from the draft convention;
- paragraph 2(c) was new text that provided shippers with the opportunity, and the requirement that they be given notice of that opportunity, to conclude a contract of

carriage on the terms and conditions that complied with the draft convention without any derogation;

- paragraph 2(d) prohibited the use of a contract of adhesion in setting out such derogations; and
- the definition of “volume contracts” in paragraph 2 of draft article 1 would be maintained without amendment.

245. Strong support was expressed for the proposal as containing a number of clarifications of the previous text which were key to establishing an appropriate balance between the rights of shippers and carriers in the negotiation of volume contracts. Further, the clarifications and refinements in the revised text were said to contribute greatly to the understanding of the provision and to the overall protection offered shippers against possible abuses pursuant to the volume contract provision. In particular, delegations that had most often and consistently expressed concerns regarding the provision of adequate protections for shippers in the volume contract provisions on several previous occasions expressed complete satisfaction with the proposed refinements of the draft article. Others speaking in support of the proposed text emphasized the importance of finding an adequate and flexible means for the expression of party autonomy in order to assure the success of a modern transport convention, while at the same time ensuring that any party whose interests could be open to abuse was adequately protected.

246. However, disappointment was expressed by some delegations that, while applauding the effort to further protect shippers that resulted in the proposal for the refinement of draft article 83, felt that further efforts were needed to ensure adequate protection of those parties. Reference was made to the historical imbalance of market power which led to the gradual introduction of mandatory law that eventually became the norm for all earlier conventions regulating the carriage of goods by sea. The suggestion was made that even under the refined text it would still be possible for strong parties to impose their will on weaker interests, such as small shippers. It was suggested that the reduced freight rates that might be generated by volume contracts would be offset by higher insurance rates for shippers, coupled with disadvantageous jurisdiction provisions and a possible lack of market choices. With a view to addressing that perceived enduring imbalance, the following suggestions, for which there was some support, were made:

- to provide a more precise definition of volume contracts in draft article 1(2) which would require a minimum number of shipments, such as 5, or containers, such as 500;
- to make the conditions in paragraph 2(b) conjunctive by replacing “or” between subparagraphs (i) and (ii) with “and” in the revised text;
- to revise the chapeau of paragraph 2 by changing the phrase “a derogation” to “a volume contract” in order to make certain that the entire volume contract would not be binding if the conditions for derogation from the draft convention were not met; and
- the phrase “individually” should be deleted from paragraph 2(b)(i).

247. Some sympathy was expressed for those delegations that felt that the refined text did not go far enough in terms of protecting shippers and it was suggested that the inclusion of specific numbers in the definition of “volume contract” was dangerous, since it would lead to uncertainty. If, for example, fewer containers than stated in the volume contract were actually

shipped would the volume contract be held to be retroactively void? Further, it was pointed out that any shipper that was dissatisfied with the terms of the volume contract presented always had the right to enter into a transport agreement on standard terms. In addition, it was noted that the fact that the derogation in paragraph 2 would not be binding if the conditions were not met effectively meant that the entire contract would be subject to the provisions of the draft convention, because no derogation from it would be binding. It was also pointed out that the chapter on jurisdiction would be binding only on Contracting States that declared that chapter to be binding, so that disadvantageous choice of court agreements should not be a particular problem.

248. A number of delegations were of the view that the proposed refinements to draft article 83 were a good, but somewhat insufficient, start toward satisfying their concerns regarding the possible effects of volume contracts on small shippers. However, the general view of the Working Group was that the refined text of the proposed article 83 was an improvement over the previous text and should be adopted. In addition, emphasis was placed in the Working Group on the fact that it had in previous sessions approved the policy of providing for volume contracts in the draft convention (see, most recently, A/CN.9/621, paras. 161-172), and that that decision should not be revisited in the face of insufficient consensus to do so.

249. Following a lengthy discussion on the proposal for refined text for draft article 83, the Working Group approved the substance of the text of draft article 83 set out in paragraph 243 above, and referred it to the drafting group.

Definition of “volume contract” – Paragraph 2 of draft article 1

250. While the proponents of the proposed refined text of draft article 83 insisted that one of the key components of that compromise was that the definition of “volume contract” in draft article 1(2) remained unamended, a significant minority of delegations were of the view that the definition should be revised. The rationale for that position was that the existing definition was too vague, and that it would be in the interests of the parties to know precisely what would trigger the application of the volume contract provision. Further it was thought that the threshold for the operation of volume contracts should be high enough so as to exclude small shippers, notwithstanding the additional protections built into the refined text of draft article 83.

251. In addition to the proposal for the amendment of the definition of “volume contract” noted in paragraph 246 above, other proposals for amendment were made as follows:

- instead of a “specified quantity of goods” the text should refer to a “significant quantity of goods”; and
- the specified quantity of goods referred to should be 600,000 tons and the minimum series of shipments required should be 5.

252. While there was a significant minority of delegations of the view that the definition of “volume contract” should be amended, possibly along the lines suggested in the paragraph above, there was insufficient consensus to amend the existing definition. The Working Group was urged to be realistic about what could be achieved on the matter. Proposals for amending the definition, in particular by introducing a minimum shipment volume below which no derogations to the convention could be made, it was said, had been considered and discarded at earlier occasions and there was no reason to expect that they could be accepted at the present stage.

253. The Working Group approved the substance of the definition of the term “volume contract” in paragraph 2 of draft article 1 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 82. Special rules for volume contracts

243. Concern was expressed with respect to the provision concerning volume contracts in draft article 82. One delegation reiterated its consistent and strong opposition to the inclusion of draft article 82 in its current form. In particular, it was suggested that the text, as currently drafted, allowed too broad an exemption from the mandatory regime established in the draft Convention. Since it was felt that a large number of contracts for the carriage of goods could fall into the definition of a volume contract, the concern was expressed that derogation from the obligations of the draft Convention would be widespread and could negatively affect smaller shippers. Further, it was thought that such a result would undermine the main goal of the draft Convention, which was to harmonize the law relating to the international carriage of goods. It was suggested that possible remedies to reduce the breadth of the provision could be to restrict the definition of “volume contract” (see para. 32 above) and to further protect weaker parties to the contract of carriage by requiring that the requirement in draft article 82, subparagraph 2 (b) that the volume contract be individually negotiated or that it prominently specify the sections of the contract containing any derogations should be amended to be conjunctive rather disjunctive. There was some support in the Commission for that position. There was also a proposal to allow States to make a reservation with respect to draft article 82.

244. Concern along the same lines was expressed with respect to the effect that the provision concerning volume contracts in draft article 82 could have on small liner carriers. In that respect, it was suggested that such carriers would not have sufficient bargaining power vis-à-vis large shippers and that such carriers would find themselves in the situation of having to accept very disadvantageous terms in cases where volume contracts allowed derogation from the mandatory provisions of the draft Convention.

245. The Commission was reminded that in addition to previous efforts that had been made in the Working Group to adjust the text of draft article 82 in order to ensure the protection of parties with weaker bargaining power, additional protection had been added to the draft text as recently as at the final session of the Working Group. In particular, it was noted that delegations at the final session of the Working Group had succeeded in amending the text of the draft provision through the addition of draft subparagraphs 2 (c) and (d). In doing so, it was noted that the Working Group had achieved a compromise acceptable to many of the delegations that had previously expressed their concerns regarding the protection of parties with weaker bargaining power (see A/CN.9/645, paras. 196-204). Support was expressed in the Commission that the compromise that had been reached should be maintained.

246. The Commission approved the substance of draft article 82 and referred it to the drafting group.

Article 81. Special rules for live animals and certain other goods

Notwithstanding article 79 and without prejudice to article 80, the contract of carriage may exclude or limit the obligations or the liability of both the carrier and a maritime performing party if:

(a) The goods are live animals, but any such exclusion or limitation will not be effective if the claimant proves that the loss of or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier or of a person referred to in article 18, done with the intent to cause such loss of or damage to the goods or such loss due to delay or done recklessly and with knowledge that such loss or damage or such loss due to delay would probably result; or

(b) The character or condition of the goods or the circumstances and terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement, provided that such contract of carriage is not related to ordinary commercial shipments made in the ordinary course of trade and that no negotiable transport document or negotiable electronic transport record is issued for the carriage of the goods.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]**(c) Paragraph 17.2****(i) Subparagraph 17.2 (a)**

216. It was recalled that, at the ninth session of the Working Group, subparagraph 17.2(a), which allowed the carrier and the performing party to exclude or limit liability for loss or damage to goods where the goods were live animals, was widely supported. It was also recalled that the provision was a traditional exception, with both the Hague and Hague-Visby Rules excluding live animals from the definition of goods. It was noted that trade in live animals represented only a very small trade. However, a concern was raised against allowing the carrier to exclude or limit the liability for loss or damage to live animals. It was suggested that a better approach would be to simply exclude carriage of live animals altogether from the draft instrument rather than allowing exclusion of liability (see A/CN.9/510, para. 64). Support was expressed for adopting the text of subparagraph 17.2(a) unchanged. Strong support was also expressed for the view that, while the traditional exception with respect to live animals should be maintained, the draft instrument should not simply recognize any clause that would “exclude or limit” the liability of the carrier and any performing party where live animals were transported. The carrier or the performing party should not be allowed to exempt itself from any liability, for example, in case of serious or intentional fault or misconduct in the treatment of live animals, or where the carrier or performing party failed to follow the instructions given by the shipper. Yet another view was that the draft instrument should specify the circumstances under which the liability of the carrier or the performing party could be excluded in the case of transport of live animals. It was suggested that a reference to the “inherent vice of the goods” might be helpful in that respect, for example, to establish that a carrier carrying live cattle in poor health condition might be allowed to exclude its liability. It was generally felt, however,

that the inherent vice of the goods, which was already covered under subparagraph 17.2(b), was difficult to characterize with respect to live animals.

217. After discussion, the Working Group decided that the substance of subparagraph 17.2(a) should be maintained in the draft instrument for continuation of the discussion at a future session. The Secretariat was requested to prepare alternative wording to limit the ability of the carrier and the performing party carrying live animals to exonerate themselves from liability in case of serious fault of misconduct.

218. The Working Group found the substance of subparagraph 17.2(b) to be generally acceptable.

[15th Session of WG III (A/CN.9/576) ; referring to A/CN.9/WG.III/WP.32]

Draft article 89

105. The Working Group considered the proposed redraft of article 89 (see paragraph 52 above). The Working Group was reminded that it had most recently considered draft article 89 at its eleventh session (see A/CN.9/526, paras. 216-218).

Draft article 89(1). Carriage of live animals

Freedom of contract approach vs. exemption from liability approach

106. It was recalled that the approach taken in article 5(5) of the Hamburg Rules was based on exemption from liability and exempted the carrier from liability only for loss, damage or delay in delivery of live animals resulting from any special risks inherent in that kind of carriage. It was also indicated that under the Hamburg Rules the carrier of live animals was subject to all the obligations mandated in that instrument. In contrast, it was observed that draft article 89(a) was based on a contractual approach, and that under this provision the carrier of live animals was exposed to liability only for reckless actions and omissions and under the additional conditions set forth in the draft provision. Support was expressed for both approaches. It was also indicated that the practical result of the two approaches was similar. Wide support was expressed for the suggestion to complement the reference to the liability of the carrier with a reference to its obligations. In addition, a view was expressed that the carrier's loss of the right to limit liability was regulated pursuant to draft article 19, independent of draft article 89(a).

Servants and agents of the carrier and other maritime performing parties

107. A view was expressed that reference to servants or agents of the carrier should be avoided since the need to dispose intentionally of stressed animals arose regularly in this trade. However, the prevailing view was that the bracketed language in draft article 89(a) should be retained because in practice only servants or agents of the carrier would interact with live animals on board, and that a reference to maritime performing parties should be inserted after the bracketed text. In this line, it was indicated that intentional disposal of stressed animals would be exempt from liability as a reasonable measure to protect property at sea (see draft article 14(3)(l), A/CN.9/572, para. 64).

Multimodal transport

108. A question was raised as to whether draft article 89(a) would introduce exemption of liability in the non-maritime legs of the carriage in case of multimodal transport. In response it was explained that, while the carriage of live animals was typically multimodal in practice, it was never conducted on the basis of a multimodal contract of carriage and that therefore the non-maritime leg of the carriage was subject to domestic law.

Conclusions reached by the Working Group on proposed draft article 89

109. After discussion, the Working Group decided that:

- The proposed text of draft article 89, including the bracketed text and the additional reference to the maritime performing parties, should be retained for continuation of the discussion at a future session in light of the considerations expressed above;
- A reference to the obligations of the carrier should be inserted in the chapeau of draft article 89;
- The substance of draft article 89(b) was generally acceptable.

[17th Session of WG III (A/CN.9/594) ; referring to A/CN.9/WG.III/WP.56]**Draft article 96. Special rules for live animals and certain other goods**

171. It was suggested that draft article 96 should be deleted from the draft convention since trade of live animals was a specialized trade that traditionally fell outside of the Hague and Hague-Visby Rules. In response, it was noted that the Working Group had already decided to retain the draft provision (see A/CN.9/572, para. 109). It was further suggested that certain drafting modifications could be prepared bearing in mind the suggestions contained in paragraphs 63 to 67 of A/CN.9/WG.III/WP.61.

Conclusions reached by the Working Group regarding draft article 96:

172. After discussion, the Working Group decided that:

- The substance of draft article 96, as it appeared in paragraph 62 of A/CN.9/WG.III/WP.61, was acceptable, bearing in mind any necessary drafting modifications.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 90. Special rules for live animals and certain other goods**

173. The Working Group was reminded that its most recent consideration of draft article 90 on special rules for live animals and certain other goods was at its seventeenth session (see A/CN.594, paras. 171 to 172). The Working Group proceeded to consider draft article 90 as contained in A/CN.9/WG.III/WP.81.

Chapeau and subparagraph (a)

174. The Working Group was in agreement that the chapeau and draft subparagraph (a) should be approved as drafted, bearing in mind that adjustments might need to be made to the text following the Working Group's reconsideration of the definitions of "performing party" and "maritime performing party".

Subparagraph (b)

175. The Working Group took note of the proposal set out in A/CN.9/WG.III/WP.90 that, to combat alleged abuses that considered containers or road vehicles "non-ordinary shipments" in order to have the container or road vehicle considered to be a single unit for the purposes of limiting liability, the following sentence should be added to the end of the subparagraph: "The containers or road vehicles, whose transport is made by a ship entirely or partially equipped to undertake such transport, cannot be considered as 'non-ordinary commercial shipments'." The view was expressed that such an addition was unnecessary, since clauses of that type usually appeared in some short sea voyages, such as ferry carriage, in respect of which carriers typically issued sea waybills rather than bills of lading which would trigger the Hague and Hague-Visby Rules. However, it was expected that the contract of carriage applicable in such a case would trigger the draft convention, whose provisions would eliminate such an abuse.

176. The Working Group was in agreement that draft subparagraph (b) should be approved as drafted.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 84. Special rules for live animals and certain other goods**

254. A question was raised whether the reference to the "maritime performing party" in paragraph (a) was necessary, since the "performing party" was already included in the text by way of the reference to "a person referred to in article 19". It was observed that maintaining the specific reference to the "maritime performing party" would signal the Working Group's intention to narrow the application of the provision to that party, but that deletion of the phrase would broaden the application to all "performing parties". The Working Group agreed that it intended that the provision should apply to all performing parties, and that retaining the reference to the "maritime performing party" was potentially confusing, and thus should be deleted.

255. Subject to the above deletion, the Working Group approved the substance of draft article 84 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 83. Special rules for live animals and certain other goods**

247. With a view to aligning the text of the draft article with the provisions of draft article 63, paragraph 1, it was agreed that the words "done with the intent to cause such loss or

damage to the goods or the loss due to the delay or” should be added before the word “recklessly” in subparagraph (a).

248. Subject to that amendment, the Commission approved draft article 83 and referred it to the drafting group.

CHAPTER 17.

MATTERS NOT GOVERNED BY THIS CONVENTION

General Discussion on the Chapter

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(a) General remarks

192. The Working Group heard that article 16 on other conventions was based upon article 25 of the Hamburg Rules, although the order of the subparagraphs had been adjusted somewhat in the draft instrument. Further, it was noted that the draft instrument did not contain an article in keeping with article 25.2 of the Hamburg Rules with respect to other conventions on jurisdiction and arbitration, since the draft instrument did not yet contain chapters on these matters. It was suggested that the Working Group might wish to include a similar provision in the draft instrument if it decided to include provisions therein regarding jurisdiction and arbitration. The additional comment was made that if such a provision were included in the draft instrument, the Working Group might wish to consider specifying the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1968) and any subsequent regulation, as well as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

193. It was also explained that article 25.5 of the Hamburg Rules had been omitted in the draft instrument in light of the scope of application issue. It was noted that the Working Group might wish to revisit the possibility of adding a provision similar to article 25.2 of the Hamburg Rules once it had made a decision regarding the scope of application of the draft instrument.

194. General support was expressed for draft article 16 as a useful and appropriate addition to the draft instrument.

195. It was noted that article 16 was intended to specify the relationship between the draft instrument and other international conventions, but that the list of other international conventions that could be affected by the draft instrument was much longer than that set out in article 16, and could include, for example, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (1996). It was suggested that rather than risk omitting a convention in a specific list of instruments, a general clause be used instead that this instrument would not affect other international conventions concerning the limitation of liability. Some support was expressed for this approach, however, caution was urged that too general a statement, such as, for example, to state that all other conventions with limitation on liability should prevail, might not accurately reflect the intention of the Working Group. It was also suggested that the Working Group should carefully examine the list of other conventions, keeping in mind the fact that the draft instrument, unlike the Hamburg Rules upon which draft article 16 is based, dealt not only with the carrier's liability, but also with the shipper's liability, on a mandatory basis.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Chapter 17 – Matters not governed by this Convention**

256. The view was expressed that the title of the chapter “matters not governed by this convention” would be better expressed in a positive sense, such as “matters governed by other instruments”, or perhaps simply “other instruments”.

Prevalence over earlier conventions [Deleted]***Article 90. Prevalence over earlier conventions***

[As between parties to this Convention, it prevails over those][Subject to article 102, this Convention prevails between its parties over those] of an earlier convention to which they may be parties [that are incompatible with those of this Convention].

[Last version before deletion: A/CN.9/WG.III/WP56]

[See paragraphs 229-255, A/CN.9/616 (18th Session of WG III) under article 82 at p. 753]**Article 82. International conventions governing the carriage of goods by other modes of transport**

Nothing in this Convention affects the application of any of the following international conventions in force at the time this Convention enters into force, including any future amendment to such conventions, that regulate the liability of the carrier for loss of or damage to the goods:

- (a) Any convention governing the carriage of goods by air to the extent that such convention according to its provisions applies to any part of the contract of carriage;
- (b) Any convention governing the carriage of goods by road to the extent that such convention according to its provisions applies to the carriage of goods that remain loaded on a road cargo vehicle carried on board a ship;
- (c) Any convention governing the carriage of goods by rail to the extent that such convention according to its provisions applies to carriage of goods by sea as a supplement to the carriage by rail; or
- (d) Any convention governing the carriage of goods by inland waterways to the extent that such convention according to its provisions applies to a carriage of goods without trans-shipment both by inland waterways and sea.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]**Article 89. International instruments governing other modes of transport and Article 90. Prevalence over earlier conventions**

229. The Working Group continued its discussion of the relationship between the draft convention and other conventions on the basis of draft articles 89 and 90, which, it was recalled, had been included in the draft convention at the request of the Working Group during its eleventh session (see A/CN.9/526, paras. 245-250, particularly paras. 247 and 250), but had not yet been considered by the Working Group.

230. Concern was expressed that draft articles 89 and 90 seemed to contradict each other, such that draft article 89 would allow for the prevalence of other conventions over the draft convention in cases of conflict, while draft article 90 provided for the prevalence of the draft convention over all other conflicting earlier conventions. In light of this, two possible solutions were suggested: the deletion of one or the other of draft articles 89 or 90, or the deletion of both provisions. In this regard, it was suggested that draft article 27 presented a satisfactory solution to the problem of any potential conflict between other unimodal transport conventions and the draft convention, and that no additional provision in this regard was necessary or desirable.

231. Other views were expressed in support of the proposal to delete draft articles 89 and 90 and to allow draft article 27 to stand, along with specific conflict of convention provisions in the draft convention at draft articles 79, 91, 92, 93 and the denunciation provision in draft article 102, as the sole provisions intended to resolve any potential conflict of conventions. In support of this proposal, the view was reiterated that, in terms of other unimodal transport conventions, such as the CMR, there was no conflict with the draft convention because the scope of application of those conventions was tied to contracts of carriage that were different from the “maritime plus” contract of carriage covered by the draft convention (see para. 225 above). Thus, it was said, the subject matter of those conventions and the draft convention was not identical. Secondly, it was said that draft article 27 had been drafted at the outset as a limited network approach to fulfil the role of a conflict of conventions provision, and that separating it from that conflict of conventions role could result in the broad application of draft article 27 to all inland carriage contemplated under the draft convention. It was said that such an interpretation could result in a significant decrease in the recoverability of damages by the shipper, who, in the case of road carriage, would be thus limited to the 8.33 SDR per kilogram limitation amount of the CMR, rather than to a limitation level comparable to, for example, that of the Hague-Visby Rules of 666.67 SDRs per package. In terms of this example, it was said that recovery under the per kilogram limitation of the CMR would be more favourable than under the per package limitation of a provision like that of the Hague-Visby Rules only when an individual package weighed greater than 83 kilograms which, it was said, was a rare occurrence. Finally, it was said that draft articles 89 and 90 were superfluous anyway, since if there was any conflict with another convention with respect to subject matter, in light of article 30 of the Vienna Convention of the Law on Treaties, any later convention dealing with the same subject matter would prevail over the provisions of the earlier convention.

232. While there was general agreement that draft article 90 could be deleted as potentially causing confusion with respect to the application of article 30 of the Vienna Convention on the Law of Treaties, there remained substantial support in the Working Group for the retention of draft article 89, at least for the moment. In this regard, concerns were reiterated from the earlier

discussion (see para. 225 above) concerning the adequacy of draft article 27 in dealing with general conflict of conventions issues as they may arise with respect to certain unimodal transport conventions and with regard to some regional unimodal transport instruments other than the CMR, such as the uniform rules on road carriage that had been formulated by the Organization for the Harmonization of Business Law in Africa (OHADA). In particular, it was thought that draft article 89 could provide additional protection against such residual risk of conflict of conventions, to the extent that such protection was necessary in addition to the operation of draft article 27. Further, in supporting the retention of draft article 89, a specific request was made to ensure certainty regarding the intention of that provision by retaining the word “primarily” as found therein and in article 25(5) of the Hamburg Rules.

233. It was suggested in response that such concerns regarding additional protection were unnecessary and that draft article 27 presented a clear and complete solution to the problem, and that, in fact, adding draft article 89 to the draft convention could result in confusion and could obscure the intended operation of draft article 27. In this regard, the view was also expressed that draft article 89 was too general a provision as currently drafted to fulfil the role envisioned for it of filling any potential gaps left by the application of draft article 27. However, it was suggested that in order to assuage remaining concerns regarding the clarity of the application of draft article 27 as a conflict of convention provision, the Secretariat could propose additional clarifying provisions such as those set out in paragraphs 29 and 36 of A/CN.9/WG.III/WP.78, to the effect that actions under the draft convention were available against only the contracting carrier and the maritime performing party, and that claims against other performing inland carriers were not so included. Additional suggestions were made that, in light of its role as a conflict of conventions provision, the optimal placement of draft article 27 within the draft convention might be reconsidered, and that the Secretariat could also consider clarifications to the text of the draft convention based on the Bimco COMBICONBILL referred to in paragraph 26 of A/CN.9/WG.III/WP.78.

234. Since concerns had been raised regarding a possible conflict of conventions with the Montreal Convention (see para. 225 above), it was suggested that, although the combination of air and sea transport in the same carriage was thought to be rare, additional clarification of the draft convention could be undertaken to ensure that there was no lingering conflict with the Montreal Convention. In this regard, additional concerns were raised that a direct conflict of convention could also arise between the draft convention and the instruments under certain regional agreements affecting trade and transport, such as OHADA.

Conclusions reached by the Working Group regarding draft articles 89 and 90:

235. After discussion, the Working Group decided that:

- Draft article 89 should be deleted;
- Draft article 90 should be deleted;
- The Secretariat was requested to consider the optimal placement of draft article 27; and
- Possible drafting clarifications to ensure the proper application of the limited network system should be considered to the draft instrument in light of paragraphs 26, 29 and 36 of A/CN.9/WG.III/WP.78, and in order to ensure that there is no conflict between the draft convention and the Montreal Convention.

[19th Session of WG III (A/CN.9/621) ; referring to A/CN.9/WG.III/WP.81]**Draft article 84. International conventions governing the carriage of goods by air**

204. In keeping with its discussion of matters involving the relationship of the draft convention with other transport conventions as determined by the operation of draft article 26, the Working Group next considered a provision that had been added to the text of the draft convention following its most recent consideration of those issues during its eighteenth session (see A/CN.9/616, paras. 216 to 235). It was recalled that at that session, the Working Group had requested that a provision be proposed in the draft convention in order to ensure that it would not conflict with the Montreal Convention (see A/CN.9/616, paras. 225 and 234 to 235). Draft article 84, as it appeared in A/CN.9/WG.III/WP.81 was intended to respond to that request.

205. To the extent that conventions such as the CMR also contained a certain multimodal dimension, the question was raised whether other unimodal transport conventions in addition to the Montreal and Warsaw Conventions should be mentioned in the provision in order to ensure that conflicts were not encountered with those conventions. In response, it was noted that the Working Group had considered the issue at its eighteenth session, and that it had decided to include in the draft convention text like that found in draft article 84 only with respect to the Montreal and Warsaw Conventions, which were unique in their intention to include multimodal transport to such an extent that a conflict between those conventions and the draft convention was inevitable. There was support for retaining draft article 84 as it appeared in the text.

Conclusions reached by the Working Group regarding draft article 84

206. The Working Group was in agreement that draft article 84 should be approved as drafted.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 84. International conventions governing the carriage of goods by air**

228. A concern was raised that conflicts might arise between the draft convention and other unimodal transport conventions not addressed in draft article 84, because that provision only ensured that the draft convention would not conflict with international conventions governing the carriage of goods by air. It was suggested that, to the extent that conventions such as the CMR or CIM-COTIF also contained a certain multimodal dimension, those conventions should also be included in draft article 84 in order to avoid any conflicts. A suggestion was made that, to remedy that perceived problem, draft article 84 could be redrafted along the following lines: “Nothing in this Convention prevents a contracting State from applying the provisions of any other international convention regarding the carriage of goods to the contract of carriage to the extent that such international convention according to its provision applies to the carriage of goods by different modes of transport.”

229. Whereas some support was expressed for that proposal, there was also firm opposition to it. Moreover, the Working Group was reminded that at its eighteenth and nineteenth sessions

(see A/CN.9/616, paras. 225 and 234-235, and A/CN.9/621, paras. 204 to 206), it had decided to include a provision such as draft article 84 only with respect to international conventions regarding the carriage of goods by air, and that it had approved draft article 84 as it appeared in the text. It was noted that the Working Group had considered the concerns noted above in paragraph 228 at its previous sessions, and that it had decided to include a text like that found in draft article 84 only with respect to international conventions regarding the carriage of goods by air. It was recalled that the reason for limiting the provision to those conventions was due to the fact that they were unique in their expansive inclusion of multimodal transport in their scope of application to such an extent that a conflict between those conventions and the draft convention was inevitable. It was also noted that draft article 84 could be expected to have only a minor application, as multimodal transport contracts seldom combined transport by sea with transport by air. Support was expressed for that previous decision in the Working Group.

230. Notwithstanding the broad support to retain draft article 84 as drafted, it was noted that a very specific area of possible conflict could also arise with respect to the CMR and CIM-COTIF. In particular, concern was raised regarding ferry traffic, and the specific situation in which goods being transported by road or rail would remain loaded on the vehicle or railroad cars during the ferry voyage. It was said that provision should be made in the draft convention in order to ensure that it did not conflict with the CMR and CIM-COTIF in those very specific situations so as to ease the concerns of States Parties to those instruments regarding possible conflicts, but that there should not be a broader exception for unimodal transport as such. While some doubt was expressed regarding whether there was a conflict with respect to such ferry transport, the Working Group expressed some willingness to consider resolutions that were set out in written proposals regarding those perceived conflicts with unimodal transport conventions. It was also pointed out that some concerns with respect to the treatment of ferry transport under the draft convention had also been mentioned in previous sessions (see A/CN.9/526, paras. 222 to 224, and A/CN.9/621, paras. 137 to 138, and 144 to 145), but that no specific solution had been proposed at that time. It was further suggested that, if such a proposal were taken up by the Working Group, it might be better to treat it in the context of draft article 26, or by way of the scope of application provisions in chapter 2, rather than in draft article 84.

Conclusions reached by the Working Group regarding draft article 84:

231. The Working Group agreed that:

- The text of draft article 84 as contained in A/CN.9/WG.III/WP.81 should be maintained; and
- The Working Group would consider written proposals intended to avoid specific conflicts with unimodal transport conventions, and that did not markedly change draft article 84.

Further consideration of draft article 84 conflict of convention issues

232. With reference to the Working Group's willingness to consider proposals for a text to resolve possible issues regarding a conflict between the draft convention and existing unimodal conventions that were raised earlier in the session (see paragraphs 228 to 231 above), two written proposals were submitted to the Working Group as follows:

“Article 5, para. 1 bis

“Notwithstanding article 5, para. 1, if the goods are carried by rail or road under an international convention and where the goods for a part of the voyage are carried by sea, this Convention does not apply, provided that during the sea carriage the goods remain loaded on the railroad car or vehicle.”

“International conventions governing the carriage of goods

“Nothing in this Convention prevents a Contracting State from applying the provisions of any of the following conventions in force at the time this Convention enters into force:

“(a) Any convention regarding the carriage of goods by air to the extent such convention according to its provisions applies to the carriage of goods by different modes of transport;

“(b) Any convention regarding the carriage of goods by land to the extent such convention according to its provisions applies to the carriage of land transport vehicles by a ship; or

“(c) Any convention regarding the carriage of goods by inland waterways to the extent such international convention according to its provisions applies to a carriage without trans-shipment both on inland waterways and on sea.”

233. By way of explanation, it was noted that the first proposal had taken the approach of slightly narrowing the scope of application of the draft convention through adding a paragraph 1 bis, and that it had focused on the CMR and CIM-COTIF issue of ferry transport of railroad cars and vehicles on which the goods remained loaded through the transport. In contrast, the second proposal had focused on a conflict of conventions approach that enlarged upon the existing provision with respect to air transport in draft article 84, and that also referred to possible sources of conflict with the CMR and CIM-COTIF, and with the Convention on the Contract for the Carriage of Goods by Inland Waterway (“CMNI”). It was explained that, in both cases, the proposals were intended to eliminate only a very narrow and unavoidable conflict of convention between the relevant unimodal transport conventions and the draft convention.

234. The Working Group expressed its support for finding a resolution to the very narrow issue of possible conflict of laws outlined in the proposals presented. A slight preference was expressed for the approach to the problem taken by the second proposal in paragraph 232 above, although paragraph (a) was thought to require some adjustment, and paragraph (b) was thought to be drafted slightly too widely. The Working Group requested the Secretariat to consider the two approaches, and to prepare draft text along the lines of the proposals aimed at meeting the concerns expressed. By way of further clarification, in response to a question, it was noted that the first proposal in paragraph 232 above contemplated that the draft convention would govern the relationship between the road carrier and the ferry operator.

235. A view was expressed that a third alternative could be pursued to avoid even narrow conflicts of convention, such as that taken in the United Nations Convention on Contracts for the International Sale of Goods (“Vienna Sales Convention”), in which article 3(2) excludes contracts in which the “preponderant part” consists of the supply of labour or other services. It was suggested that a similar methodology could be used in the draft convention to exclude

transport for which the preponderant part was non-maritime. That suggestion was not taken up by the Working Group.

Conclusions reached by the Working Group regarding proposals on draft article 84 conflict of convention issues:

236. The Working Group agreed that a resolution to the very narrow issue of possible conflict of laws outlined in the proposals in paragraph 232 above should be sought, and requested the Secretariat to prepare a draft based on the proposals as set out.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 85. International conventions governing the carriage of goods by other modes of transport

257. It was suggested that draft article 85 should make reference to draft article 27 in terms such as, “without prejudice to article 27”, so that its relationship with draft article 27 would be clear. However, it was observed that the revised approach taken by the Working Group in draft article 27 was no longer as a conflict of convention provision, but rather as the establishment of a network approach on the basis of a hypothetical contract. There was support for the view that, as such, a cross-reference to draft article 27 was unnecessary.

258. The Working Group approved the substance of draft article 85 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 84. International conventions governing the carriage of goods by other modes of transport

249. It was pointed out that draft article 84 preserved only the application of international conventions that governed unimodal carriage of goods on land, on inland waterways or by air that were already in force at the time that the Convention entered into force. That solution was said to be too narrow. Instead, the draft Convention should expressly give way both to future amendments to existing conventions as well as to new conventions on the carriage of goods on land, on inland waterways and by air. It was noted, in that connection, that an additional protocol to the Convention on the Contract for the Carriage of Goods by Road (the “CMR”) dealing with consignment notes in electronic form had recently been adopted under the auspices of the Economic Commission for Europe and that such amendments were common in the area of international transport. The Convention concerning International Carriage by Rail and Appendix B to that Convention containing the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (the “CIM-COTIF”), for instance, had an amendment procedure as a result of which the 1980 Convention (“COTIF”) had been replaced with the 1999 version. Furthermore, the draft Convention should also preserve the application of any future convention on multimodal transport contracts. It was said that the provisions of the draft Convention had

been mainly designed with a view to sea carriage and that it was therefore advisable to leave room for further development of the law with respect to other modes of carriage.

250. It was suggested that the words “in force at the time this Convention enters into force” should be deleted. There was some support for that proposal. Although it was said that additional protocols to existing international conventions might be seen as implicitly covered by the reference to the existing conventions they amended, the view was expressed that the draft Convention should not exclude the possibility of new instruments being developed in addition to or in replacement of the unimodal conventions contemplated by the draft article. That, it was proposed, should be done either by an expansion of the scope of the draft article or by way of appropriate reservations that Contracting States could be permitted to submit.

251. However, there were strong objections to the proposal that the draft Convention should also preserve the application of any future convention on other modes of transport that might have multimodal aspects. The draft Convention had been negotiated exactly for the purpose of covering door-to-door carriage, which in most cases meant “maritime plus” carriage. The purpose of the draft Convention would be defeated if it were to give way to any future instrument covering essentially the same type of carriage.

252. The views were divided as regards the impact of draft article 84 on future amendments to the conventions to which it referred. On the one hand, there was support for the proposition that the draft article should also encompass future amendments to existing conventions and that the draft article might need to be redrafted if that conclusion was not allowed by the current text. On the other hand, it was argued that the draft Convention should not give unlimited precedence to future amendments to those conventions. There was a risk that an amending protocol might expand the scope of application of an existing convention to such an extent that the convention in question might become applicable to multimodal carriage in circumstances other than those mentioned in draft article 84. The sensitive issue of localized damages was appropriately taken care of by draft article 27, which already envisaged future amendments to unimodal conventions so as to encompass, for instance, adjustments to liability limits that might be introduced in the future.

253. In view of the conflicting opinions that had been expressed on the matter, the Commission agreed to suspend its deliberations on the draft article.

254. Following informal consultations, it was proposed that the following phrase be inserted into the chapeau of the draft provision, after the phrase “enters into force”: “including any future amendment thereto”. Subject to the inclusion of a phrase along those lines, the Commission approved draft article 84 and referred it to the drafting group.

Article 83. Global limitation of liability

Nothing in this Convention affects the application of any international convention or national law regulating the global limitation of liability of vessel owners.
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[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(b) Paragraph 16.1***

196. The suggestion was made that it would be helpful to some States attempting to avoid conflicts with other transport conventions if paragraph 16.1 were amended to add language stating that the draft instrument would prevail over other transport conventions except in relation to States that are not members of the instrument. It was stated that this addition would be particularly helpful if the Working Group decided upon a door-to-door scope of application of the draft instrument, but that it would be equally welcome if the Working Group were to decide upon a port-to-port scope of application.

197. It was noted that the word “seagoing” in paragraph 16.1 appeared in square brackets, and it was suggested that this word be deleted, since in light of the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (2000), use of the term might cause confusion regarding which convention was applicable.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 85. Global limitation of liability**

237. It was observed that draft article 85 might be too narrowly drafted and needed clarification. In particular, it was proposed that the phrase “or inland navigation vessels” should be inserted after “applicable to the limitation of liability of owners of seagoing ships” and that the last part “or the limitation of liability for maritime claims” should be deleted. The first part of the proposal found broad support, however, it was noted that appropriate wording should be found to cover all vessels, whether seagoing or inland. With regard to the second part of the proposal, the question was raised whether the deletion of the final phrase was necessary, and it was suggested that the final phrase should be retained. The Working Group was reminded that the phrase “for maritime claims” had been added in order to reflect the terminology of the Convention on Limitation and Liability for Maritime Claims, 1976 and its 1996 Protocol. It was suggested that it should not be deleted hastily.

Conclusions reached by the Working Group regarding draft article 85:

238. The Working Group agreed that:

- Appropriate wording should be found to cover all vessels in the provision; and
- The Secretariat should review the matter and, if necessary, suggest amendment to the text to reflect the subject matter of the conventions in question, including whether it was necessary to retain the final phrase “or the limitation of liability for maritime claims” in the text.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 86. Global limitation of liability**

259. The Working Group approved the substance of draft article 86 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 85. Global limitation of liability

255. In response to a query as to the need for draft article 85, it was noted that the draft article aimed at solving situations where the carrier under the draft Convention was at the same time the ship owner under the 1976 Convention on Limitation of Liability for Maritime Claims (the “LLMC”), which subjected the combined amount of individual claims against the owner to a global liability limit. Thus, for example, in cases of a major accident where the entire cargo of a ship was lost, cargo claimants might have the right to submit individual claims up to a certain amount, but their claim might be reduced if the combined value of all claims exceeded the global limitation of liability under the other applicable convention. Global limitation of liability such as provided by the Convention on Limitation of Liability for Maritime Claims (the “LLMC”) or domestic law was an important element with a view to providing predictability in international sea carriage and should not be affected by the draft Convention.

256. There was some support for the view that the words “vessel owner” were unclear and possibly too restrictive, since the Convention on Limitation of Liability for Maritime Claims (the “LLMC”), for instance, also provided a global limit for claims against charterers and operators. One proposal to clarify the text was to replace the reference to “vessel owner” with a reference to international conventions or national laws regulating global limitation of liability “for maritime claims”. Another proposal was to qualify the words “vessel owner” by the phrase “as defined by the respective instrument”.

257. However, there was not sufficient support for either proposal. It was pointed out that the draft article merely preserved the application of other instruments, without venturing into the definition of the categories of persons to which those instruments applied. Replacing the term “vessel owners” with a reference to “maritime claims” in turn, would not be appropriate, since the draft article also preserved the application of rules on global limitation of liability of owners of inland navigation vessels and not only of seagoing vessels.

258. The Commission approved draft article 85 and referred it to the drafting group.

Article 84. General average

Nothing in this Convention affects the application of terms in the contract of carriage or provisions of national law regarding the adjustment of general average.
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[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(a) General remarks***

184. The Working Group was reminded that it had discussed draft article 15 on general average in broad terms in relation to paragraph 5.5 during its ninth session (see A/CN.9/510, paras. 137-143). It was recalled that draft article 15 was closely based upon article 24 of the Hamburg Rules, and that article 15 of the draft instrument was intended to permit the incorporation into the contract of carriage the operation of the York-Antwerp Rules (1994) on general average. It was pointed out that the drafting in chapter 15 was intended to reflect the principle that the general average award adjustment must first be made, and the general average award established, and that pursuant to paragraph 15.2, liability matters would thereafter be determined on the same basis as liability for a claim brought by the cargo owner for loss of or damage to the goods. It was submitted it was reasonable to determine the two claims using the same liability rules, given that they amounted to two sides of the same set of facts. It was further stated that the principles of general average have a long history in maritime law, and that they form part of the national laws of most maritime countries.

185. There was broad support for the continued operation of the rules on general average as a set of rules independent from the operation of those in the draft instrument. Whilst there was some discussion as to whether it was necessary to specifically include provisions such as those in article 15 in order to accomplish this goal, there was general support for the existing chapter as drafted. It was stated, however, that article 24 of the Hamburg Rules had been included due to the specific liability rules in that convention, and that the Hague and Hague-Visby Rules had no specific provision on general average, although they did contain in article V a statement that “Nothing in these Rules shall be held to prevent the insertion in a bill of lading of any lawful provision on general average”. It was recalled that this statement in the Hague and Hague-Visby rules allowed for the operation of the York-Antwerp Rules on general average, but it was pointed out that the issue was unclear and generated jurisprudence. It was suggested that since the liability provisions in the draft instrument more closely resembled the Hague and Hague-Visby Rules, it would be appropriate to delete article 15 on general average as unnecessary, without fear that it would impede the operation of the general average rules. It was stated in response, however, that the insertion of an article such as draft article 15 was of great assistance in clarifying the relationship between the draft instrument and the general average rules, such that it could significantly reduce the potential jurisprudence on this point.

(b) Paragraph 15.1

186. There was broad support for the continued incorporation of the York-Antwerp Rules on general average into the contract of carriage, and, with the Working Group found the substance of paragraph 15.1 to be generally acceptable.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]***Draft article 87***

240. It was recalled that draft article 87 largely reproduced the provisions regarding general average as contained in the Hague, Hague-Visby and Hamburg Rules and expressed the agreed policy that the draft convention should not affect the application of provisions in the contract of

carriage or national law regarding the adjustment of general average. It was agreed that the principle contained in draft article 87 was useful and should be retained. A suggestion was made that any necessary clarification be made that the operation of article 16(2) was not intended to have any effect on the existing general average regime.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 82. Provisions on general average

219. A suggestion was made that draft article 16(2) should be considered in conjunction with the Working Group's consideration of draft article 82. However, it was pointed out that the Working Group had decided at its nineteenth session to retain paragraph 2 of draft article 16 as a separate provision, possibly draft article 16 bis, and to delete the square brackets surrounding it (see A/CN.9/621, paras. 60 to 62). The Working Group confirmed its earlier decision in that regard.

220. The Working Group agreed that the text of draft article 82 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 87. General average

260. The Working Group approved the substance of draft article 87 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 86. General average

259. There was no support for a proposal to insert a definition of the term "general average", but the Commission agreed that the various language versions should be reviewed to ensure appropriate translation.

260. The Commission approved draft article 86 and referred it to the drafting group.

*Contribution in general average [Deleted]**Article 88. Contribution in general average*

1. *[With the exception of the chapter on time for suit,] the provisions of this Convention relating to the liability of the carrier for loss of or damage to the goods also determine whether the consignee may refuse to contribute in general average and the liability of the carrier to indemnify the consignee in respect of any such contribution made or any salvage paid.*
2. *All [actions for] [rights to] contribution in general average are [time-barred] [extinguished] if judicial or arbitral proceedings are not instituted within a period of [one year] from the date of the issuance of the general average statement.*

[Last version before deletion: A/CN.9/WG.III/WP.56]

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(c) Paragraph 15.2***

187. Whilst it was generally conceded that paragraph 15.1 served to clarify and ensure the incorporation of the rules on general average, the question was raised whether paragraph 15.2 was necessary in the draft instrument. It was suggested that the rules on liability pursuant to the contract of carriage would apply regardless of the inclusion of paragraph 15.2, and that the statement to this effect in paragraph 15.2 only served to confuse the issue.

188. There was also support expressed for the retention of paragraph 15.2, but there were suggestions for modification to the drafting. It was stated that the opening phrase of paragraph 15.2 with respect to time for suit was intended to indicate that the time for suit provisions did not apply to general average awards, but it was suggested that clearer language could be found to express that meaning. In this connection, it was also suggested that the Working Group might wish to establish a separate provision on time for suit for general average awards, such as, for example, that the time for suit for general average began to run from the issuance of the general average statement. Some support was expressed for this approach.

189. In addition, it was questioned whether paragraph 15.2 should also include liability for loss due to delay and demurrage in those liabilities under the draft instrument which should be applied to the determination of refusals for contribution to general average.

190. The Working Group requested the Secretariat to prepare a revised draft of paragraph 15.2, with due consideration being given to the views expressed.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

241. It was noted that paragraph (1) was intended to reflect the principle that the general average award adjustment must first be made, and the general average award established, and that liability matters would thereafter be determined on the same basis as liability for a claim brought by the cargo owner for loss of or damage to the goods.

242. It was noted that paragraph (2) dealt with the limitation period for claims in general average. It was noted that, when drafted, some doubt existed as to what the applicable time period should be, but that subsequently in 2004 the CMI had issued a revision of the York-Antwerp Rules 1994, which contained a limitation period of one year after the date of the general average adjustment or six years after the date of termination of the common maritime adventure, whichever came first. It was noted that given that it was unclear whether a limitation period in a private contract could override a limitation period in international law, and that the revised York-Antwerp Rules 2004 had not yet achieved general acceptance, it might be helpful to retain paragraph (2) for the sake of clarity, but to adjust its text to reflect the York-Antwerp Rules regarding claims “under general average bonds or guarantees”. Some support was expressed for that proposal.

243. However, opposition was expressed to the retention of article 88. It was said that incorporating the revised time limitation of the York-Antwerp Rules 2004 could create confusion given that the revised rules had not been taken up by all ship owners. It was suggested that the question of a time bar should be left to the existing legal regime for the adjustment of general average.

Conclusions reached by the Working Group regarding Chapter 18:

244. After discussion, the Working Group decided to:

- Retain article 87 in substance; and
- Delete article 88.

Article 85. Passengers and luggage

This Convention does not apply to a contract of carriage for passengers and their luggage.
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[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]

(c) Paragraph 16.2

198. Support was expressed for paragraph 16.2, however, it was suggested that the phrase “by sea” be deleted from the final line of paragraph 16.2, since a number of conventions govern the carriage of passengers and luggage by means other than sea, such as by road, railroad and air, and it would be helpful to clarify that the draft instrument was not intended to affect these conventions.

199. The Working Group found the substance of paragraph 16.2 to be generally acceptable, and in keeping with the drafting approach in paragraph 16.1, the Working Group decided to place square brackets around the phrase “by sea”.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 86. Other provisions on carriage of passengers and luggage*****General comments***

239. The Working Group proceeded to consider the text of draft article 86 as contained in document A/CN.9/WG.III/WP.81. The Working Group was reminded of its understanding that the draft convention should not apply to luggage of passengers. It was suggested, however, that draft article 86 was formulated too narrowly. In its present form, the draft article could imply that a carrier could become liable under this draft convention, as long as it was not at the same time liable under any convention or national law applicable to the carriage of passengers and their luggage. In order to reflect that concern, it was suggested that the phrase “for which the carrier is liable” should be replaced with the word “covered”.

240. Another proposal was to explicitly exclude passengers’ luggage from the definition of “goods” in paragraph 25 of draft article 1, so as to clarify the draft convention’s scope of application. However, it was pointed out that excluding passengers’ luggage from the definitions in the draft convention would mean a complete exclusion of passengers’ luggage from the draft convention. That result would be substantially different from excluding only the carrier’s liability in respect of passengers’ luggage otherwise covered by domestic law or another international convention. Under the latter approach, there could be instances where the draft convention would still apply to passengers’ luggage.

241. There was strong agreement in the Working Group to indicate in the draft convention that it did not apply to the passengers’ luggage. Such an exclusion should not only apply to the liability of the carrier, since the treatment of transport documents and right of control clearly indicated that the draft convention focused on commercial shipments of goods and not on passengers’ luggage. Whether the best way to effect such an exclusion should be by means of amendments of the definition of goods under draft article 1, paragraph 25, or by means of an expansion of draft article 86 was a matter that the Working Group could consider at a later stage on the basis of recommendations to be made by the Secretariat after review of the implications of the available options.

242. It was further noted that the title of draft article 86 would also need to be amended to fully reflect the understanding of the Working Group with respect to the provision, since the current wording could imply that the draft convention applied to personal loss or injury of passengers.

Conclusions reached by the Working Group regarding draft article 86:

243. The Working Group agreed that the Secretariat should review the possible ways of resolving the matter of passengers’ luggage and suggest amendments to the text of draft article 86 either by excluding them from the definition or making amendments to the text of draft article 86 as well as the title of the article.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 88. Passengers and luggage**

261. The Working Group approved the substance of draft article 88 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 87. Passengers and luggage**

261. The Commission approved the substance of draft article 87 and referred it to the drafting group.

Article 86. Damage caused by nuclear incident

No liability arises under this Convention for damage caused by a nuclear incident if the operator of a nuclear installation is liable for such damage:

(a) Under the Paris Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 as amended by the Additional Protocol of 28 January 1964 and by the Protocols of 16 November 1982 and 12 February 2004, the Vienna Convention on Civil Liability for Nuclear Damage of 21 May 1963 as amended by the Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention of 21 September 1988 and as amended by the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage of 12 September 1997, or the Convention on Supplementary Compensation for Nuclear Damage of 12 September 1997, including any amendment to these conventions and any future convention in respect of the liability of the operator of a nuclear installation for damage caused by a nuclear incident; or

(b) Under national law applicable to the liability for such damage, provided that such law is in all respects as favourable to persons that may suffer damage as either the Paris or Vienna Conventions or the Convention on Supplementary Compensation for Nuclear Damage.

[11th Session of WG III (A/CN.9/526) ; referring to A/CN.9/WG.III/WP.21]***(d) Paragraph 16.3***

200. It was explained that the list of conventions in paragraph 16.3 was not yet complete, since the instruments listed had been supplemented by further protocols and amendments, one of which was the Protocol to Amend the 1963 Vienna Convention on Civil Liability for Nuclear Damage (1998). It was noted that care would have to be taken to examine the list and to prepare an accurate and updated version thereof.

201. The suggestion was made that other conventions touching on liability could be added to those listed in paragraph 16.3, such as those with respect to pollution and accidents. However, some hesitation was voiced at extending the list of conventions in this fashion, and caution was urged to include on the list only those conventions with which the draft instrument could have a conflict. It was suggested that the list of conventions that appeared in paragraph 16.3 and in article 25.3 of the Hamburg Convention might be as a result of the requirements of the Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material (1971).

202. The Working Group requested the Secretariat to update the list of conventions and instruments in paragraph 16.3, and to prepare a revised draft of paragraph 16.3, with due consideration being given to the views expressed.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 87. Other provisions on damage caused by nuclear incident

244. The Working Group proceeded to consider the text of draft article 87 as contained in document A/CN.9/WG.III/WP.81. It was observed that draft article 87 raised the same concerns as draft article 86 because the chapeau contained a similar phrase, “if the operator of a nuclear installation is liable”. There was broad support to address this concern with the same approach to be taken as with respect to draft article 86. It was noted that the draft convention should make it clear that liability for damage caused by a nuclear incident is outside its scope of application.

Conclusions reached by the Working Group regarding draft article 87:

245. The Working Group agreed that the Secretariat should make the necessary amendments to the text of draft article 87 following the same approach taken in draft article 86.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 89. Damage caused by nuclear incident

262. A concern was expressed that subparagraph (a) of draft article 89 made reference not only to existing conventions regarding civil liability for nuclear damage, but also to later amendments of those conventions or to future conventions. It was observed that such “dynamic references” were strictly forbidden by legislators in some States, as allowing the State to be bound by future modifications or future instruments. Although some sympathy was expressed for that concern, it was observed that a similar approach had also been taken with respect to revised or amended conventions in paragraph 5 of article 25 of the Hamburg Rules, and that it had been acceptable in practice. A further observation was made that the chapeau of draft article 89 would regulate any potential problem, since it limited the operation of the provision to cases where the operator of a nuclear installation was liable for damage, and would thus require that the new or amended convention had come into force in the specific State in issue. Although possible drafting methods to resolve the potential problem were suggested, the Working Group concluded that such solutions were unnecessary.

263. In addition, it was noted that draft article 89 in its chapeau referred to “the operator of a nuclear installation.” It was suggested that the drafting group consider instead a more precise formulation, such as “if the carrier is considered the operator of a nuclear installation and is liable.”

264. Subject to that possible amendment, the Working Group approved the substance of draft article 89 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 88. Damage caused by nuclear incident

262. After requesting the Secretariat to ascertain the current status of the nuclear conventions listed in the provision, the Commission approved the substance of draft article 88 and referred it to the drafting group.

CHAPTER 18. FINAL CLAUSES

Article 87. Depositary

The Secretary-General of the United Nations is hereby designated as the depositary of this Convention.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 91. Depositary

246. The Working Group agreed that the text of draft article 91 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 90. Depositary

265. Draft article 90 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 89. Depositary

263. The Commission approved the substance of draft article 89 and referred it to the drafting group.

Article 88. Signature, ratification, acceptance, approval or accession

1. This Convention is open for signature by all States at Rotterdam, the Netherlands, on 23 September 2009, and thereafter at the Headquarters of the United Nations in New York.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open for accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 92. Signature, ratification, acceptance, approval or accession**

247. The Working Group proceeded to consider the text of draft article 92 as contained in document A/CN.9/WG.III/WP.81.

248. The Working Group was informed that after it completed its review of the draft convention at its twenty-first session, scheduled to take place in Vienna from 14 to 25 January 2008, the Working Group would be expected to formally approve the draft, which would be circulated to Governments for written comments within the first quarter of 2008, and submitted for consideration by the Commission at its 41st annual session (New York, 16 June to 11 July 2008). It was pointed out that no recommendation would be made for convening a special diplomatic conference for the final act of adoption of the convention. Instead, it was envisaged that the draft approved by UNCITRAL would be submitted to the General Assembly, which would be requested to adopt the final text of the convention at its 63rd annual session, acting as a conference of plenipotentiaries, likely during the last quarter of 2008. Thereafter, some time should be allowed for the depositary to establish the original text of the convention, which would not likely be capable of being opened for signature before the first quarter of 2009.

249. There was general agreement that it was premature to insert specific dates in the square brackets at the present stage of the negotiations. In response to a question, it was pointed out that paragraph 1 of draft article 92 currently made possible either to have the convention opened for signature during a certain period at the United Nations Headquarters in New York only, or to open the convention for signature at a given date at a different location prior to the ordinary signature period at the United Nations Headquarters. The latter alternative had been left open, for the time being, in the event that a State might wish to host a diplomatic conference or a signing event.

250. In response to another question, it was pointed out that a signing ceremony would not have the character of a diplomatic conference, since the convention at that time would already have been formally adopted by the General Assembly. Nevertheless, anyone signing the convention at a signing ceremony would be requested to produce the adequate full powers in accordance with the depositary's practice.

Conclusions reached by the Working Group regarding draft article 92:

251. The Working Group agreed that the text of draft article 92 as contained in A/CN.9/WG.III/WP.81 was acceptable and would be supplemented as needed.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 91. Signatures, ratification, acceptance, approval or accession**

266. A question was raised with respect to the reason for having the draft convention open for signature at the same time as for accession as provided in paragraph 3 of draft article 91. It was noted that the usual practice was that a convention was only opened for accession after the time for its signature had passed. In response, it was pointed out that according to the practice of the United Nations, the final clauses had to be submitted for examination to the Treaty

Section of its Office of Legal Affairs, which exercised the Secretary-General's depositary functions, and that the Secretariat would ensure that the final clauses were in accordance with the depositary's practice.

267. The Working Group approved the substance of draft article 91 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 90. Signature, ratification, acceptance, approval or accession

264. In connection with draft article 90, the attention of the Commission was drawn to an invitation from the Minister of Transport of the Netherlands, the Mayor of Rotterdam and the Executive Board of the Port of Rotterdam Authority for States to visit the port of Rotterdam in the Netherlands in September 2009 to participate in an event for the celebration of the adoption of the draft Convention (see annex II). Further, if approved by the General Assembly, the Rotterdam event could include a ceremony for the signing of the draft Convention, once adopted. The event was also envisioned to include a seminar under the auspices of UNCITRAL and the International Maritime Committee (CMI). The Commission was informed that the Government of the Netherlands was prepared to assume all additional costs that might be incurred by convening a signing ceremony outside the premises of the United Nations so the organization of the proposed event and the signing ceremony would not require additional resources under the United Nations budget.

265. The proposal to host such an event in Rotterdam, the Netherlands, was accepted by acclamation by the Commission. The Commission expressed its gratitude for the generosity of the Government of the Netherlands and the City and Port of Rotterdam in offering to act as host for such an event.

266. It was observed that, given the strong positive response of the Commission to the invitation to attend a signing ceremony in Rotterdam, the Netherlands, the text of draft article 90 could be adjusted to include Rotterdam as the place at which the draft Convention would be opened for signature for a short time and the instrument could then be opened for further signature for a longer period at United Nations Headquarters in New York. There was broad support for that suggestion and the Commission agreed to delete the square brackets around the phrase "at [...] from [...] to [...] and thereafter", as well as the square brackets after the word "at", and to insert "Rotterdam, the Netherlands," after "at".

267. Following the insertion of "Rotterdam, the Netherlands," into the first blank space in the draft provision and the deletion of the square brackets as indicated above, the Commission approved the substance of draft article 90 and referred it to the drafting group.

Article 89. Denunciation of other conventions

1. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the International Convention for the Unification of certain Rules of Law relating to Bills of Lading signed at Brussels on 25 August 1924, to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 23 February 1968, or to the Protocol to amend the International Convention for the Unification of certain Rules of Law relating to Bills of Lading as Modified by the Amending Protocol of 23 February 1968, signed at Brussels on 21 December 1979, shall at the same time denounce that Convention and the protocol or protocols thereto to which it is a party by notifying the Government of Belgium to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
2. A State that ratifies, accepts, approves or accedes to this Convention and is a party to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978 shall at the same time denounce that Convention by notifying the Secretary-General of the United Nations to that effect, with a declaration that the denunciation is to take effect as from the date when this Convention enters into force in respect of that State.
3. For the purposes of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the instruments listed in paragraphs 1 and 2 of this article that are notified to the depositary after this Convention has entered into force are not effective until such denunciations as may be required on the part of those States in respect of these instruments have become effective. The depositary of this Convention shall consult with the Government of Belgium, as the depositary of the instruments referred to in paragraph 1 of this article, so as to ensure necessary coordination in this respect.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 83. Denunciation of other conventions

221. The Working Group proceeded to consider the text of draft article 83 as contained in document A/CN.9/WG.III/WP.81. The Working Group was reminded that the text of paragraph 1 had been corrected through the deletion of the phrase “or, alternatively, to the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978,” (see A/CN.9/WG.III/WP.81/Corr.1, para. 3).

222. A concern was expressed with respect to a possible lack of harmonization that could be caused by the rule in draft article 83 requiring that a Contracting State denounce any previous convention concerning the international carriage of goods by sea when that State ratified the new convention. By way of explanation, there was no problem perceived if two potential Contracting States had each been party to a different convention for the international carriage of goods by sea, and only one of them ratified the new convention, as that would not alter the existing disharmony between them. However, in the case where two potential Contracting States had each been party to the same international regime for the carriage of goods by sea, and only one of them ratified the new convention, the concern was that a lack of harmonization would actually be created by that ratification and the requisite denunciation of the previous

convention, and could lead to parties to a dispute racing to one jurisdiction or the other to obtain more favourable treatment under the applicable convention. There was some sympathy in the Working Group for that concern and some interest was expressed in considering a written proposal suggesting a solution to the problem described, but it was acknowledged that it was a very complex issue and should therefore be carefully considered. For example, the question was raised regarding what the recommended outcome would be if a third State through which trans-shipment was required were added to the hypothetical situation, and only two of the three States concerned were Contracting States of the draft convention.

223. In response, it was pointed out that it would be unusual for a convention to allow a State that had ratified one convention to continue to be a party to another convention on the same subject matter. Further, it was thought that the problem described was less a problem of a State denouncing the previous regime to which it had been a party, and more of an issue of reciprocity, and that if reciprocity regarding other potential Contracting States was a concern, it would be better considered pursuant to the provisions in the draft convention on the scope of application. For example, if reciprocity was sought, draft article 5 could be adjusted such that both the place of receipt and the place of delivery had to be in Contracting States, and not merely one of those locations, and the solution should not be sought pursuant to draft article 83. There was some support for that view, and caution was expressed regarding any possible narrowing of the broad scope of application of the draft convention that had been previously agreed by the Working Group.

224. Further, it was pointed out that a solution along the lines of article 31 of the Hamburg Rules might be of assistance in regard to the concern expressed. It was suggested that an approach could be adopted similar to the approach in article 31(1) whereby a Contracting State was allowed to defer denunciation of previous conventions to which it was a party until the Hamburg Rules entered into force. It was thought that any problem concerning which rules would apply in the case of a State that had ratified the draft convention and denounced previous conventions to which it had been a party could be regulated by way of an approach similar to that of paragraphs 1 and 4 of article 31 of the Hamburg Rules. Another possible solution for the concerns raised regarding potential disharmony created by the ratification of the draft convention by a Contracting State and its denunciation of previous conventions was that a high number of States could be required pursuant to draft article 97 for entry into force of the draft convention.

225. By way of further consideration of the issue, the concern was expressed that a legal vacuum could be created when a State ratified the draft convention and denounced any previous convention to which it was a party in accordance with draft article 83, but when the draft convention had not yet entered into force. It was noted that paragraph 3 did not seem to provide a clear rule in that regard. However, it was observed that this was a policy matter, on which the Working Group had to make a decision. While the draft convention took the approach to the issue that it should be open to States to decide on how best to achieve a smooth transition in terms of the conventions to which it was party, the Hamburg Rules set out another approach by providing express rules for States in that regard.

226. A view was expressed that the text as drafted solved the problem of any perceived legal vacuum in the same manner as previous practice with respect to a number of other conventions: it left the decision open to a State to decide how best to avoid a legal vacuum in its transition from one international legal regime to another, but that the rule requiring denunciation of

previous conventions on ratification of a new convention was rightfully preserved in the text. However, there was support in the Working Group for the view that the more explicit procedure laid down in article 31 of the Hamburg Rules should be considered, and that it should be incorporated into the text of this draft convention, since it would provide a clear rule with which States already had some experience. One issue in paragraph 4 of article 31 of the Hamburg Rules which was not considered entirely satisfactory was that it allowed Contracting States to defer the denunciation of previous conventions for up to five years from the entry into force of the new convention. It was suggested that allowing the deferral of a denunciation of a previous convention for such a length of time should not be allowed under the draft convention.

Conclusions reached by the Working Group regarding draft article 83:

227. The Working Group agreed that:

- The Secretariat should review the text of draft article 83, with a view to taking a similar approach to that in paragraph 1 of article 31 of the Hamburg Rules.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 92. Denunciation of other conventions

268. In response to a question, the Working Group was reminded that the current text of draft article 92 had been the result of extensive discussion and that the Working Group had decided to take the same approach in paragraph 3 as that provided for in paragraph 1 of article 31 of the Hamburg Rules (see A/CN.9/642, paras. 221-227). It was recalled that the entry into force of the draft convention had been made conditional on the denunciation of previous conventions in order to prevent any legal vacuum from arising for States.

269. The Working Group approved the substance of draft article 92 and referred it to the drafting group.

Article 90. Reservations

No reservation is permitted to this Convention.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 93. Reservations

252. It was noted that the text of draft article 93 as contained in document A/CN.9/WG.III/WP.81 had been revised to accommodate the possible inclusion of reservations in chapters 15 and 16. However, as the Working Group had decided to adopt an opt-in approach by way of declarations (see paras. 202 to 205 and 216 to 218 above), it was proposed to delete from draft article 93 the phrase “except those expressly authorized.”

253. One view was expressed that further discussion of draft article 83, which might include a proposal on a reservation model, could actually require maintaining the text of draft article 93 as contained in A/CN.9/WG.III/WP.81, as the draft convention would need to be open for reservations. It was clarified that the approach envisaged to resolve the problem of possible disharmony regarding article 83 involved declarations, which the draft convention allowed under draft article 94 and which were different in character from reservations.

Conclusions reached by the Working Group regarding draft article 93:

254. The Working Group agreed that the text of draft article 93 should be amended to read, “No reservation may be made to this Convention.”

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

270. Draft article 93 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 92. Reservations

Proposal regarding draft article 92

269. A number of concerns with respect to the text of the draft Convention were reiterated. The Commission was reminded that concern had been raised regarding the perceived failure of the draft Convention to address specific problems relating to transport partially performed on land, on inland waterways and by air. Some examples were given in this regard, such as the failure of draft article 18, paragraph 3, to take into account non-maritime events, such as a fire on a vehicle other than a ship, or the failure of draft article 26 to address the situation of the carriage of goods in an open, unsheeted road cargo vehicle. Further, it was said that the definition of the term “volume contract” did not address the situation where the contract provided for a series of shipments by road but one single shipment by sea.

270. In addition to those perceived shortcomings in dealing with non-maritime transport, it was suggested that there was no justification for applying the draft Convention to cases where the inland leg of transport was longer than the maritime leg, in particular when the liability limit of the carrier in the case of non-localized damage would be lower than the Convention on the Contract for the Carriage of Goods by Road (the “CMR”), the Convention concerning International Carriage by Rail (the “COTIF”) or the Montreal Convention. It was further suggested that draft article 27 placed an unfair burden of proof on the shipper to determine when loss or damage could be said to be localized. Concern was also raised that, where other conventions provided a time shorter than two years for suit, it would prejudice the shipper who was relying on the two-year rule in the draft Convention if the carrier could prove that the damage occurred on a land leg to which another convention with a shorter time for suit applied. Further concerns were expressed regarding the failure of the draft Convention to provide for a direct action against the carrier performing the carriage by road or rail and for not allowing

parties to opt out of the network system and adopt a single liability regime pursuant to draft article 81. In addition, it was suggested that the draft Convention would lead to a fragmentation of laws on multimodal transport contracts because of its “maritime plus” nature.

271. In order to address those perceived shortcomings in the draft Convention, it was suggested that the following text should be inserted in place of draft article 92:

“Article 92. Reservations

“1. Any State may, at the time of signature, ratification, acceptance or accession, or at any time thereafter, reserve the right to exclude the application of this Convention to contracts that provide for carriage by sea and by other modes of transport in addition to sea carriage.

“2. No other reservation is permitted to this Convention.”

272. There was some support for that proposal, in particular for the purpose of introducing additional flexibility into the draft Convention so as to allow a greater number of States to ratify it. Acceptance of the proposal, it was suggested, would lead to more widespread ratification of the international legal regime in respect of maritime transport. This would be preferable to achieving greater uniformity of the law, but at the price of ratification by fewer States. Although some delegations were not in favour of the text as drafted, they nonetheless favoured the pursuit of a possible additional compromise that would attract a greater number of States to ratify the Convention.

273. However, strong objections to the proposal were raised. It was said that the door-to-door nature of the draft Convention to provide for the commercial needs of modern container transport was an essential characteristic of the regime and that to allow States to make a reservation to such an integral part of the draft Convention would be tantamount to dismantling the instrument and nullifying years of negotiation, compromise and work that had gone into its preparation. The proposed reservation was said to be an attempt to reopen the decision that had been made regarding the door-to-door nature of the draft Convention and to attempt to re-insert the concept of mandatory national law to narrow the scope of the draft Convention, an approach that had been considered and discarded by the Working Group in pursuit of broader consensus. Such a resort to national law was said to be a dangerous move that would be contrary to the need for harmonization of the international rules governing the transport of goods, thus resulting in fragmentation of the overall regime and creating disharmony and a lack of transparency regarding the applicable rules. Further, it was pointed out that parties to the contract of carriage always had the right to negotiate a port-to-port agreement rather than a door-to-door contract and that, in many respects, the draft Convention had left certain matters open to applicable law, thus leaving ample scope for national rules in some areas.

274. In addition, it was noted that the perceived problems in the draft Convention said to have led to the proposal had been thoroughly considered by the Working Group and by the Commission and that the prevailing view did not regard the solutions adopted in those areas as unsatisfactory. It was strongly felt that adopting the proposed reservation would be to act in a manner contrary to the delicate compromise that was reached by the Working Group in January 2008 (see A/CN.9/645, paras. 196-204). In that vein, a number of delegations cited their own difficulties with certain aspects of the Convention as currently drafted, including contentious provisions such as draft article 18, paragraph 3, or even requests to remove entire chapters, but

noted their determination to maintain the elements of the compromise agreement, encouraging those who were more reluctant to relinquish their criticism of the draft Convention and join the broader consensus. A strong desire was evinced to retain the various compromises resulting in the current text of the draft Convention, lest the adjustment of one or two points of agreement lead to unravelling the entire compromise and reopening the discussion on a host of related issues. As such, there was strong support in the Commission for retaining the text of draft article 92 as currently drafted.

Proposal for draft article 92 bis

275. Since a number of delegations had opposed as being too radical the proposal to seek broader approval of the draft Convention by providing for a reservation to restrict the application of the draft Convention to maritime transport, but had left open the possibility of coming to another compromise, a further proposal was made. In an effort to enable States that had expressed concerns regarding the application of national law and the level of the carrier's limitation on liability to ratify the text, the following new provision was proposed:

“Article 92 bis. Special declarations

“A State may according to article 93 declare that:

“(a) It will apply the Convention only to maritime carriage; or

“(b) It will, for a period of time not exceeding ten years after entry into force of this Convention, substitute the amounts of limitation of liability set out in article 61, paragraph 1, by the amounts set out in article 6, paragraph 1 (a) of the United Nations Convention on Carriage of Goods by Sea, concluded at Hamburg on 31 March 1978. Such a declaration must include both amounts.”

276. In support of the proposal, it was noted that subparagraph (a) of the proposed article 92 bis was intended to be more limited than the other new reservation proposal (see para. 271 above) and thus it presented a less controversial method of narrowing the scope of application of the Convention to maritime carriage. Further, it was suggested that subparagraph (b) of the proposed article 92 bis could accommodate those who had expressed concerns about the level of the limitation on a carrier's liability currently in draft article 61, in that it offered those States the opportunity to adopt the level of limitation for the carrier's liability in the Hamburg Rules and to phase in their adherence to the higher limits over a 10-year period. That approach, it was suggested, could encourage broader approval of the draft Convention.

277. Although there was some support for the proposal, in particular for subparagraph (b) of the proposal, which was described as an innovative idea to gain broader acceptance of the text, the prevailing view in the Commission was that the compromise that had been reached among a large number of States in January 2008 (see A/CN.9/645, paras. 196-204) should be maintained, which precluded adoption of the proposal. Further, concerns were reiterated regarding the need to retain the door-to-door nature of the draft Convention and the likelihood that approval of the proposal could have the undesirable effect of causing the entire compromise to unravel and lead to renewed discussion on a number of issues of concern to various delegations.

278. The Commission decided against the inclusion of a new draft article 92 bis in the text of the Convention.

Article 91. Procedure and effect of declarations

1. The declarations permitted by articles 74 and 78 may be made at any time. The initial declarations permitted by article 92, paragraph 1, and article 93, paragraph 2, shall be made at the time of signature, ratification, acceptance, approval or accession. No other declaration is permitted under this Convention.
2. Declarations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.
3. Declarations and their confirmations are to be in writing and to be formally notified to the depositary.
4. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
5. Any State that makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. The withdrawal of a declaration, or its modification where permitted by this Convention, takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 94. Procedure and effect of declaration**

255. The Working Group proceeded to consider the text of draft article 94 as contained in document A/CN.9/WG.III/WP.81. It was first suggested that the reference to “modify” or “modification” in paragraph 4 of draft article 94 should be deleted because the only declarations contemplated by the draft convention (i.e. the opt-in declarations to chapter 15 on jurisdiction, and chapter 16 on arbitration) were not, by their nature, susceptible of being modified. In response it was noted, however, that if the Working Group decided in the future to insert a provision allowing declarations for the application of domestic laws under the circumstances envisaged in draft article 26 (see A/CN.9/621, paras. 189-192), there might be circumstances where States would need to modify their declarations. To address that concern, the Working Group agreed to put the reference to “modification” in square brackets until draft article 26 bis was decided upon.

256. A concern was raised that the text of paragraph 4 of draft article 94 was too general and might be interpreted to the effect that States were allowed to make any kind of declaration. It was suggested that the language of paragraph 4 should be aligned with the text of draft article 93 as contained in document A/CN.9/WG.III/WP.81. Some States also expressed their concerns as they were not familiar with declarations as instruments in international law.

257. In response, it was pointed out that in the area of private international law and uniform commercial law, it had become the practice to distinguish between declarations pertaining to the scope of application, which were admitted in uniform law instruments without being subject

to a system of acceptances and objections by Contracting States, on the one hand, and reservations, on the other hand, which triggered a formal system of acceptances and objections under international treaty practice, for instance, as provided in articles 20 and 21 of the Vienna Convention on the Law of Treaties, of 1969.

258. As the draft convention dealt with law that would apply not to the mutual relations between States, but to private business transactions, it was suggested that declarations would serve the purpose of the draft convention better than reservations in the way that term was understood under international treaty practice. Recent provisions in UNCITRAL instruments supported those conclusions, such as articles 25 and 26 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995) and articles 19 and 20 of the United Nations Convention on the use of Electronic Communications in International Contracts (New York, 2005), in the same way as final clauses in private international law instruments prepared by other international organizations, such as articles 54 to 58 of the Unidroit Convention on International Interests in Mobile Equipment (Cape Town, 2001) and articles 21 and 22 of the Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary (The Hague, 2002) concluded by the Hague Conference on Private International Law.

259. However, in the practice of UNCITRAL and other international organizations, such as Unidroit and the Hague Conference, States were not free to submit declarations, which as a matter of principle were only possible where explicitly permitted. If a declaration was used without explicit permission, it would be treated as a reservation. Accordingly, it was suggested that there was no stringent need to make a general reference in draft article 94 that no declarations other than those expressly allowed were admitted, but such a qualifying provision could be inserted, if the Working Group wished.

260. The question was raised whether paragraph 3 of draft article 94 implied that declarations could be made at any time whereas paragraph 1 seemed to only allow declarations at the time of signature. It was clarified that paragraph 3 only provided a general procedure for declarations and that provisions in the draft convention permitting its use would state the specific time for declarations to be made. In particular, it was recalled that the draft convention in chapters 15 and 16 permitted declarations to be made with regard to jurisdiction and arbitration at any time.

Conclusions reached by the Working Group regarding draft article 94:

261. The Working Group agreed that the text of draft article 94 as contained in A/CN.9/WG.III/WP.81 was acceptable in substance. However, the Secretariat was requested to examine paragraph 4 of draft article 94 to ensure that the text was aligned with the practice and interpretation of international private law.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 94. Procedure and effect of declarations

271. A question was raised whether the reference to modification in paragraph 5 of draft article 94 was necessary. It was noted that the reference to withdraw a modification did not apply equally to the various declarations mentioned in paragraph 5 of draft article 94, as the

declarations under draft articles 77 and 81 could be simply declared or withdrawn, whereas the declarations under draft articles 95 and 96 could be declared, modified or withdrawn. In this light, it was suggested to add adequate cross-references in paragraph 5 of draft article 94 with regard to declarations under draft articles 95 and 96.

272. Subject to the aforementioned amendment of paragraph 5, the Working Group approved the substance of draft article 94 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 93. Procedure and effect of declarations

279. There was support for the view that the second sentence of paragraph 1 of draft article 93, which required the declarations referred to therein, including the declaration contemplated in draft article 94, paragraph 1, to be made at the time of signature, ratification, acceptance, approval or accession, seemed to contradict paragraph 1 of draft article 94, which allowed a Contracting State to amend a declaration made pursuant to that article by submitting another declaration at any time. It was noted that the apparent contradiction was not limited to draft article 94, paragraph 1, but also appeared to exist in respect of draft article 95, paragraph 2. It was pointed out that in order for the declarations envisaged in draft articles 94 and 95 to operate properly they must be capable of being amended from time to time to allow information about extensions to more territorial units or about changes in competence to be communicated to other Contracting States.

280. For the purpose of eliminating the perceived contradiction, the Commission agreed to insert the word “initial” before the word “declarations” in the second sentence of paragraph 1 of draft article 93. Subject to that amendment, the Commission approved the draft article and referred it to the drafting group.

Article 92. Effect in domestic territorial units

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.
3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.
4. If a Contracting State makes no declaration pursuant to paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 95. Effect in domestic territorial units**

262. The Working Group agreed that the text of draft article 95 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 95. Effect in domestic territorial units**

273. Draft article 95 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 94. Effect in domestic territorial units**

281. It was pointed out that draft article 94 contained an important provision to facilitate the ratification of the draft Convention by multi-unit States where legislative competence on private law matters was shared. It was noted, in that connection, that paragraph 3 of the draft article dealt with the effect that the extension of the Convention to some but not all the territorial units of a Contracting State might have on the geographic scope of application of the Convention.

282. Paragraph 3, it was further noted, was based on a similar provision in article 93, paragraph 3, of the United Nations Sales Convention. However, it was said that paragraph 3

required some additional refinement since the definition of the geographic scope of application of the draft Convention under draft article 5 was more elaborate than that of the United Nations Sales Convention and was not linked to the notion of place of business. In order to address that problem, it was suggested that paragraph 3 of the draft article should be replaced with text along the following lines:

“If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the relevant connecting factor for the purposes of articles 1, paragraph 28, 5, paragraph 1, 20, subparagraph 1 (a), and 69, subparagraph 1 (b), is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.”

283. The Commission generally recognized the need for addressing the problem that had been identified, but was of the view that it might be preferable to avoid references to connecting factors in specific provisions of the draft Convention, since, at least as far as draft article 5 was concerned, not all of the connecting factors needed to be located in one and the same Contracting State in order to trigger the application of the draft Convention.

284. The Commission approved the substance of draft article 94 and referred it to the drafting group, with a request to propose an alternative text to draft paragraph 3 to reflect its deliberations.

Article 93. Participation by regional economic integration organizations

1. A regional economic integration organization that is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The regional economic integration organization shall in that case have the rights and obligations of a Contracting State, to the extent that that organization has competence over matters governed by this Convention. When the number of Contracting States is relevant in this Convention, the regional economic integration organization does not count as a Contracting State in addition to its member States which are Contracting States.
2. The regional economic integration organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States. The regional economic integration organization shall promptly notify the depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration pursuant to this paragraph.
3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a regional economic integration organization when the context so requires.

[16th Session of WG III (A/CN.9/591) ; referring to A/CN.9/WG.III/WP.56]**Proposed revised text for chapter on jurisdiction*****General discussion***

73. Based upon the discussion in the Working Group with respect to the chapter of the draft convention on jurisdiction as it appeared in A/CN.9/WG.III/WP.56 (see above paras. 9 to 17 and 19 to 72) and proposed new text, a number of delegations proposed the following revised text for the chapter, including a provision on regional economic integration organizations (to be included in the chapter on final clauses):

[* * *]

“Article XX. Participation by Regional Economic Integration Organizations

“1. A Regional Economic Integration Organization which is constituted by sovereign States and has competence over certain matters governed by this Convention may similarly sign, ratify, accept, approve or accede to this Convention. The Regional Economic Integration Organization shall in that case have the rights and obligations of a Contracting State, to the extent that that Organization has competence over matters governed by this Convention. Where the number of Contracting States is relevant in this Convention, the Regional Economic Integration Organization shall not count as a Contracting State in addition to its Member States which are Contracting States.

“2. The Regional Economic Integration Organization shall, at the time of signature, ratification, acceptance, approval or accession, make a declaration to the Depositary specifying the matters governed by this Convention in respect of which competence has been transferred to that Organization by its Member States. The Regional Economic Integration Organization shall promptly notify the Depositary of any changes to the distribution of competence, including new transfers of competence, specified in the declaration under this paragraph.

“3. Any reference to a “Contracting State” or “Contracting States” in this Convention applies equally to a Regional Economic Integration Organization where the context so requires.”

[See also paragraphs 74, 75 and 84, A/CN.9/591 (16th Session of WG III) under General Discussion, Chapter 14 at p. 610]

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 96. Participation by regional economic integration organizations**

263. The Working Group agreed that the text of draft article 96 as contained in A/CN.9/WG.III/WP.81 was acceptable and should be retained, subject to the addition of a footnote, to assist the Working Group in its further consideration of the draft article, indicating

in which UNCITRAL or other international instruments a similar provision had already been used.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 96. Participation by regional economic integration organizations

274. Draft article 96 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 95. Participation by regional economic integration organizations

285. The view was expressed that paragraph 3 of draft article 95, which stated that reference to a “Contracting State” or “Contracting States” in the Convention applied equally to a regional economic integration organization when the context so required, seemed to contradict the last sentence of paragraph 1, which provided that when the number of Contracting States was relevant in the draft Convention, the regional economic integration organization did not count as a Contracting State in addition to its member States that were Contracting States.

286. In response, it was observed that the interpretative provision in paragraph 3 was useful since international organizations were not generally regarded as equals to States under public international law and would not therefore be necessarily regarded as being covered by references to “Contracting States” in the Convention. To the extent, however, that they joined the Convention in their own right, it would be appropriate to extend to them, as appropriate, some of the provisions that applied to Contracting States, such as, for example, draft article 93 on the procedure and effect of declarations. The last sentence of paragraph 1, in turn, made it clear that a regional economic integration organization would not count as a “State” where the number of Contracting States was relevant, for instance in connection with the minimum number of ratifications for the entry into force of the Convention under article 96, paragraph 1. It was further noted that provisions along the lines of the draft article had become customary in many international conventions.

287. The Commission approved draft article 95 and referred it to the drafting group.

Article 94. Entry into force

1. This Convention enters into force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.
2. For each State that becomes a Contracting State to this Convention after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the deposit of the appropriate instrument on behalf of that State.
3. Each Contracting State shall apply this Convention to contracts of carriage concluded on or after the date of the entry into force of this Convention in respect of that State.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 97. Entry into force***General comments***

264. The Working Group proceeded to consider the text of draft article 97 as contained in document A/CN.9/WG.III/WP.81. It was observed that the draft provision contained two sets of alternatives in square brackets: the time period from the last date of deposit of the ratification to the entry into force of the convention, and the number of ratifications, acceptances, approvals or accessions required for the convention to enter into force.

Number of ratifications required

265. In the interests of avoiding further disunification of the international regimes governing the carriage of goods by sea, it was suggested that a high number of ratifications, such as thirty, should be required in draft article 97. In support of that suggestion, it was stated that a high number of ratifications would be more likely to reduce any disconnection created by the ratification by some but not all the States Parties to any of the existing regimes, as set out in paragraph 222 above. Furthermore, reference was made to the desire that the convention be as global as possible, and it was suggested that a higher number of required ratifications would make that outcome more likely. There was some support for that proposal. However, it was observed that thirty ratifications could take a long time to achieve, and that a large number of required ratifications was unlikely to create any sort of momentum toward ratification for a State.

266. It was observed that the number of ratifications required for entry into force was thought to be affected by the final outcome with respect to the compromise package on limitation levels of the carrier's liability (see paragraphs 135 and 158 above), and that, as such, no final number could yet be decided upon by the Working Group. In any event, it was said that thirty ratifications was too high a requirement, and that a lower number closer to 3 or 5 would be preferable, both for reasons of allowing the convention to enter into force quite quickly, and of affording States that were anxious to ratify the convention and modernize their law the opportunity to do so as quickly as possible. Speed in terms of entry into force was also considered by some to be a factor in averting the development of regional or domestic

instruments. However, concerns were also expressed regarding the adoption of a very low number of required ratifications, since it would not be advantageous to have yet another less than successful regime in the area of the international carriage of goods by sea. In that connection, a view was again expressed in favour of the adoption of a so-called “sunset” clause that provided that the draft convention would no longer be in force after a certain time. However, there were strong objections to the adoption of such a clause as being extremely unusual in a convention, and contrary to the spirit of such international instruments. In any event, it was noted that any State could make the decision to denounce the convention at any time, thus making a “sunset” clause unnecessary should the convention enter into force with only a small number of ratifications.

267. In response to concerns regarding the length of time that it would take to achieve thirty ratifications to the convention, it was noted that the Montreal Convention required thirty ratifications, and that it had entered into force very quickly, despite that fact. However, it was cautioned that instruments covering different transport modes could not necessarily be compared, as the industries were quite different in each case.

268. Some support was expressed in the Working Group for twenty ratifications to be required prior to entry into force. A further nuance was suggested in that a calculation could be added to the provision so that a minimum amount of world trade was required by the ratifying countries prior to entry into force, or a minimum percentage of the world shipping fleet. However, that calculation was thought to be rather difficult to make with precision.

269. It was observed that perhaps three or five ratifications would be too low a number for any sort of uniformity to be achieved but that a number of other maritime conventions tended to adopt an average of ten required ratifications for entry into force, which seemed to be an optimal number. The proposal of a requirement of ten ratifications received some support.

Time for entry into force

270. The Working Group did not have a strong view with respect to the time period that should be required prior to entry into force following the deposit of the last required ratification.

Conclusions reached by the Working Group regarding draft article 97:

271. The Working Group agreed that, in paragraphs 1 and 2:

- The word “[fifth]” should be substituted for the word “[third]” and the word [twentieth]” should be kept as an alternative in the text;
- The alternatives “[one year]” and “[six months]” should both be retained; and
- The text of draft article 97 as contained in A/CN.9/WG.III/WP.81 was otherwise acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 97. Entry into force*****General comment***

275. The Working Group was reminded of its extensive discussion of draft article 97 in its previous session (see A/CN.9/642, paras. 264-271). It was observed that draft article 97 contained two sets of alternatives in square brackets in its paragraphs 1 and 2: the time period from the last date of deposit of the ratification to the entry into force of the convention, and the number of ratifications, acceptances, approvals or accessions required for the convention to enter into force.

Number of ratifications required

276. The views for having a high number of ratifications, such as 30, and the views for having a lower number, closer to 3 or 5 ratifications, as discussed in the previous session of the Working Group, were reiterated (see paras. 265-269 of A/CN.9/642). In general, the rationale given for preferring a high number of ratifications was mainly to avoid further disunification of the international regimes governing the carriage of goods by sea, and the rationale given for favouring a lower number was mainly to allow the draft convention to enter into force quickly amongst those States that wished to enter rapidly into the new regime. Both positions presented suggestions aimed at achieving consensus: one suggestion was to require 20 ratifications prior to entry into force, and the other one was to require 10. The former proposal found broad support.

Time for entry into force

277. Virtually uniform support was given to the suggestion to retain one year as time period from the last date of deposit of the ratification to the entry into force of the draft convention.

Conclusions reached by the Working Group

278. The Working Group approved the substance of draft article 97 and referred it to the drafting group, subject to the following adjustments in paragraphs 1 and 2:

- the square brackets around “one year” should be deleted and the text retained;
- the words “six months” and the square brackets surrounding them should be deleted;
- the square brackets around “twentieth” should be deleted and the word retained; and
- the word “fifth” and the square brackets surrounding it should be deleted.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 96. Entry into force**

288. The Commission approved draft article 96 and referred it to the drafting group.

Article 95. Revision and amendment

1. At the request of not less than one third of the Contracting States to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting States for revising or amending it.
2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]**Draft article 98. Revision and amendment*****General comments***

272. The Working Group proceeded to consider the text of draft article 98 as contained in document A/CN.9/WG.III/WP.81. The statement in footnote 255 that amendment procedures were not common in UNCITRAL texts was noted, and the suggestion was made that resort could simply be had to normal treaty practice to mend the text pursuant to the Vienna Convention on the Law of Treaties, if necessary.

273. However, it was observed that the lack of an amendment provision in a convention could be considered unusual, since despite the Vienna Convention on the Law of Treaties, it was standard practice for conventions to have provisions for amendment. It was thought that failure to include one in this case could mistakenly induce the conclusion that no amendment was possible. Support was expressed for keeping the draft provision.

Conclusions reached by the Working Group regarding draft article 98:

274. The Working Group agreed that the text of draft article 98 as contained in A/CN.9/WG.III/WP.81 was acceptable.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]**Draft article 98. Revision and amendment**

279. The question was raised as to whether there should be an automatic time period with respect to draft article 98 to the effect that 5 years after entry into force of the draft convention, its revision or amendment would be considered. In response, it was pointed out that draft article 98 fully adopted the approach taken in article 32 of the Hamburg Rules with no need for such a requirement.

280. The Working Group approved the substance of draft article 98 and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]**Draft article 97. Revision and amendment**

289. The Commission approved draft article 97 and referred it to the drafting group.

Amendment of limitation amounts [Deleted]*[Article 99. Amendment of limitation amounts]*

1. *The special procedure in this article applies solely for the purposes of amending the limitation amount set out in article 62, paragraph 1 of this Convention.*
2. *Upon the request of at least [one fourth] of the Contracting States to this Convention, the depositary shall circulate any proposal to amend the limitation amount specified in article 62, paragraph 1, of this Convention to all the Contracting States and shall convene a meeting of a committee composed of a representative from each Contracting State to consider the proposed amendment.*
3. *The meeting of the committee shall take place on the occasion and at the location of the next session of the United Nations Commission on International Trade Law.*
4. *Amendments shall be adopted by the committee by a two-thirds majority of its members present and voting.*
5. *When acting on a proposal to amend the limits, the committee will take into account the experience of claims made under this Convention and, in particular, the amount of damage resulting therefrom, changes in the monetary values and the effect of the proposed amendment on the cost of insurance.*
6. (a) *No amendment of the limit pursuant to this article may be considered less than [five] years from the date on which this Convention was opened for signature or less than [five] years from the date of entry into force of a previous amendment pursuant to this article.*

(b) *No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention increased by [six] per cent per year calculated on a compound basis from the date on which this Convention was opened for signature.*

(c) *No limit may be increased so as to exceed an amount that corresponds to the limit laid down in this Convention multiplied by [three].*
7. *Any amendment adopted in accordance with paragraph 4 of this article shall be notified by the depositary to all Contracting States. The amendment is deemed to have been accepted at the end of a period of [eighteen] months after the date of notification, unless within that period not less than [one fourth] of the States that were Contracting States at the time of the adoption of the amendment have communicated to the depositary that they do not accept the amendment, in which case the amendment is rejected and has no effect.*

8. *An amendment deemed to have been accepted in accordance with paragraph 7 of this article enters into force [eighteen] months after its acceptance.*

9. *All Contracting States are bound by the amendment unless they denounce this Convention in accordance with article 100 at least six months before the amendment enters into force. Such denunciation takes effect when the amendment enters into force.*

10. *When an amendment has been adopted but the [eighteen]-month period for its acceptance has not yet expired, a State that becomes a Contracting State during that period is bound by the amendment if it enters into force. A State that becomes a Contracting State after that period is bound by an amendment that has been accepted in accordance with paragraph 7 of this article. In the cases referred to in this paragraph, a State becomes bound by an amendment when that amendment enters into force, or when this Convention enters into force for that State, if later.]*

[Last version before deletion: A/CN.9/WG.III/

[13th Session of WG III (A/CN.9/552) ; referring to A/CN.9/WG.III/WP.32]

Amendment procedure

40. It was proposed that the draft instrument should include a rapid amendment procedure, so that the limitation level, once agreed upon, could be adjusted without reopening the negotiation on the entire instrument. It was noted that a rapid amendment procedure had been proposed in paragraphs 11 and 12 of A/CN.9/WG.III/WP.34. It was suggested that reference could also be had to the amendment procedure in the Athens Convention. There was broad support for the inclusion of an amendment procedure in the draft instrument.

[18th Session of WG III (A/CN.9/616) ; referring to A/CN.9/WG.III/WP.56]

Draft article 104: Amendment of limitation amounts

205. In light of the provision's close relationship with the provisions in chapter 13 on the limitation of liability, the Working Group next considered draft article 104 on the amendment of the limitation amounts in the draft convention. The Working Group recalled that it had requested the Secretariat at its thirteenth session to prepare a specific amendment procedure for the rapid amendment of limitation amounts in the draft convention (see A/CN.9/552, para. 40). The Working Group had before it two texts of draft article 104: that prepared by the Secretariat and inserted into the text of the draft convention in A/CN.9/WG.III/WP.56, and that proposed as a revised version set out in paragraph 9 of A/CN.9/WG.III/WP.77.

206. The view was expressed that a provision such as that in draft article 104, whether it was the proposed revised text or the version set out in A/CN.9/WG.III/WP.56, was directly linked to the level of the limitation of the carrier's liability. In particular, it was thought that if the amount of the limitation were set at a very high level, the procedure for its amendment should

be very strict, but if the amount were set at a relatively low level, the procedure for its amendment should be less strict.

Introduction of the text in paragraph 9 of A/CN.9/WG.III/WP.77

207. By way of introduction of the changes suggested in the proposed revised text, the Working Group heard that, as set out in paragraph (1) thereof, draft article 104 was intended to be a specific amendment procedure to be followed only with respect to the amendment of the limitation on liability of the carrier set out in draft article 64(1). Any other amendments to the draft convention would be undertaken in the normal course under general treaty law.

208. In paragraph (2) of the proposed revised text, it was proposed that the number of Contracting States required to request the amendment of the limitation amount should be one-half of the number of Contracting States rather than one-quarter. The view was expressed that this change would ensure that there was sufficient consensus and that there was a need for material change of the provision among the parties most affected, in particular, those representing a sufficient percentage of cargo volume or cargo value in transport covered by the draft convention. It was further suggested that paragraph (2) of the proposed revised text should provide for the amendment to be made at a meeting of all Contracting States and Members of the United Nations Commission on International Trade Law (UNCITRAL), since it was thought that, under existing international private law, significant changes to concluded texts were often produced by the same multilateral bodies that had formulated the original text.

209. A further innovation of the proposed revised text was said to be found in paragraph (4), which avoided the strict and potentially politicizing mechanism of a vote in favour of the normal consensus-based procedures of UNCITRAL. In addition to greater flexibility, resort to a consensus-based approval mechanism was proposed as appropriate for the amendment procedure, given that that was the mechanism that was used for the adoption of the draft convention itself.

210. Draft paragraph (5) of draft article 104 as set out in A/CN.9/WG.III/WP.56 was thought to be unnecessary, and it had been deleted in the proposed revised text of the provision.

211. By way of further introduction, draft paragraph (5) of the proposed revised text was said to be important in order to lend some stability to the draft convention by limiting the frequency with which, and the amount by which, the limitation level could be amended. The proposed text suggested that the appropriate time period for requesting any amendment was seven years after the entry of the draft convention into force, and seven years after any prior amendment procedure. Further, the proposed text suggested that any single increase or decrease in the limitation level should be limited to twenty-one per cent, and that any limit could not be increased or decreased by more than two times the original amount, cumulatively.

212. Draft paragraph (6) of the proposed revised text set out a time period for the amendment's entry into force of twelve months after the date of its adoption by a sufficient number of Contracting States, which was suggested should be the same number as that ultimately agreed upon in draft article 101 as required for entry into force of the draft convention as a whole. Paragraphs (7) and (8) of draft article 104 as set out in A/CN.9/WG.III/WP.56 were said to have established an unnecessarily lengthy period for the coming into force of the amendment.

213. Draft paragraph (7) of the proposed revised text provided that Contracting States would have to denounce the amendment or be bound by it, rather than having adopted the approach in the text in A/CN.9/WG.III/WP.56 whereby Contracting States would have to denounce the entire convention. The approach in the proposed revised text was thought to be a more flexible one, that would allow States that, for example, had difficulties with approving the amendment internally in time for its entry into force, to nonetheless remain parties to the convention itself.

Preliminary reaction to the proposed revised text in paragraph 9 of A/CN.9/WG.III/WP.77

214. It was observed that paragraph (2) of the proposal envisioned three different groups of States attending any UNCITRAL session convened to consider a proposed amendment: Contracting States that were members of UNCITRAL; non-Contracting States that were members of UNCITRAL; and Contracting States that were non-members of UNCITRAL. The question was raised whether there was any precedent for such a mixed body to amend a convention. In response, it was said that the three types of States were included in the text because they constituted the usual members and observers that participated in consensus UNCITRAL deliberations, and that all Contracting States to the convention should also be included in any discussions regarding its amendment. Examples mentioned in this regard were the adoption of the Visby Protocol, which was not limited to a conference of Contracting Parties, and the negotiation of the 1974 Convention on the Limitation Period in the International Sale of Goods. In response to an additional question on this point with respect to any precedent that could be identified for the adoption of a simplified amendment procedure by a group including non-Contracting States, mention was made of various conventions of the International Maritime Organization that contain specific amendment procedures that are agreed to by consensus.

Conclusions reached by the Working Group regarding draft article 104:

215. After a preliminary discussion, the Working Group decided that:

- More time was required to reflect upon the procedure outlined in draft article 104 in both A/CN.9/WG.III/WP.56 and A/CN.9/WG.III/WP.77; and
- Further discussion of the provision would be deferred until a later date.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 99. Amendment of limitation amounts

General comments

275. In spite of its earlier decision to place square brackets around draft article 99 as part of the provisional consensus on the limitation on liability of the carrier in the draft convention (see paragraphs 135 and 158 above), the Working Group heard some technical remarks on the text of draft article 99 as contained in document A/CN.9/WG.III/WP.81. In particular, it was suggested that the phrase “Contracting States” in paragraph 2 be replaced with “States Parties” because of the definition in the Vienna Convention on the Law of Treaties, and so that the text refers to States that are bound by the text and not just those that have ratified it. Secondly, it was suggested that, in order to shorten the time required for the operation of the procedure, the

phrase “may be considered” should be deleted in paragraph 6, and replaced with the phrase “may take effect”.

276. It was also observed that an alternative proposal for an amendment procedure had been submitted at a previous session (A/CN.9/WG.III/WP.77), but that further comment in that regard would be reserved, pending an outcome of the decision on the fate of draft article 99.

Conclusions reached by the Working Group regarding draft article 99:

277. The Working Group agreed that the text of draft article 99 should be put in square brackets (see paragraph 166 above).

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 99. Amendment of limitation amounts

281. The Working Group deferred consideration of the substance of draft article 99 pending agreement regarding the compromise package regarding the limitation on liability (see above, paras. 183 to 188 and 196 to 203). In keeping with its agreement regarding the compromise package, the Working Group agreed to delete draft article 99.

Article 96. Denunciation of this Convention

1. A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.
2. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. If a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

[20th Session of WG III (A/CN.9/642) ; referring to A/CN.9/WG.III/WP.81]

Draft article 100. Denunciation of this Convention

General comments

278. The Working Group agreed that the text of draft article 100 was acceptable as contained in document A/CN.9/WG.III/WP.81.

[21st Session of WG III (A/CN.9/645) ; referring to A/CN.9/WG.III/WP.101]

Draft article 100. Denunciation of this Convention

281. The Working Group deferred consideration of the substance of draft article 99 pending agreement regarding the compromise package regarding the limitation on liability (see above,

paras. 183 to 188 and 196 to 203). In keeping with its agreement regarding the compromise package, the Working Group agreed to delete draft article 99.

282. Draft article 100 did not elicit comments. The Working Group approved its substance and referred it to the drafting group.

[41st Session of UNCITRAL (A/63/17) ; referring to Annex to A/CN.9/645]

Draft article 98. Denunciation of this Convention

290. The Commission approved draft article 98 and referred it to the drafting group.